CORNELL LAW SCHOOL

GAMBLING PROJECT

THE DEVELOPMENT OF THE LAW OF GAMBLING: FEDERAL

February 15, 1975

The Midwest developed its gambling policies by drawing its people and its legislation from the East and the South. It was also the place where Jacksonian democracy, with its emphasis on the little man and its aversion to privilege, succeeded in writing into many state constitutions provisions against lotteries. In modern times, these constitutions have had to be amended to make possible modern experiments with lotteries. The Midwest, too, was the scene of early efforts to work out legal attitudes towards futures contracts on grain and other agricultural products. Chicago, as well, saw the rise of modern forms of organized crime.

The West was at first characacterized by a male dominated cattle grazing and mining society in which amusement centered in a combination casino, bordello, and saloon. With the arrival of eastern farmers and their families, efforts were made to curtail this aspect of Western life, particularly as statehood was sought. Nevada was one of the last states to bring gambling under control and one of the first to revert to old patterns of life.

Federal law has played mainly a supporting role in the development of gambling policies. For a while, early Supreme Court jurisprudence under the Contract Clause inhibited state efforts to end the state chartered lottery system. Federal legislative intervention was also required to end the corrupt Louisiana Lottery. In modern times, federal policy has been aimed at organized crime. Beginning in the 1950's, a series of federal statutes have virtually eliminated slot machines and large scale casino gambling in a "sin city" context. Federal efforts to restrict the operation of off-track betting and clandestine lotteries have been less successful. Federal

tax policy, too, takes special recognition of gambling income and gambling businesses. As such, it has had a major impact on modern efforts to alter traditional gambling policies at the state level.

Lotteries have played a large role in the development of gambling policy. At first, they were used to raise revenue. Later, when they became corrupt, they were outlawed. Today, they have been revived in an effort once again to raise revenue. They are a particularly objectionable form of taxation: expensive to operate and not dependable. It has been necessary to promote them to keep them in operation. They have been characterized, not by fraud, as in the 19th century, but the manipulators of the bureaucracy, as in the 20th century.

Few modern codes adequately attack syndicated gambling. Even with efforts at decriminalization of social gambling and the creation of legal games, some areas of gambling will apparently remain outside the law and efforts will have to be made to prohibit them with well drawn laws. Bookmaking, numbers, lotteries, casinos, and gambling machines will have to be prohibited.

Efforts at reform of gambling law all too often concentrate solely on the criminal law. The policies of the criminal law have given rise to parallel civil law rules designed to curtail gambling contracts, debts, and other civil obligations. Fraud, too, in connection with gambling has occupied the attention of the law.

English law in modern times has been reformed. Following the American Revolution, England had its Puritan days under Victoria. In 1960, however, English law turned to a libertarian policy. By 1968, it was necessary to curtail abuses, but English law today remains permissive by American standards.

General findings and conclusions include the need to examine each form of gambling on its own terms. Sweeping generalizations should be avoided. Consideration in efforts to suppress or regulate should be given to who operates a particular form, who participates in it, levels of participation, methods of promotion, places of participation, and degrees of regulation. Effective methods of control vary with the form: publicly operated casinos are the most easily controlled, while clandestinely operated lotteries are the least easily suppressed. Criminal, civil, and tax policies on the state and federal levels must be coordinated if reform is to be effective.

The Midwest developed its gambling policies by drawing its people and its legislation from the East and the South. It was also the place where Jacksonian democracy, with its emphasis on the little man and its aversion to privilege, succeeded in writing into many state constitutions provisions against lotteries. In modern times, these constitutions have had to be amended to make possible modern experiments with lotteries. The Midwest, too, was the scene of early efforts to work out legal attitudes towards futures contracts on grain and other agricultural products. Chicago, as well, saw the rise of modern forms of organized crime.

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This Report is the product of the combined efforts of students at the Cornell Law School, working under the supervision of Professor G. Robert Blakey. The following participated in the research and writing of the Report: Paul D. Bennett, Mary E. Bradley, Don F. Dagenais, Thomas J. Denitzio, John J. D'Onofrio, Philip S. Figa, Michael J. Hinton, Harold A. Kurland, Robert S. Pasley, Paul B. Phinney, Raymond M. Schlather, Paul K. Stecker, Susan C. Thon, and William C. Waller. Mr. Harold A. Kurland deserves special mention. He had the responsibility for the preparation of the overview; he also acted as a general coordinator for the research and writing of the individual reports. The initials of the person who was primarily responsible for each report are on the cover page of each separate appendix.

G.R.B.

Cornell Law School
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APPENDIX

I. INTRODUCTION

Suggestions for the decriminalization of new forms of gambling at the local level[1] and a threat of possible prosecution of State officials by the Department of Justice[2] have lent a sense of immediacy to the study[3] of the Federal statutes relating to gambling.

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[1]Two significant studies with respect to the partial decriminalization of gambling enterprises have been recently conducted. Both reports outline the types of illegal games, the various suggestions for change, and policy implications of legalization in terms of the potential impact on organized crime and as a State revenue source in lieu of additional taxation. Neither report contains extensive statistical findings, perhaps necessarily, nor a thorough legal analysis of the relevant Federal statutes. See Task Force on Legalized Gambling, Easy Money (Twentieth Century Fund 1974); Fund for the City of New York, Legal Gambling in New York (1972). One decriminalization proposal, legalized casino gambling in New Jersey's Atlantic City, was defeated by a State referendum on November 5, 1974.

[2]On August 30, 1974, Attorney General William B. Saxbe sent the governors of each State currently permitting lotteries a telegram warning them that "Serious questions have arisen concerning the lottery that is being conducted in your State," and that "[t]here is a distinct possibility that there are violations of the criminal provisions of the Federal code." N.Y. Times, Aug. 31, 1974, at 1, col. 1. Saxbe then announced a ninety-day moratorium on Federal prosecution under these statutes: "Attorney General William B. Saxbe promised representatives of 13 states at a meeting here [Washington] yesterday that he will not act to shut down their State-run lotteries for at least 90 days in order to give Congress time to amend Federal antilottery laws." Wash. Post, Sept. 7, 1974, at 1, col. 8. But cf. "A Fair Bet: Official Gambling Will Grow." N.Y. Times, Oct. 13, 1974, § 4 (The Week in Review), at 10, col. 3.

[3]The Commission on the Review of the National Policy Toward Gambling was established by the Organized Crime Control Act of 1970, Pub. L. No. 91-452, title VIII, §§ 804-09, 84 Stat. 938 to "conduct a comprehensive legal and factual study of gambling in the United States . . . and to formulate and propose such changes . . . as the Commission may deem appropriate." Id. at 939.

More than 50 provisions of Federal law directly affect gambling activities. These statutes have been adopted in diverse circumstances over more than 80 years and are contained in numerous titles of the United States Code.[4] Yet there has been little effort over the years to analyze these statutes as a whole or to reconsider the policies that they represent in light of changing conditions.[5] It is the purpose of this Report, therefore, to discuss the origins of the Federal statutes relating to gambling and to articulate from these statutes, the legislative history, and the major cases what the current Federal policy is with respect to gambling in order that policy makers will be in a position to evaluate what changes, if any, should be made.

The approach of this Report will be to consider the Federal statutory scheme relating to gambling, largely chronologically, ". . . to know what it is, we must know what it has been. . . ."[6] The antilottery statutes of the 19th century, the recent criminal statutes, the tax laws, and miscellaneous statutes relating to gambling from other titles will be brought together to determine how current Federal policy developed. Only through an understanding of what the laws are, where they came from, and the specific policies they were enacted to serve can an overall policy

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[4] See, e.g., 7 U.S.C. § 2044; 8 U.S.C. § 1101; 12 U.S.C. §§ 25A, 339, 1730C, 1829A; 15 U.S.C. §§ 1171-78; 18 U.S.C. §§ 1081-84, 1301-04, 1306, 1307, 1511, 1952, 1953, 1955, 1961-68, 2516; 19 U.S.C. § 1305; 26 U.S.C. §§ 165(d), 4401-23, 4461-64; 39 U.S.C. § 3005; 42 U.S.C. § 3781; 47 U.S.C. § 312 (1970).

[5] Thirteen states currently operate lotteries, all legalized since 1964: New Hampshire, New York, New Jersey, Massachusetts, Connecticut, Pennsylvania, Michigan, Maryland, Illinois, Ohio, Delaware, Rhode Island, and Maine.

[6] O. Holmes, The Common Law 5 (Howe ed. 1963).

analysis be meaningful and productive. Each of the current Federal statutes is, moreover, the subject of a separate appendix. Additional appendices have also been included on the possessions, the District of Columbia, and Puerto Rico.

II. THE ANTI-LOTTERY STATUTES

Of all the Federal statutes having to do with gambling, those related to lotteries have been of the greatest contemporary import.[7] The central provisions concerning lotteries date from the late 19th century and remain, with one major exception, in force in substantially the same form as they were when first codified in 1909.[8] The time-span covered by the developing Federal policy toward lotteries, the complexity of the statutory evolution and the underlying legislative policy, the clear dichotomy between the lottery statutes and later Federal gambling laws, and the significance of determining the prior intentions of Congress

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[7]Prior to their recent amendment, the Federal statutes limiting the operation of lotteries were at odds with the new State-operated lotteries in several respects. Not only were technical violations of Federal statutes easily committed by the States (such as transportation interstate of materials to be used in the lottery enterprise in violation of 18 U.S.C. § 1301, note 11 infra, or 18 U.S.C. § 1953, note 154 infra, or utilization of federally insured banks for the distribution of lottery materials prohibited by 12 U.S.C. §§ 25A, 339, 1730C, and 1829A), but the parameters of State advertising of lottery ventures were also narrowly defined by 18 U.S.C. §§ 1301-02, notes 11 and 12 infra. The exemption of State lotteries by the addition of 18 U.S.C. § 1307 infra, note 16, will ease the immediate lottery conflict. Since other types of gambling, which might be in serious conflict with Federal statutes have not yet been legalized by any State, with the exception of Nevada, friction between Federal and State policies concerning nonlottery gambling has not yet sharply occurred.

[8]Act of March 4, 1909, ch. 321, §§ 213, 214, 237, 35 Stat. 1129-30, 1136.

in light of the current reassessment of State and Federal policy with regard to lotteries require that the Federal lottery statutes be given careful attention.

A. The Current Scheme

The existing scheme of Federal anti-lottery laws consists principally of six statutes,[9] five of which comprise chapter 61 of 18 United States Code.[10] 18 U.S.C. § 1301 prohibits the importation and passing through interstate commerce of lottery tickets and related matter.[11] 18 U.S.C. § 1302 limits the mailing of lottery tickets,

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[9] 18 U.S.C. §§ 1301-07; 39 U.S.C. § 3005 (1970).

[10] Chapter 61 also includes § 1305, exempting fishing contests, from the antilottery provisions, and § 1306, prohibiting certain participation by federally insured or chartered banks in lottery activities (discussed in connection with the banking law amendments, Pub. L. No. 90-203, Dec. 15, 1967, 81 Stat. 608 at notes 195-97 infra).

[11] § 1301. Importing or transporting lottery tickets

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or any list of prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

advertisements, or related materials.[12] 18 U.S.C. § 1303 forbids a postmaster to act as a lottery agent.[13] 18 U.S.C. § 1304 brings radio communications into the scope of section 1302; it was added by the

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[12] § 1302. Mailing lottery tickets or related matter

Whoever knowingly deposits in the mail, or sends or delivers by mail:

Any letter, package, postal card, or circular containing any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title --

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

[13] § 1303. Postmaster or employee as lottery agent

Whoever, being a postmaster or other person employed in the Postal Service, acts as agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than $100 or imprisoned not more than one year, or both.

Communications Act of 1934.[14] 39 U.S.C. § 3005, in the Postal Service title of United States Code,[15] implements 18 U.S.C. § 1302 in terms of the role of postal agents in restricting the delivery of mail having to

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[14] Act of June 19, 1934, ch. 652, § 316, 48 Stat. 1088.
§ 1304. Broadcasting lottery information

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

[15] § 3005. False representations; lotteries

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which -

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

(c) . . .

do with lotteries. Finally, 18 U.S.C. § 1307 exempts, under defined circumstances, State run lotteries from the strictures of Federal law.[16]

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[16] § 1307. State-conducted lotteries

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law --

(1) contained in a newspaper published in that State, or

(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by a State acting under authority of State law.

(c) For the purposes of this section 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(d) For the purposes of this section 'lottery' means the pooling of proceeds derived from the sale of tickets or chance and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. 'Lottery' does not include the placing or accepting of bets or wagers on sporting events or contests.

SEC. 2 The sectional analysis for chapter 61 is amended by adding the following item:

"1307. State-conducted lotteries.".

SEC. 3 Section 1953(b) of title 18 of the United States Code is amended by changing the period to a comma and adding: "or (4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law."

SEC. 4. Section 3005 of title 39 of the United States Code is amended by adding at the end thereof the following subsection:

"(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation published in a State containing advertisements, lists of prizes, or information concerning a lottery conducted by that State acting under authority of State law, or (2) tickets or other materials concerning such a lottery within that State to addresses within that State. For the purposes of this subsection, 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States."

B. Constitutional Issues

The 19th century saw Federal policy toward lotteries shift from encouragement at the outset[17] to complete prohibition in the District of Columbia by 1878[18] and severe regulation elsewhere to the largest extent possible consistent with Federal jurisdiction by 1895.[19] The movement toward Federal regulation of lotteries posed many crucial issues in constitutional law, and it was not accomplished without opposition and debate. Motivation for congressional action was sometimes complex, but at major steps in the increased regulation of lotteries by the Federal government, the significance of the developing Federal constitutional role was raised and fully discussed.

The major issues which were argued during congressional debate and before the Supreme Court with regard to Federal legislation on lotteries were as follows: the extent of the congressional power to regulate interstate commerce under Article 1, § 8 of the Constitution;[20]

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[17]Congressional furtherance of lottery ventures is exemplified by the delegation of power to the corporation for the District of Columbia to operate lotteries, Act of May 4, 1812, ch. 75, 2 Stat. 726. See note 30.

[18]Act of April 29, 1878, ch. 68, 20 Stat. 39. Two years later, the House debated H.R. 4000, 46th Cong., 2d Sess. (1880), which would have prohibited the advertisement or publication of lottery schemes in the District of Columbia as well, 10 Cong. Rec. 929-30 (1880), but the bill was not agreed to after first and fourth amendment objections were made.

[19]Act of March 2, 1895, ch. 191, 28 Stat. 963.

[20]"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" U.S. Const. art. I, § 8, cl. 3.

the role of the post office within the internal affairs of the States under clause seven of Article 1, § 8;[21] whether the reach of Federal police power under the "necessary and proper clause" extends to proscribing new crimes in a manner with which all States do not agree;[22] the extent of the protection afforded the States by the 10th Amendment[23] to make the distinction between crimes they considered to be mala prohibita and those regarded as mala in se[24] without interference by the

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[21]"The Congress shall have Power . . . To Establish Post Offices and Post Roads;" U.S. Const. art. I, § 8, cl. 7.

[22]"The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

[23]"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[24]The distinction is that an act malum in se is "an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law," while an act malum prohibitum is "a thing which is wrong because prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law;" Black's Law Dictionary, 1112 (rev'd 4th ed. 1968; italics in text). The distinction was important to the argument of the petitioners for writs of habeas corpus in In Re Rapier, 134 U.S. 110 (1892), discussed infra at note 69. Counsel's argument hinges the reservation of powers under the 10th amendment on the malum prohibitum/malum in se distinction, 143 U.S. at 119:

> Turning to the division of powers made by our Constitution between the States and the general government, we find, as its most distinctive feature, that certain enumerated powers were awarded to the latter, and all others reserved to the former. And among the powers so reserved most certainly that of determining what new things should be declared and treated as criminal offences against the good order of society was embraced, except so far as distinct powers of legislation upon particular subjects were conferred upon the general government.
>
> There is, therefore, a well-defined line which limits the extent to which the general government can act as a moral person, and regulate its powers so as to favor or disfavor particular acts of

Federal government; the nature of First Amendment freedom of the press protection from the congressional power to control advertisements appearing in newspapers;[25] and the extent of the Fourth Amendment right of individuals to be secure in their persons[26] with regard to having their mail delivered unopened and unquestioned.

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individuals in the States. That line is, in general, coincident with the boundary everywhere recognized as separating mala prohibita from mala in se.

Although this categorization was rejected by the Court, 143 U.S. at 134, the argument is useful because it unveils the reason for the controversy about gambling prohibition extending over time. The distinction had been raised by the Supreme Court previously: "[lotteries] are not, in the legal acceptation of the term, mala in se, but, as we have just seen, may properly be made mala prohibita," Stone v. Mississippi, 101 U.S. 814,821 (1879).

Where State and Federal policies conflict at different stages of political history in their drawing of the malum prohibitum/malum in se line is where the constitutional delegation of powers arguments become crucial. The current friction between Federal statutes and State-operated lotteries resulted from a change in the State definition of mala prohibita that was not yet reflected by Congress. The process is cyclical. It underlies much of the congressional arguments of the late 19th century concerning the limitation of gambling enterprises.

[25]"Congress shall make no law . . . abridging the freedom of speech, or of the press;" U.S. Const. amend. I.

[26]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," U.S. Const. amend. IV.

Congress, either openly or tacitly, took a position on each of these issues in passing the anti-lottery measures, and none of its efforts was overturned by the Supreme Court.[27] Running through the gamut of constitutional considerations was the basic policy question of the proper role to be played by the Federal government in what many considered an essentially local affair. Congress assumed an active role in determining to regulate the lotteries.[28] Congress placed the Federal government in strong opposition to lotteries by foreclosing the passage of lottery information through the channels of interstate commerce. Had it done otherwise, it would have had the effect of making Federal agencies the crucial link in the operation of ventures illegal in almost every state.

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[27] Ex Parte Jackson, 96 U.S. 727 (1877), affirmed the constitutionality of Rev. Stat. § 3894 (1875 ed.), the first congressional limitation of lotteries (see notes 47-53 infra and accompanying text); In Re Rapier, 143 U.S. 110 (1892) affirmed extensions of congressional power made by the Act of Sept. 19, 1890, ch. 908, 26 Stat. 465, see note 61 infra; and Champion v. Ames, 188 U.S. 321 (1903) affirmed the constitutionality of the Act of March 2, 1895, ch. 191, 28 Stat. 963, notes 75-83 infra, which is substantially the same as 18 U.S.C. §§ 1301-03.

[28] By not acting, Congress could have been considered to have taken an equally decisive position, since allowing lotteries to thrive contrary to the wishes of almost all of the States would have constituted a Federal policy of permitting lottery activity contrary to the wishes of those who sought to limit gambling. Of 38 States, only Delaware, Vermont, and Louisiana had not completely prohibited lotteries by 1884, according to a survey reported by the Senate Committee on Post-Offices and Post-Roads at 15 Cong. Rec. 4380-82 (1884). This survey led the Senate Committee to recommend that limiting lotteries was "not only within the power and duty of Congress, but [was] also in harmony with and in support of the policy of nearly every State in the Union." Id. at 4382.

C. Historical Development

1. Original detachment

Pre-Civil War discussion of lotteries by Congress did not extend to questions of national regulation. The general attitude of the populace ranged from openly favorable to merely acquiescent,[29] and Congress reflected these feelings.[30] Congress imposed only minor restrictions on lottery ventures within its exclusive jurisdiction.[31] Those questions that did arise were resolved without serious constitutional difficulty because they pertained to the affairs of the District of Columbia and the internal management of the post office.

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[29] See generally H. Chafetz, Play the Devil 297-308; J. Ezell, Fortune's Merry Wheel 177-203.

[30] The following exemplify the early deliberations of Congress with respect to lotteries: 1) authorizing the corporation that was to manage the District of Columbia to conduct lotteries up to $10,000 in amount with the approval of the President, Act of May 4, 1812, ch. 75, 2 Stat. 726; 2) assigning for committee study the holding of a lottery to benefit an Alexandria Episcopal church, Annals of Cong., 10th Cong., 2d Sess. 501 (1808); 3) the consideration of an excise tax on lottery earnings in conjunction with new taxes on jewelry and plate, Annals of Cong., 13th Cong., 3d Sess. 224, 1122 (1815); 4) a potential lottery for the benefit of Georgetown University, Annals of Cong., 14th Cong., 1st Sess. 90 (1816).

[31] The lotteries authorized in the District of Columbia engendered considerable Supreme Court litigation. See, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Brent v. Davis, 23 U.S. (10 Wheat.) 395 (1825); Corporation of Washington v. Young, 23 U.S. (10 Wheat.) 406 (1825); Clark v. Corporation of Washington, 25 U.S. (12 Wheat.) 40 (1827); Shankland v. Corporation of Washington, 30 U.S. (5 Pet.) 390 (1831). The validity of the lottery itself was not challenged, but attendant corruption provoked the legal difficulties. Congress passed a resolution calling for a report on the number and profits of lotteries in 1821, Annals of Cong., 16th Cong., 2d Sess. 757. In 1827, Congress passed the antecedent of 18 U.S.C. § 1303 to limit the participation of postal officials in the lottery enterprises, Act of March 2, 1827, ch. 61, 4 Stat. 238:

> Sec. 6. And be it further enacted, That no postmaster, or assistant postmaster, shall act as agent for lottery offices, or, under any color of purchase, or otherwise, vend lottery tickets; nor shall any postmaster receive free of postage, or frank lottery schemes, circulars, or tickets. For a violation of this provision, the person offending shall suffer a penalty of fifty dollars.

The first clear limitation on local lotteries became law in 1868. Almost hidden within "An Act to further amend the postal Laws."[32] The provision provided that "it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."[33] A further provision allowing the postmaster to open letters suspected of containing lottery materials prohibited by the statute was eliminated in conference.[34] There was no open debate over the substantive limitation on the mailing of lottery tickets and seemingly little dispute at that time.

With the 1872 codification of the postal laws,[35] a Federal policy toward lotteries began to emerge. The prohibition of postal officials acting as lottery agents[36] was brought forward unchanged.[37] The 1868

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[32]Act of July 27, 1868, ch. 246, 15 Stat. 194. The act concerns inter alia, the establishment of postal money orders (§ 2), free return of nondeliverable mail (§ 1), and discounted sales of postage stamps to vendors (§ 12).

[33]Id. at § 13. The anti-lottery provision had been added to the House bill by the Senate, Cong. Globe., 40th Cong., 2d Sess. 4175 (1868).

[34]Cong. Globe, 40th Cong., 2d Sess. 4412 (1868). Farnsworth, reporting for the House Committee on the Post-Office and Post-Roads, argued that this would be a "dangerous power to confer upon postmasters."

[35]Act of June 8, 1872, ch. 335, 17 Stat. 283.

[36]Act of March 2, 1827, ch. 61, 4 Stat. 238, reproduced fully at note 31 supra.

[37]Act of June 8, 1872, ch. 335. § 79, 17 Stat. 294.

limitation on the mailing of lottery tickets and circulars was reworded,[38] but only "illegal" lotteries were made subject to the statutory prohibition.[39] Both provisions were carried forward in the general codification, the Revised Statutes, those concerning postal agents, as section 3851,[40] and those concerning the mailing of lottery materials, as section 3894.[41]

2. The 1876 "illegal" debate

Four years later, Congress amended section 3894 by striking the word "illegal."[42] The change clearly meant that Congress had determined that the exclusion of lottery materials from the mails was to extend to all

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[38] Id. at § 149. The provision read as follows:

> Sec. 149. That it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences, and a penalty of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution, is hereby imposed upon conviction, in any Federal court, of the violation of this section.

[39] In introducing the bill, H.R. 1, 42d Cong., 2d Sess., Farnsworth for the House Committee on the Post-Office and Post-Roads said that there were no major changes, Cong. Globe, 42d Cong., 2d Sess., pt. 1,15 (1872), but despite this there were two differences of note with respect to § 149. As compared with the 1868 statute, given supra accompanying note 33, § 149 was far more comprehensive. Sec. 149, however, only referred to illegal lotteries while the 1868 provision had pertained to all lotteries. Whether the 1868 inclusion of all lotteries was inconsistent with the intent of Congress is unclear, but there was no discussion reported about the change, except for Farnsworth's cryptic introduction.

[40] Rev. Stat. § 3851 (1875 ed.).

[41] Rev. Stat. § 3894 (1875 ed.).

[42] Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90.

lotteries, whether authorized by State governments or not.[43] Despite the assertion of the chairman of the House Committee on the Post-Office and Post-Roads that the bill contained no material changes,[44] and subsequent passage in the lower body with no debate,[45] Senate agreement was not obtained easily. Many of the major and recurring issues of constitutional dimension were seen in the Senate, fervently argued on the floor, and decisively answered with the vote favoring the propriety of the proposed regulations.[46]

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[43]"The object of the amendment to [Rev. Stat. § 3894] is to secure uniformity and prohibit lottery circulars of any kind from passing through the mails." 4 Cong. Rec. 3656 (1876) (remarks of Mr. Cannon, of the House Committee on the Post-Office and Post-Roads on reporting H.R. 1239, 44th Cong., 1st Sess. (1876). The bill, as H.R. 2575, was fully debated in the Senate, Id. at 4261-64.

[44]Speaking as to a modification of Rev. Stat. § 3893, relating to obscene books, as well as to the anti-lottery provision, Cannon was responding to the challenge that "the proposed bill in no wise changes the law as it now is except to provide a penalty for the circulation of obscene literature." Id.

[45]Id. at 3656.

[46]"Certainly the Senate does not mean to decide that the citizens of a State where lotteries are legal have no right to send a lottery scheme from one portion of the State to another. That seems to me to be interfering with the rights of the people of the States where they choose to think that the sale of lottery tickets is not criminal or improper." 4 Cong. Rec. 4262 (1876) (remarks of Sen. Whyte). Further excerpts from the debate in the Senate highlight the clarity with which the continuing arguments with respect to the prohibition of gambling enterprises by the Federal government were seen in 1876:

> The difficulty which the Department [Post Office] labors under is in determining what are and what are not legal lotteries. A great many schemes are gotten up, some in the Territories, some of them in operation to-day apparently with the form of law, but yet of doubtful legal force, and they are transmitting their matter through the mails, and the whole thing proves to be a fraud upon the community; and the question arises whether it is not wiser and better to treat all lotteries, whether legal or illegal, as precisely the same, or as a system of gambling which a wise course in legislation will not only justify but demand at our hands shall be stopped.

Id. at 4262 (remarks of Sen. Hamlin).

Debate in the Senate also reflected the propriety of congressional action with respect to local gambling activity: ". . . if a State chooses

The constitutionality of the congressional restriction on the mailing of lottery materials was considered the following year by the Supreme Court in Ex Parte Jackson.[47] The Court had no difficulty finding that "[t]he power possessed by Congress embraces the regulation of the entire postal system of the country."[48] Construing the lottery exclusion from the mails within the context of any postal regulation, the Court avoided questions of interference with State prerogatives under the reservation provision of the 10th Amendment.[49] Instead, the Court warned against infringing upon individual freedoms.[50]

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to authorize and legalize a lottery, call it gambling, if you please, and gambling it is, that is a matter entirely for the consideration of that State . . . " Id. (remarks of Sen. West). This argument raises the mala in se versus mala prohibita (see note 24 supra) problem. There is little doubt that Congress was reflecting the change in the perspective of the populace at large towards lotteries as well as specific aims of eradicating corruption. There is also little question that the national mood had been correctly perceived by Congress as having shifted away from approval of lotteries. J. Ezell, Fortune's Merry Wheel 242-70. The following dicta from Phalen v. Virginia, 49 U.S. (8 How.) 163,168 (1850) has often been relied upon to demonstrate the change:

> Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community: it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.

[47] 96 U.S. 727 (1877).

[48] 96 U.S. at 732.

[49] See note 23 supra.

[50] 96 U.S. at 732.

> The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.

The Court then referred to potential Fourth[51] and First[52] Amendment difficulties possible under the statute. Ex Parte Jackson merely sustained the right of Congress "to refuse its facilities for the distribution of matter deemed injurious to the public morals."[53] It did not affirm on its merits the congressional decision to regulate lotteries.

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[51]The Court in Ex Parte Jackson set fourth amendment (see note 26 supra) guidelines as to permissible interference with the mails restrictively, cautioning the Congress not to attempt to violate the guarantee no matter what the purpose at 96 U.S. 733:

> Letters and sealed packages of this kind are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

[52]96 U.S. at 733-35; see note 25 supra.

[53]96 U.S. at 736. The holding of Ex Parte Jackson was the subject of much dispute in ensuing years. In 1884, the Senate Committee on Post-Offices and Post-Roads reported S. 1017, 48th Cong. 1st Sess. The purpose of S. 1017 was to prohibit the mailing of newspapers containing lottery advertisements. Jackson was cited as authorizing the enactment of such legislation, 15 Cong. Rec. 4380 (1884). The minority report characterized the Jackson language differently, finding that the case could only be construed as having upheld the Act of July 12, 1876, (see note 42 supra) and otherwise as spelling out restrictions upon the power of Congress to interfere with freedom of the press: "Nor can any

Pressure upon Congress to take further action against lotteries mounted over the next decade. Scores of petitions begged for the congressional eradication of the Louisiana lottery, the most corrupt and untouchable of the lotteries.[54] Countless bills were introduced to accomplish this and related purposes, but most were never reported out of committee.[55] In a special message to Congress concerning

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regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value," (96 U.S. at 733). Because Jackson affirmed the lottery restrictions of 1876 but also cautioned against over-extensions of congressional power in violation of constitutional guarantees, the case was cited in an exaggerated fashion to support both sides repeatedly in the volatile decades to follow during the congressional battle with the Louisiana lottery (see note 46 supra).

[54]J. Ezell, Fortune's Merry Wheel, 242-70 reports a concerted petitioning campaign undertaken by the clergy at 268. A large number of such petitions were printed in the Congressional Record from 1880 to 1895.

[55]There was much lottery-related congressional activity over the years 1876 to 1890. In 1878, the 45th Congress eliminated the sale of lottery tickets in the District of Columbia by the Act of April 29, 1878, ch. 68, 20 Stat. 39. Approximately ten bills a year were read and sent to committee from the 48th to 51st Congresses concerning lotteries. One such bill was H.R. 5933, 50th Cong. 1st Sess. (1888), which concerned the prohibition of the advertisement of lottery tickets in the District of Columbia. Debate concerning H.R. 5933 typifies the arguments and divisions of Congress at the period, 19 Cong. Rec. 1153-1161 (1888). Ex Parte Jackson was extensively relied upon at 19 Cong. Rec. 1155 to show the restrictions imposed upon Congress with regard to regulating lotteries by the first and fourth amendments. Proponents of the bill to eliminate lottery advertisements often argued emotionally, denying that they could be circumventing constitutional guarantees:

> I know it will be insisted that the provisions of the bill will be an abridgment of the 'freedom of the press,' but, Mr. Speaker, it will not abridge any 'freedom of the press' to do right or to publish whatever may promote the good of mankind. It is not designed to take away any proper or legitimate right of the press, but only to restrain and prohibit all license to perpetrate a wrong by enticing the young and unsuspecting into habits that will lead them into ruin, as has heretofore been done in many instances. Some

lotteries,[56] President Benjamin Harrison urged that without aid from the Federal government it would be beyond the powers of the States to control the Louisiana lottery:

> If the baneful effects of the lotteries were confined to the States that give the companies corporate powers and a license to conduct the business, the citizens of other States, being powerless to apply legal remedies, might clear themselves of responsibility by the use of such moral agencies as were within their reach. But the case is not so. The people of all the States are debauched and defrauded. The vast sums of money offered to the States for charters are drawn from the people of the United States, and the General Government through its mail system is made the effective and profitable medium of intercourse between the lottery company and its victims. . . . The use of mails by these companies is a prostitution of an agency only intended to serve the purpose of a legitimate trade and a decent social intercourse.

> of the blackest deeds in the catalogue of crimes have been committed under the plea of liberty. On the way to the guillotine Madame Roland, [sic] exclaimed, "O, Liberty! Liberty! what crimes are committed in thy name." (Remarks of Mr. Glass).

Those opposed to further congressional action argued as follows:

> What is the Louisiana lottery? It is an institution authorized, organized, and created by the organic law of a sovereign State of this Union. It is a legal institution in so far as the State of Louisiana can make it so, as completely as any institution chartered by any State in this broad land. Now, my friend from Illinois [Mr. Cannon] knows that in so far as we can exercise this power in reference to the Louisiana lottery we can equally exercise it with reference to any banking institution chartered in the State of Louisiana or elsewhere. Now, I wish to ask my friend this question: If we can say to this lottery company, a chartered institution, bearing the stamp and impress of the authority of a State law -- nay, of the constitution of one of the States of this Union -- "Your advertisement shall not be published in any newspaper issued in the District of Columbia," why can we not say to some banking corporation authorized in the State of Louisiana, or, if you choose, in the District of Columbia, "You shall not receive the moneys of this lottery company as deposits in your vaults?" (Remarks of Mr. Compton, Id. at 1157).

H.R. 1159 was defeated 119-113, with 91 not voting, Id. at 1161, showing the closeness of the issue. The excerpts given are representative of the nature of the arguments on the floor and the extent to which pertinent issues were raised and overcome.

[56] A Compilation of the Messages and Papers of the Presidents 1789-1897 (J. Richardson ed.), H.R. Misc. Doc. No. 210, Part 9, 53d Cong., 2d Sess, (1894) 80-81, hereinafter cited as Richardson. The same message

3. 1890: The decision is made

The President's urgent request to Congress for new legislation to eliminate the Louisiana lottery provided the final impetus for the passage of comprehensive amendments[57] to section 3894,[58] imposing new restrictions on the scope of State legislative power and new strains on the Constitution. A provision prohibiting the carriage of any

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was reprinted at 21 Cong. Rec. 7916 (1890). Harrison's message was based upon the increasing concern reported by the Postmaster General, John Wanamaker. In his 1889 annual report, Wanamaker had decried the ineffectiveness of existing Federal law in dealing with the Louisiana Lottery, Report of the Postmaster General, 1889, 10 House Executive Documents, 51st Cong., 1st Sess. (1889-90), 39-41. This prompted Harrison to ask for new anti-lottery legislation in his first message to Congress, Richardson, 44:

> The unsatisfactory condition of the law relating to the transmission through the mails of lottery advertisements and remittances is clearly stated by the Postmaster-General, and his suggestion as to amendments should have your favorable consideration.

The President also complained of conditions in the District of Columbia in his message, Richardson, 81:

> The national capital has become a sub-headquarters of the Louisiana Lottery Company, and its numerous agents and attorneys are conducting here a business involving probably a larger use of the mails than that of any legitimate business enterprise in the District of Columbia. There seems to be good reason to believe that the corrupting touch of these agents has been felt by the clerks in the postal service and by some of the police officers of the District.

Harrison was again speaking on the recommendation of his Postmaster General, John Wanamaker, who had written in a special report that the "entire Post-Office Department is in point of fact the principal agent of the Louisiana State Lottery Company." 11 Executive Documents of the Senate, 51st Cong., 1st Sess. (1889-90), Exec. Doc. No. 196, 3-4. From Wanamaker's perspective this may have been merely demoralizing to the Post Office, but to the President and to Congress the political impact of the role of the Post Office in the propagation of the Louisiana State Lottery was disasterous. No State law could restrict the U.S. Post Office's authority to carry the mails and thus only Congress could eliminate the plague.

[57] Act of September 19, 1890, ch. 908, 26 Stat. 465.

[58] See note 41 supra and accompanying text.

publications advertising lottery tickets or schemes of any kind was added over First Amendment objections.[59] Although postmasters were not permitted to open sealed mail following Ex Parte Jackson,[60] postal authorities were authorized to stamp registered letters "Fraudulent" when suspected of containing lottery materials and not deliver the mail.[61]

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[59]". . . nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier." Act of September 19, 1890, ch. 908, 26 Stat. 465. This provision was similar to that discussed for the District of Columbia in 1888, discussed at note 55 supra.

[60]96 U.S. 727, 733 (1877).

[61]Act of September 19, 1890, ch. 908, § 2, 26 Stat. 466:

SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any postoffice at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent, or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof: and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

Such letters then could be returned to their senders, as could postal money orders suspected of being drawn in favor of lottery enterprises.[62]

The Act of September 19, 1890,[63] was the culmination of 15 years of congressional debate on essentially the same measures relating to lotteries. Framed by the opponents of further congressional action in the minority report accompanying an earlier version of the bill from the Senate Committee on Post-Offices and Post-Roads,[64] the issue was as follows:

> Assuming that the States are competent to protect the morals of their people against the corrupting and injurious effects of lotteries and lottery advertisements, and that the duty to furnish such protection rests with them, this bill presents the grave question as to how far Congress may legitimately go in exercising unquestionable powers for the accomplishment of objects and purposes that do not come lawfully within its jurisdiction. In other words, can Congress properly regulate the mail service of this country, under its authority "to establish post-offices and post-roads," for the purpose of preventing the circulation of newspapers containing lottery advertisements and the suppression of lotteries?

After due references to Ex Parte Jackson,[65] the framers of the Constitution, and subsequent discussions of federalist principles, the minority report concluded that "[t]he present bill is a long departure from the conservative opinions entertained and acted upon by the great statesmen of 1836. If not unconstitutional it embodies a principle and policy of a most dangerous character and tendency. . . ."[66]

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[62]Act of September 19, 1890, ch. 908, § 3, 26 Stat. 466 amended Rev. Stat. § 4041 (1875 ed.) relating to money orders.

[63]Ch. 908, 26 Stat. 465.

[64]The minority report in connection with S. 1017, 48th Cong., 1st Sess. (1884), an analogous bill to that passed in 1890, construed the principal question as one of the States' rights. 15 Cong. Rec. 4383 (1884).

[65]96 U.S. 727 (1877). See note 53 supra.

[66]15 Cong. Rec. 4383 (1884).

Congress was clearly taking a more aggressive tack toward that which many still considered essentially local matters.[67] The changes of

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[67]House debates concerning the 1890 legislation reiterated the previous arguments. 21 Cong. Rec. 8698-8721 (1890) (Concerning H.R. 11569, 51st Cong., 1st Sess. (1890)). The significant difference from prior debates was that the balance had shifted in favor of a more restrictive anti-lottery provision. The arguments were the same but the votes had shifted. President Harrison's plea (see note 56 supra) and the continuing vitality of the Louisiana lottery in the face of State prohibitions prompted the shift in the congressional balance. Congress was told that the business of the Louisiana lottery in 1890 was greater than $30 million annually, Id. at 8706, of which 93% was derived outside Louisiana:

> The States are powerless to extirpate the Louisiana lottery. They are powerless even to protect themselves from its insidious brigandage. They have exhausted their resources. The mails, the national banks, and the channels of interstate commerce are controlled by the national authority and the national authority alone. The national Congress and the national Executive are alone equal to the overthrow of this pestilent corporation, which has become the richest, the most audacious, and the most powerful gambling institution that the world has ever known.

The federalist argument of the minority was persuasively stated but not followed by a Congress now firmly bent on action, Id. at 8703:

> . . . if Congress, in its supremacy, can indirectly undermine, discriminate against, and in effect destroy the legislation of the States in matters exclusively reserved to the States, our system is destroyed, the rights of the States under their reserved powers practically ended, and the Government is centralized, with the States mere figure-heads. To apply it: If a State, for purposes of revenue or from policy, desires to establish, tolerate, or legalize lotteries, which it has an undenied and undoubted authority to do, and which is a matter over which Congress has no earthly concern, and then Congress can, by indirection, through the exercise of another power, practically nullify and invalidate this action and make criminals of those within that State that do the customary and essential acts to its existence and prosperity according to its design and the law of the State, then the State might as well go out of business and cease to exist.

Despite this plea the Congress concluded that they must "crush this hydra-headed monster, which is demoralizing the young, the poor, and the needy throughout the country, as no other institution in America has ever done." Id. at 8705.

1890 were largely successful in curtailing the operations of the Louisiana lottery,[68] and despite a constitutional challenge, the statute was upheld by the Supreme Court in its decision In Re Rapier:

> We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people.[69]

4. 1895: Beyond the mails

A further step was taken by Congress in 1895, when, going beyond its authority to regulate the mails,[70] it prohibited the importation of lottery matter in a provision that was to become 18 U.S.C. § 1301,[71] and the interstate carriage of lottery materials without regard to the postal

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[68]The Postmaster-General reported in 1890 that business at the New Orleans post office was off by one third in response to the new legislation. Report of the Postmaster General, 1890, 10 House Executive Documents, 14, 51st Cong., 2d Sess. (1890-91). The Postmaster General reported the following year that there were increased convictions under the anti-lottery statutes and that the new statutes were popularly received in the press. Of 2,259 newspaper editorials in 850 papers, 2,172 opposed the use of mails by lottery companies and 87 favored such use. Report of the Postmaster General, 1891, 13 House Executive Documents 17-22, 52d Cong., 1st Sess. (1891-92).

[69]143 U.S. 110,134 (1892). The Court found that it was for Congress in the first instance to determine the propriety of its actions absent constitutional infirmities, undercutting the argument that Congress had over-extended itself in determining matters mala prohibita reserved for local resolution (see note 24 supra).

[70]U.S. Const. art. I, § 8, cl. 7 (quoted at note 21 supra).

[71]Reprinted at note 11 supra.

service.[72] Once again, the immediate reason for the enactment was a desire to combat a revitalized Louisiana lottery, which had reestablished itself in Honduras and was trying to conduct its operations without using the United States mails.[73] To regulate the interstate transportation of lottery materials without regard to the postal service, Congress was forced to rely on its powers under the commerce clause.[74] The Supreme Court sustained against constitutional challenge such congressional

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[72]Act of March 2, 1895, ch. 191, 28 Stat. 963. Sections 2 and 3 of the 1895 legislation integrated the new changes into prior Federal anti-lottery statutes, e.g. Rev. Stat. §§ 3894, 3929, 4041, last revised at 26 Stat. 465 (note 57 supra). Section 4 extended the power of postal officials to refuse to deliver mail relating to lotteries (note 61 supra) by including ordinary letters. The most significant extension of the 1895 act, unrelated to congressional authority to operate the postal service, was contained in § 1:

> Be it enacted . . . That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift-concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery . . . to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable . . . .

[73]The Louisiana lottery had been reestablished in Honduras and was being conducted outside the U.S. mails. 27 Cong. Rec. 3013 (1895) (remarks of Mr. Broderick). In attempting to eradicate the Louisiana lottery, Congress also affected charitable lotteries, despite its intention to avoid doing so: "I have not the slightest objection to confining it to the lottery business, but to provide that the offering of prizes shall be a penal offense at innocent church fairs and other little enterprises of that sort, it seems to me, is going beyond what we ought to attempt." 26 Cong. Rec. 4313 (1894) (remarks of Mr. Gorman). The problem was inherent to the unsophisticated nature of the statute that was passed. For an alternative, see, e.g., 18 U.S.C. § 1955 at notes 174-82 infra.

[74]Reproduced at note 20 supra.

power with respect to lotteries in Champion v. Ames,[75] a case argued three times before the Supreme Court and finally determined by only a 5-4 majority.[76]

Although the reservation of powers to the States under the 10th Amendment was briefed and argued by Champion,[77] who sought relief from a conviction under the 1895 statute by a writ of habeas corpus,[78] the case was decided through reliance on Gibbons v. Ogden[79] as a commerce clause issue.[80] Since the Court found that Congress was authorized under the commerce clause to pass the anti-lottery statutes,[81] the 10th Amendment issue was dismissed by the statement that "the power to regulate commerce among the States has been expressly delegated to Congress."[82] The propriety of congressional action was not for the courts to determine; its constitutionality was abundantly clear:

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[75]188 U.S. 321 (1903).

[76]See note 83 infra.

[77]188 U.S. at 330-32.

[78]Id. at 325.

[79]22 U.S. (9 Wheat.) 1 (1824).

[80]The Champion court (Harlan, J.) quoted from Mr. Chief Justice Marshall's opinion in Gibbons v. Ogden extensively at 188 U.S. 346-47 (italics added by the Champion opinion):

> [The commerce power] is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.

[81]After tracing the development of the commerce clause powers subsequent to Gibbons at 188 U.S. 348-52, the Champion court affirmed the power of Congress to pass the 1895 anti-lottery statute. Id. at 357.

[82]Id. at 357.

> If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.[83]

The antilottery statutes were codified as part of the Federal criminal code project of 1909[84] substantially as they existed in 1895.[85] The provisions authorizing specific action by the postal authorities where violations of the antilottery statutes are suspected were

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[83] Id. at 358. The dissenters argued that the 10th Amendment precluded further congressional action and that the "scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest." Id. at 372. (For dramatic later expansion of the commerce clause powers of the Federal Government in the limitation of local gambling ventures, see notes 182-96 and accompanying text infra.) Champion was heard together with Francis v. United States, 188 U.S. 375 (1903), in which Mr. Justice Holmes restricted the application of the 1895 statutes by finding that the stubs to lottery tickets held by customers were not covered by the statutory definition prohibiting the interstate carriage of lottery materials (see note 72 supra for text). Champion was first argued in 1900 and then was joined with Francis to be argued in October, 1901 and again in December, 1902. 188 U.S. at 325. The final opinion, decided 5-4, coupled with the constricting of the congressional purpose in Francis through the reversal of a conviction, demonstrates the closeness of the issue in the mind of the Court. A prior decision of the Court, which also narrowly construed the 1895 statute, reinforces this interpretation of the cases, see France v. United States, 164 U.S. 676 (1897).

[84] Act of March 4, 1909, ch. 321, 35 Stat. 1088.

[85] Rev. Stat. § 3894 as amended by 26 Stat. 465 (see note 57 and accompanying text supra) became § 213 at 35 Stat. 1129; Rev. Stat. § 3851, having to do with postmasters acting as lottery agents (see notes 31 and 40 supra), became § 214 at 35 Stat. 1130; the 1895 amendments at 28 Stat. 963 relating to the importation and interstate transportation of lottery materials (see note 72 supra) were codified as § 237 at 35 Stat. 1136.

separated and became what is currently 39 U.S.C. § 3005.[86] The lottery statutes codified in 1909, together with the statute incorporating radio communication of lottery information,[87] became chapter 61 of 18 United States Code.[88]

D. Modern Accomodation

The growth in recent years of State operated lotteries has been the most significant feature of the gambling landscape.[89] Reversing a century old trend, New Hampshire established a sweepstake in 1964. In 1969, New York established its lottery. New Jersey soon followed suit with a daily lottery, and spurred on by New Jersey's success, ten other States in the past few years have done likewise.

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[86] 39 U.S.C. § 3005 is virtually identical to the pre-1970 39 U.S.C. § 4005, the change being made pursuant to the reorganization of the Post Office in Pub. L. No. 91-375, Aug. 12, 1970, 84 Stat. 746. The statute had devolved from Rev. Stat. §§ 3929, 4041 (see notes 18, 61-62 supra) through 39 U.S.C. §§ 259, 732 (1952 ed.).

[87] Communications Act of 1934, Pub. L. No. 416, June 19, 1934, § 316, 48 Stat. 1088. The language is substantially identical to 18 U.S.C. § 1304 (1970), reproduced at note 14 supra.

[88] With the recodification of 1948, Pub. L. No. 772, June 25, 1948, 62 Stat. 683, § 213 of the 1909 code became 18 U.S.C. § 1302 (reprinted at note 12 supra); § 214 became 18 U.S.C. § 1303 (reprinted at note 13 supra); and § 237 became 18 U.S.C. § 1301 (reprinted at note 11 supra). There were no substantive changes in any of these statutes, since the 1895 anti-lottery statutes (see note 72 and accompanying text supra) were adopted by Congress, until the enactment of 18 U.S.C. § 1307, see note 16 supra.

[89] See Task Force on Legalized Gambling: Easy Money (Twentieth Century Fund 1974) 35.

The operation of these lotteries has been severely curtailed by the complex of Federal statutes that were enacted over the last century. Restrictions, for example, were placed on importation,[90] transportation,[91] mailing,[92] and broadcast advertisements.[93] The strained relations between Federal and State officials came to a head on August 30, 1974, when the Attorney General sent the governors of each lottery State a telegram warning them that "serious questions" had arisen concerning the operation of the lotteries and that there was a "distinct possibility" that some of them were in violation of the "criminal provisions" of Federal law.[94]

To avoid this confrontation, Congress passed amending legislation in the last days of the 93rd Congress. While it received urgent attention only following the Attorney General's telegram, the legislation had been introduced in the Senate as S. 544 in January of 1973[95] and in the House as H.R. 6668 in the following April.[96]

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[90] 18 U.S.C. § 1301.

[91] 18 U.S.C. § 1301.

[92] 18 U.S.C. § 1302.

[93] 18 U.S.C. § 1304.

[94] N.Y. Times, August 31, 1974, at 1 col. 1.

[95] S. 544, 93rd Cong., 1st Sess. 1973 (By Senator Hart).

[96] H.R. 6668, 93d Cong., 1st Sess. (1973), by Congressman Rodino of New Jersey, chairman of the Judiciary Committee. Rodino had also introduced a similar bill in the 92d Congress, H.R. 2374, and held hearings on the bill on October 13, 1971. Neither that attempt, nor the subsequent hearings held on April 24, 1974 on H.R. 6668 produced immediate action on the floor. [Copies of these hearings unavailable as of this writing.]

The basic rationale of the legislation was said by the Senate report to be to "accomodate the operations of legally authorized State-run lotteries consistent with continued Federal protection to the policies of nonlottery States."[97] The scope of the proposed legislative exception/or State lotteries was described as follows:

> 1. Permitting transportation and mailing to addresses within the particular State conducting the lottery;
> 2. Permitting the mailing of newspapers published within the State, notwithstanding lottery promotional or other information contained therein concerning a State-run lottery in that State;
> 3. Permitting the broadcasting of promotional or other information concerning a lottery within that State from stations licensed in a location within that State; and
> 4. Permitting a State-run lottery to obtain material necessary to conduct its operation from out-of-state sources.[98]

Passage of the legislation did not seem likely until November, 1974, when the Senate Committee on the Judiciary held hearing on S. 544 and related bills.[99] S. 544 was reported out on December 18,[100] and was passed by the Senate the following day.[101] The House passed its H.R. 6668 on December 20, incorporating one additional provision,[102] with which the Senate agreed on the same day.[103] The President signed the bill as P.L. No. 93-583 on January 2, 1975.

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[97] S. Rep. No. 93-1404, 93d Cong. 2d Sess. 2 (1974).

[98] Id. at 3.

[99] S. Rep. No. 93-1404, 93d Cong., 2d Sess. 2 (1974). The hearings were held on November 20, 1974 before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary. [Copy unavailable as of this writing.]

[100] S. Rep. No. 93-1404 supra.

[101] 120 Cong. Rec. S22145 (daily ed. Dec. 19, 1974).

[102] 120 Cong. Rec. H12599-609 (daily ed. Dec. 20, 1974).

[103] 120 Cong. Rec. S22543 (daily ed. Dec. 20, 1974).

Although no litigation has arisen to interpret the Act, the scope of the new section, section 1307, added to Title 18 merits discussion. The four conditions set out by the Senate Judiciary Committee[104] are reflected in the statute.

Section 1307(a) exempts from the operation of 18 U.S.C. §§ 1301-04 lottery-related information "concerning a lottery conducted by a State acting under authority of State law," which is contained in a newspaper or radio or television broadcast originating in the same State. The radio or television station of a neighboring State that conducts a lottery according to its law could broadcast with respect to the lottery of the State of origin as well as that of the neighboring State, but a newspaper may never publish lottery-related information not concerning the lottery of the State in which it is published. This limitation is, of course, itself subject to the constitutional role which protects information having legitimate news value, whether or not pertaining to lotteries.[105]

Section 1307(b) permits the mailing or transportation to a lottery State from outside sources of materials relating to the lottery of the destination State.

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[104] See supra text at n. 98.

[105] The Supreme Court recently heard arguments in New Jersey State Lottery Commission v. United States, 491 F. 2d 219 (3d Cir. 1974), docket no. 73-1471, in which the Third Circuit held en banc that lottery information broadcast as news is constitutionally protected under the first amendment. This exemption would not apply to anything other than legitimate news under the reasoning of the case, but would extend to other media regardless of location provided that the categorization as "news" was within the sound editorial discretion of the source of the otherwise prohibited information.

Under 39 U.S.C. § 3005(d) the mailing of lottery materials relating to a given State may be mailed from addresses in that State to addresses within that State.

Finally, no information or materials relating to lotteries may originate from a nonlottery State that does not fall within the category of news or material destined to be used by the State-authorized lottery in the State to which it is sent.

Pub. L. No. 93-538 does not immunize State-operated lotteries from the impact of all Federal statutes relating to lotteries. Only lotteries conducted "by a State acting under authority of State law" are protected and only with respect to possible violations of 18 U.S.C. §§ 1301-04, 1953, and 39 U.S.C. § 3005. Thus, for example, potential violation of 18 U.S.C. § 1306 (relating to the distribution of lottery materials by Federally-insured banks) by a bank dealing in State lottery materials at the request of the State would still be possible, although the bank, not the State would be directly subject to prosecution. The precise scope of Section 1307, if any, beyond that set out in the legislative history will have to await litigation.[106]

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[106] Left unsettled, for example, is the status of United States v. Fabrezio, 385 U.S. 263 (1966). As applied to a tourist, the holding of Fabrezio, which found criminal under 18 U.S.C. § 1953 the transportatin of lottery materials out of the State of New Hampshire, may be harsh. But to permit the commercial transportation of such materials in and out of the State and the advertisement of the service, now at least partially possible, would threaten the policy of the nonlottery States.

III. THE MODERN CRIMINAL STATUTES

With the exception of the extension of the anti-lottery statutes to radio broadcasting in 1934,[107] no Federal statutes were passed directly affecting gambling between 1895 and 1948.[108] The half-century moratorium on Federal legislation with respect to gambling was consistent with the broad policy of leaving such considerations to local authorities wherever possible.[109]

Since 1948, however, the Federal role in the limitation of gambling activities has significantly expanded. Federal statutes have been passed with respect to gambling ships,[110] interstate and foreign transportation of gambling devices,[111] transmission of wagering information over wire facilities,[112] interstate transportation of wagering paraphernalia,[113] interstate travel in furtherance of racketeering enterprises connected with gambling,[114] and the business enterprise of gambling.[115] These

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[107] Communications Act of 1934, Pub. L. No. 416, June 19, 1934, § 316, 48 Stat. 1088; 18 U.S.C. § 1304. For the text of the statute see note 14 supra. See also Haley, "The Broadcasting and Postal Lottery Statutes, 11 Geo. Wash. L. Rev. 475 (1936) F.C.C. v. A.B.C. 347 U.S. 284 (1954).

[108] The codification project of 1909 and recodification of 1948 made no substantive changes in the lottery statutes. See notes 84-88 supra.

[109] See, e.g., notes 136, 150, 160, and 180 along with accompanying text, infra.

[110] 18 U.S.C. §§ 1081-83 (1970).

[111] 15 U.S.C. §§ 1171-78 (1970).

[112] 18 U.S.C. § 1084 (1970).

[113] 18 U.S.C. § 1953 (1970).

[114] 18 U.S.C. § 1952 (1970).

[115] 18 U.S.C. §§ 1511, 1955 (1970).

statutes, taken together, form a complex scheme for the Federal negotiation of gambling activities. The statutes were passed in three cycles corresponding to increased Federal concern with crime in conjunction with the Kefauver investigations of 1950-51,[116] Attorney General Robert Kennedy's program to curb organized crime of 1961-62,[117] and the Nixon Administration's efforts to attack organized crime in 1969-70.[118]

These Federal efforts to attack organized crime, largely focused on gambling revenues,[119] were not entirely consistent in their impact upon State policies related to gambling. Passed at different times by different congresses and administrations in changing political climates, these statutes, together with those concerning lotteries,[120] and the tax provisions affecting gambling,[121] only imperfectly cohere. Because the

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[116] 18 U.S.C. §§ 1171-77; see notes 129-44 infra and accompanying text.

[117] 18 U.S. C. §§ 1084, 1952-53; 15 U.S.C. § 1178; see notes 145-70 infra, along with accompanying text.

[118] 18 U.S.C. §§ 1511, 1955, 1961, 2516; see notes 171-85 infra and accompanying text.

[119] See generally President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime (1967); Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, Gambling and Organized Crime, S. Rep. No. 1310, 87th Cong., 2d Sess. (1962); The Kefauver Committee Report, Organized Crime (Didier ed. 1951).

[120] The development of the lottery statutes is set out fully supra text at nn. 9-83.

[121] See notes 221-26 and accompanying text infra.

legislative history of these recent statutes is relatively accessible,[122] and some of it has been ably discussed elsewhere,[123] the following discussion will be somewhat more brief than the lottery discussion.

The first of the modern statutes concerning gambling, 18 U.S.C. §§ 1081-83, dealt with gambling ships.[124] It was passed in 1948, before

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[122]All of the bills that were enacted were accompanied by reports in both houses of Congress and many hearings were held. The following are the House and Senate reports:

18 U.S.C. §§ 1081-83 (S. 560) (80th Cong., 2d Sess.)	-- S. Rep. No. 147, Apr. 29, 1947; H.R. Rep. No. 1700, Apr. 8, 1948.
15 U.S.C. §§ 1171-77 (S. 3357) (81st Cong., 2d Sess.)	-- S. Rep. No. 1482, Apr. 12, 1950; H.R. Rep. No. 2769, Aug. 1, 1950; Conf. Rep. No. 3111, Sept. 19, 1950.
18 U.S.C. § 1084 (S. 1656) (87th Cong. 1st Sess.)	-- S. Rep. No. 588, July 24, 1961; H.R. Rep. No. 967, Aug. 17, 1961.
18 U.S.C. § 1953 (S. 1657) (87th Cong. 1st Sess.)	-- S. Rep. No. 589, July 24, 1961; H.R. Rep. No. 968, Aug. 17, 1961.
18 U.S.C. § 1952 (S. 1653) (87th Cong. 1st Sess.)	-- S. Rep. No. 644, July 27, 1961; H.R. Rep. No. 966, Aug. 17, 1961.
15 U.S.C. §§ 1171-78 (S. 1658) (87th Cong. 2d Sess.) [1962 amendments]	-- S. Rep. No. 645, July 27, 1961; H.R. Rep. No. 1828, June 15, 1962; Conf. Rep. No. 2319, Aug. 31, 1962.
18 U.S.C. §§ 1511,1955 (S. 30) (91st Cong. 2d Sess.)	-- S. Rep. No. 91-617, Dec. 18, 1969; H.R. Rep. No. 91-1549, Sept. 30, 1970.

Pertinent citations to congressional hearings will be given in connection with specific statutes infra.

[123]See, in connection with 15 U.S.C. §§ 1171-77 and 18 U.S.C. §§ 1301-03, Comment, Federal Regulation of Gambling, 60 Yale L. J. 1396, 1401-09 (1951); with respect to 18 U.S.C. §§ 1084, 1952-53, and amendments to 15 U.S.C. §§ 1171-77, see Pollner, Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering, 28 Brooklyn L. Rev. 37 (1962).

[124]Section 1081 is the definitions section, defining 'gambling ship,' 'gambling establishment,' 'vessel,' and 'American vessel.'

Section 1082 provides as follows in subsection (a):

§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,

the surge of activity connected with the Kefauver hearings.[125] The gambling ship prohibition was passed in response to a specific need,[126] with little controversy,[127] and it has engendered little litigation.[128]

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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.

Subsection (b) provides for a penalty of $10,000 fine or two years imprisonment; subsection (c) is a forfeiture provision.

Section 1083 prohibits "water taxis" from providing transportation to and from illegal gambling ships on the high seas.

[125]Act of April 27, 1948, Pub. L. No. 500, ch. 235, 62 Stat. 200; codified at Act of May 24, 1949, ch. 139, 63 Stat. 92.

[126]Gambling ships off of the California shore were attracting thousands of customers in the early 1940's. Although prosecution was possible under a Treasury Department licensing provision, the procedure was difficult and the ships were clearly beyond California jurisdiction, Comment, Federal Regulation of Gambling, 60 Yale L. J. 1396, 1406 n. 62 (1951).

[127]The House Committee on the Judiciary reported the bill favorably and without amendment. A forfeiture provision was added upon the recommendation of the Department of Justice. The committee emphasized that only commercial gambling ships were intended to be covered by the bill:

> However, the committee wants it clearly understood that it is not its intention to provide any agency of the Government with an opportunity to harass the vast number of private yachtsmen, and that the Secretary of the Treasury shall carefully draft any regulations he may issue so as to be sure that the application thereof will be to large-scale commercial gambling alone.

H.R. Rep. No. 1700, 80th Cong., 2d Sess. 11, 1948; 1948 U.S. Code Cong. & Ad. News 1487, 1488 (1948).

[128]See, e.g., United States v. Black, 291 F. Supp. 262 (S.D.N.Y. 1968) (motion to dismiss § 1082 indictment dismissed as premature).

A. The Kefauver Committee

In 1950, two events signalled the beginning of a more active Federal role in combatting organized crime generally and gambling specifically. In February 1950, the Attorney General's Conference on Organized Crime[129] convened to discuss the need for new, concerted action to fight gambling activity despite the existence of State laws.[130] In May 1950, the Special Senate Committee to Investigate Organized Crime in Interstate Commerce was established.[131] The Attorney General's

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[129]The Attorney General had received resolutions from local law-enforcement officials and organizations asking for a conference to discuss problems related to law-enforcement. The proposed conference met during the annual Conference of United States Attorneys and focused principally on large-scale organizations that depended upon syndicated gambling, Statement of H. Plaine, Department of Justice, Hearings Before the House Comm. on Interstate and Foreign Commerce on S. 3357, and H.R. 6736, 81st Cong. 2d Sess. at 35 (1950) related to gambling devices. (Hereinafter cited as House Commerce Hearings).

[130]". . . while practically all of the States have laws prohibiting gambling and gaming, and the use of gambling machines, such as the notorious slot machine, is prohibited, the efforts of the local enforcement officials are usually and often frustrated not only by the hostility and opposition of those who stand to benefit by these operations, but also by the ease with which the paraphernalia, which is essential to gambling operations, can be distributed in interstate commerce," House Commerce Hearings at 35 (statement of H. Plaine).

[131]The committee had its origin in S. Res. 202, 81st Cong., 2d Sess. (1950), submitted by Senator Estes Kefauver of Tennessee. According to the introduction of the committee report, The Kefauver Committee Report, Organized Crime (Didier ed. 1951):

> The function of the committee was to make a full and complete study and investigation to determine whether organized crime utilizes the facilities of interstate commerce or whether it operates otherwise through the avenues to promote any transactions which violate Federal law or the law of the State in which such transactions might occur.

The committee heard over 600 witnesses in 14 cities over a full year.

Conference and the Special Committee were ultimately responsible for a flurry of publicity, governmental activity and congressional hearings,[132] and some actual legislation.[133] Although only one significant set of criminal statutes relating to gambling was enacted at the time, proposals growing out of the Kefauver hearings were at the core of measures that became law decades later.[134]

Chapter 24 of 15 United States Code, §§ 1171-77 (the Johnson Act) was added in 1951[135] to limit the interstate transportation of gambling

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[132]Hearings Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce on S. 3358, 81st Cong., 2d Sess. (1950), ("A Bill to Prohibit Transmission of Certain Gambling Information in Interstate and Foreign Commerce by Communications Facilities"); Hearing Before the Senate Comm. on Interstate and Foreign Commerce on S. 1563, S. 1564, S. 1624, and S. 2116, 82d Cong., 1st Sess. (1951), concerning bills relating to the transmission of gambling information and materials.

[133]15 U.S.C. §§ 1171-77, passed in 1951, was an outgrowth of this activity; see notes 135-43 infra.

[134]Laws relating to the transmission of wagering information were passed under the Attorney General's Program to Curb Organized Crime and Racketeering in 1961; see notes 149-64 infra.

[135]Pub. L. No. 906, January 2, 1951, ch. 1194, 64 Stat. 1134, the Johnson Act.

Section 1 is the definitions section; it defines "gambling device" as a "slot-machine" or similar coin-operated device dependent upon an element of chance to give a valuable prize, as well as a sub-assembly of such a device.

Section 2 reads as follows:

> Sec. 2. 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.

Section 3 requires manufacturers of gambling devices to register with the Attorney General annually, providing an inventory and sales

devices. According to the House report accompanying the bill,[136] "[t]he primary purpose of this legislation is 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." The bill was aimed particularly at "Nation-wide crime syndicates" that were thought to be immune from local law enforcement.[137] It was not designed to preempt State policies related to gambling.[138] The bill prohibited

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record.

Section 4 is a labelling provision.

Section 5 makes manufacture, sale, use, or possession of gambling devices illegal within areas of Federal jurisdiction.

Section 6 provides the penalties for violations of the act.

Section 7 is a forfeiture provision.

[136]H.R. Rep. No. 2769, 81st Cong., 2d Sess. 1, 2, (1950); 1950 U.S. Code Cong. & Ad. News 4240 (1950).

[137]Id. at 4, 5; 1950 U.S. Code Cong. & Ad. News at 4243.

[138]Justice Department testimony before the House Committee underlined the contemplated limited Federal role, House Commerce Hearings 37:

> Mr. Plaine. I did want to make one factual premise clear, Mr. Chairman. Aside from the Federal antilottery laws which were enacted in 1890, 1895, and 1934, and some very recent legislation dealing with gambling ships, the Federal Government has no present enforcement function in the field of gambling. The laws and the policy which by their accumulative effect we might say establish a Nationwide policy against gambling, particularly commercialized gambling, are to be found in the laws and the constitutions of the several States. In that sense, this committee and the whole Congress will be approaching the present-day problem just as Congress approached the lottery problem in 1890, and again in 1895, when the so-called national policy against lotteries had been formed by the States by their laws and constitutions, and Congress was asked to enact a Federal law to close the loopholes in interstate and foreign commerce in aid of that policy.
>
> . . .
>
> Proceeding, then, Mr. Chairman, on the assumption that there is a substantive evil to be corrected, let me say categorically that the purpose of the bill is to support the basic policy of the States

manufacture, repair, sale, use, or possession of gambling devices in Federally-controlled jurisdictions,[139] however, showing a Federal policy to eliminate such activity where it was within congressional power. Only a narrowly-defined exception[140] was allowed by which States could decline to prohibit gambling devices within their jurisdictions by means of special legislation.[141] Authority for congressional action was thoroughly briefed by the Justice Department in advance,[142] and constitutionality was never successfully questioned.[143] Although further congressional hearings related to gambling and organized crime were held in 1951,[144] no additional legislation was passed until the Kennedy Administration came to Washington.

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which outlaws slot machines and similar gambling devices by prohibiting the interstate shipment of such machines, except into States where their use is legal.

It is questionable that Plaine portrays the actions of Congress with respect to lotteries in 1890 and 1895 accurately. See notes 29-83 and accompanying text supra.

[139] Act of January 2, 1951, note 135 supra, § 5;15 U.S.C. § 1175 (1970).

[140] See note 135 supra, § 2, "Provided . . ."

[141] Senate and House differed as to the means by which this exception should be implemented and how far the exceptions should go, H.R. Rep. No. 2769, 81st Cong. 2d Sess.; 1950 U.S. Code Cong. & Ad. News 4246-47; Conf. Rep. No. 3111, 81st Cong. 2d Sess. 1; 1950 U.S. Code Cong. & Ad. News 4258 (1950).

[142] H.R. Rep. No. 2769, 81st Cong., 2d Sess.; 1950 U.S. Code Cong. & Ad. News 4250-53 (1950). The Justice Department communication referred, inter alia, to the landmark constitutional cases involving federalism of Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311 (1917) and Kentucky Whip and Collar Co. v. Illinois Central R. Co., 299 U.S. 334 (1937).

[143] In United States v. Five Gambling Devices, 346 U.S. 441 (1954), the Supreme Court, however, did dismiss indictments under the Johnson Act, because there was no proof of a violation affecting interstate commerce.

[144] See note 137 supra.

B. Robert Kennedy's Organized Crime Program

Robert Kennedy's vigorous efforts against organized crime and syndicated gambling brought about a dramatic change in the Justice Department. Kennedy appeared repeatedly before congressional committees[145] and sponsored articles urging enactment of new legislation.[146] The fruits of his endeavors were three new statutes as well as amendments to 15 U.S.C. §§ 1171-77 relating to gambling devices in interstate commerce.

The first accomplishment of the Kennedy program was an amendment to the gambling chapter of 18 United States Code,[147] previously concerned exclusively with gambling ships.[148] 18 U.S.C. § 1084 was added to prohibit the interstate transmission of wagering information.[149] Its purpose was

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[145] Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, and H.R. 7039, 87th Cong., 1st Sess. 18-47 (1961) [hereinafter cited as House Judiciary Hearings]; Hearings Before the Senate Comm. on Judiciary on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, and S. 1665, 87th Cong., 1st Sess. 1-18 (1961) [hereinafter cited as Senate Judiciary Hearings]; Hearings Before the House Comm. on Interstate and Foreign Commerce on H.R. 3024, H.R. 8410, and S. 1658, 87th Cong., 2d Sess. 9-34 (1962) [hereinafter cited as 1962 Commerce Hearings].

[146] Kennedy, The Program of the Department of Justice on Organized Crime, 38 Notre Dame Lawyer 637 (1962); Kennedy, Three Weapons against Organized Crime, 8 J. Crim. & Delinq. 321 (1962). See also Pollner, Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering, 28 Brooklyn L. Rev. 37 (1962).

[147] 18 U.S.C. §§ 1081-83, ch. 50.

[148] See notes 123-28 supra.

[149] Pub. L. No. 87-216, Sept. 13, 1961, 75 Stat. 491 added 18 U.S.C. § 1084. The first subsection reads:

§ 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission

> to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.[150]

A key exception to the general policy of prohibition under section 1084 was the following:

> (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sports events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.[151]

Although at the time of passage the subsection would have significant impact only in Nevada,[152] it provided an important outlet for States that might choose to legalize certain forms of wagering in the future.

> in interstate or foreign commerce of bets or wagers or information assisting in the placing 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, shall be fined not more than $10,000 or imprisoned not more than two years, or both. [subsecs. (b),(c), and (d) omitted]

[150]H.R. Rep. No. 967, 87th Cong. 1st Sess. 1; 1961 U.S. Code Cong. & Ad. News 2631 (1961).

[151]18 U.S.C. § 1084(b).

[152]H.R. Rep. No. 967; 1961 U.S. Code Cong. & Ad. News 2632-33 (1961).

18 U.S.C. § 1953,[153] limiting the interstate transportation of wagering paraphernalia was enacted at the same time.[154] The purpose of this statute was to exclude from interstate commerce gambling materials related to bookmaking, sports pools, or numbers.[155] The statute went beyond the older lottery statutes[156] in limiting types of gambling materials which could pass lawfully in interstate commerce.[157] Common carriers pursuing their usual course of business[158] were exempted

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[153]Pub. L. No. 87-218, Sept. 13, 1961, 75 Stat. 492. The Attorney General requested the new statute in response to prior jurisdictional limitations and narrow constructions. H.R. Rep. No. 968; 1961 U.S. Code Cong. & Ad. News 2636-37.

[154]§ 1953. Interstate transportation of wagering paraphernalia

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State . . . .

[155]H.R. Rep. No. 968, 87th Cong. 1st Sess. 1; 1961 U.S. Code Cong. & Ad. News 2635 (1961).

[156]18 U.S.C. §§ 1301-04; see notes 11-14 supra, for text.

[157]18 U.S.C. § 1953(a) seeks to restrict the interstate transportation of materials connected with numbers, sports pools, and bookmaking.

[158]18 U.S.C. § 1953(a).

from the purview of section 1953; parimutuel betting equipment[159] and the transportation of gambling materials into a State in which such activity is legal under local law were also excluded.[160]

The third aspect of the Attorney General's crime program was 18 U.S.C. § 1952, prohibiting interstate travel or transportation in furtherance of racketeering (the Travel Act),[161] which was designed to reach individuals engaged in large-scale gambling as well as the implements of their trade.[162] According to the Attorney General, the

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[159] 18 U.S.C. § 1953(b)(1).

[160] 18 U.S.C. § 1953(b)(2); this leaves to the States the option of permitting such wagering paraphernalia as they choose, assuming the materials are available from a legal source.

[161] Pub. L. 87-228, Sept. 13, 1961, 75 Stat. 498.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

[162] H.R. Rep. No. 966, 87th Cong. 1st Sess. 1; 1961 U.S. Code Cong. & Ad. News 2664 (1961).

statute would "impede the clandestine flow of profits from criminal ventures and . . . bring about a serious disruption in the far-flung organization and management of coordinated enterprises."[163] The "unlawful activity" prohibited by the statute included, however, only the operation of gambling as a business enterprise.[164]

The final aspect of the Attorney General's program with respect to gambling was the strengthening of the Johnson Act, 15 U.S.C. §§ 1171-77.[165] The amendments were passed after hearings[166] and a Justice Department report[167] were undertaken concerning the role of illicit gambling enterprises in the pinball and slot machine industries. The prior legislation had been largely circumvented; consequently, it was felt that changes in phraseology in the statute were needed to reach as many of the gambling devices controlled by racketeering enterprises[168] as possible without also eliminating machines designed solely for amusement.[169]

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[163]The Attorney General's letter recommending the bill to Congress is reprinted in H:R. Rep. No. 966; 1961 U.S. Code Cong. & Ad News 2666 (1961).

[164]This implies a "continuous course of conduct," H.R. Rep. No. 966; 1961 U.S. Code Cong. & Ad. News 2666 (1961).

[165]Gambling Devices Act of 1962, Pub. L. No. 87-840, Oct. 18, 1962, 76 Stat. 1075.

[166]1962 Commerce Hearings supra note 145 concerned amendments to the Johnson Act, 18 U.S.C. §§ 1171-77.

[167]H.R. Rep. No. 1828, 87th Cong. 2d Sess.; 1962 U.S. Code Cong. & Ad. News 3816-18 (1962).

[168]The definition in § 2 (15 U.S.C. § 1171(a)(2)) was changed to reach any machine "designed and manufactured primarily for use in connection with gambling" rather than the description of a slot machine under the Johnson Act; see note 135 supra.

[169]Section 6 of the 1962 Act (note 165 supra) provided an exception from the statute for machines not designed for gambling or with money prizes, 15 U.S.C. § 1178.

The statutory scheme enacted during the Kennedy tenure to deal with organized crime and gambling did not suffer from constitutional infirmity or excessive narrowing by the courts. All provisions contested have been construed to be valid exercises of congressional authority under the commerce clause.[170]

C. The Organized Crime Control Act of 1970

The third comprehensive effort in as many decades by the Federal Government to construct organized crime was the Organized Crime Control Act of 1970.[171] One title of the act was designed to deal specifically with syndicated gambling ventures operated by elements of organized crime.[172] Four statutes contained in title 18, United States Code were enacted or modified by the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1511, 1955, 1961, and 2516.

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[170] See, e.g., United States v. Fabrizio, 385 U.S. 263, 268-69 (1966), 18 U.S.C. § 1953; United States v. Nardello, 393 U.S. 286 (1969), 18 U.S.C. § 1952; Rewis v. United States, 401 U.S. 808, 811-12 (1971), 18 U.S.C. § 1952; Erlenbaugh v. United States, 409 U.S. 239, 245-48 (1972), 18 U.S.C. §§ 1952, 1953. During these years, too, Congress passed 18 U.S.C.§224, which dealt with sports bribery.

[171] Pub. L. No. 91-452, Oct. 15, 1970, 84 Stat. 922, bill no. S. 30.

[172] Title VIII of S. 30, the Organized Crime Control Act of 1970, originally was considered as S. 2022, 91st Cong., 1st Sess. (1969). Discussions of Title VIII was free of much of the controversy that accompanied the rest of the Organized Crime Control Act of 1970. See generally Measures Related to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S.2022, S. 2122, and S. 2292, 91st Cong., 1st Sess.; Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on S. 30 and related proposals, 91st Cong. 2d Sess.; S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970); J. McClellan, "The Organized Crime Control Act (S. 30) or Its Critics; Which Threatens Civil Liberties?," 46 Notre Dame Lawyer 55-200 (1970).

Sections 1511 and 1955 can be considered in pari materia.[173] Section 1955 is a direct prohibition of illegal gambling businesses.[174] while section 1511 makes unlawful the obstruction of State law enforcement with the intent of facilitating an illegal gambling business.[175] The two statutes are more sophisticated than any prior Federal criminal statutes relating to gambling. Relying upon expanded notions of Federal power under the commerce clause,[176] sections 1511 and 1955 do not depend in their operation on a specific showing of a relationship with interstate commerce. Instead, Federal jurisdiction rests upon a congressional finding that gambling businesses of a given size have an effect upon

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[173] The two statutes were enacted together in title VIII of S. 30 and use identical phraseology in key provisions, such as the definition of an illegal gambling business. Courts have interpreted the two statutes together. See, e.g., United States v. Becker, 461 F. 2d 230 (2d Cir. 1972).

[174] § 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

. . .

[175] § 1511. Obstruction of State or local law enforcement

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if --

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

. . .

[176] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

interstate commerce.[177] This novel approach has been repeatedly affirmed as constitutional by the Federal circuit courts in cases arising under section 1955.[178] Because both sections are contingent upon illegal gambling businesses,[179] there can be no conflict under either statute with State policies concerning gambling. To come within the Federal statutes at all the gambling business must be one which "is a violation of the law of a State or political subdivision in which it is conducted."[180]

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[177] Organized Crime Control Act of 1970, title VIII, 84 Stat. 936.

[178] To date seven circuit courts of appeal have upheld the constitutionality of the congressional finding underlying §§ 1511 and 1955: United States v. Becker, supra; United States v. Riehl, 460 F.2d 454 (3d Cir. 1972), specifically construing § 1511; United States v. Harris, 460 F.2d 1041 (5th Cir. 1972), cert. denied, 409 U.S. 877 (1972); United States v. Thaggard, 477 F.2d 626 (5th Cir. 1973), cert. denied, 94 S. Ct. 570 (Dec. 3, 1973); United States v. Hunter, 478 F.2d 1019 (7th Cir. 1973), cert. denied, 414 U.S. 857 (1973); Schneider v. United States, 459 F.2d 540 (8th Cir. 1972), cert. denied, 409 U.S. 877 (1972); United States v. Sacco, 491 F.2d 995 (9th Cir. 1974); United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973). Despite this overwhelming supporting authority, one recent decision in the fifth circuit reversed a § 1955 conviction because of an overbroad construction of Federal jurisdiction. Affirming the congressional purpose as intending to reach large-scale syndicated gambling, the court in United States v. Bridges, 493 F.2d 918 (5th Cir. 1974) held that the government had not proved jurisdictional elements of § 1955 against a four-man poker and craps gambling ring that had recently added a fifth participant. At 493 F.2d 922 the court warned:

> To construe these provisions as urged by the government would not further the congressional purpose, for such a broad construction could subject almost any small gambling operation to Federal regulation. This is clearly not the function of § 1955.

[179] See notes 174-75 supra.

[180] 18 U.S.C. § 1955(b)(1)(i).

Section 1961[181] incorporates gambling in a newly-added racketeering chapter of Title 18, United States Code[182] by including syndicated gambling in the list of definitions of racketeering activity prohibited under 18 U.S.C. § 1962.[183] Section 1961 has just begun to be used actively, and its constitutionality and design have been affirmed.[184] Syndicated gambling was also included in the list of violations in 18 U.S.C. § 2516

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[181] § 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1084 (relating to the transmission of gambling information) . . . section 1511 (relating to the obstruction of State or local law enforcement) . . . section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia) . . . section 1955 (relating to the prohibition of illegal gambling businesses) . . .

[182] The Organized Crime Control Act of 1970, Pub. L. No. 91-452, title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941 added chapter 96, "Racketeer influenced and corrupt organizations."

[183] Section 1962 prohibits people who have been engaged in a "pattern of racketeering activity" from doing certain otherwise lawful activities. Sec. 1963 and § 1964 provide criminal and civil sanctions, respectively, for violating § 1962.

[184] United States v. Parness, 449 F.2d 774 (2d Cir. 1974); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974). In Cappetto, the court resoundingly sustained the use of the civil injunctive technique by the government against § 1955 violators under § 1964. The court dismissed constitutional objections to the use of essentially equitable actions to effectuate criminal prohibitions and affirmed the constitutionality of the congressional policy in enacting 18 U.S.C. §§ 1961-68 by citing In re Debs, 158 U.S. 564 (1895) and a line of cases arising under the antitrust laws.

for which a Federal wiretapping order could be obtained by the Organized Crime Control Act of 1970.[185]

Each of the modern anti-gambling statutes was drafted to avoid outright conflict with State laws concerning gambling. Although different techniques were used,[186] a broad range of State policies related to different types of gambling are still possible under the statutes passed since 1948.[187] In short, the modern anti-gambling statutes, 15 U.S.C. §§ 1171-78 and 18 U.S.C. §§ 1081-84,1511,1952-53,1955,1961, and 2516, do not of themselves preclude States from pursuing new and different policies with respect to gambling.

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[185] 18 U.S.C. § 2516, providing for authorizations for the interceptions of wire or oral communications, was added as part of the wiretapping and electronic surveillance chapter by the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, title III, § 802, June 19, 1968, 82 Stat. 216. Pub. L. No. 91-452, title VIII, § 810, Oct. 15, 1970, 84 Stat. 940 added suspected violations under 18 U.S.C. §§ 1511 and 1955 to the grounds already enumerated in 18 U.S.C. § 2516 (among these were violations of §§ 1084 and 1952, notes 149 and 161 and accompanying text supra).

[186] The Johnson Act, supra note 135, allowed States to pass affirmative legislation permitting the use, possession, or manufacture of devices related to gambling that would otherwise be prohibited under 15 U.S.C. §§ 1171-77. The Kennedy amendments involving gambling, notes 145-70 supra and accompanying text, all contained exemptions for States in which the prohibited conduct would otherwise be legal, albeit narrowly drawn. The 1970 Federal gambling laws only affecting gambling-related conduct that was already illegal under local statutes, supra note 180.

[187] The modern Federal gambling statutes in 18 United States Code discussed supra only limit State and local policies with respect to gambling in a secondary sense. Because of the various prohibitions attached to interstate commerce and the policies of neighboring jurisdictions, gambling-related activity encouraged by one State would often be prohibited by Federal statute from interfering with the affairs of another State. For example, the purchase of slot machines has been made more difficult and expensive by 18 U.S.C. §§ 1171-78, although not necessarily illegal.

IV. THE NONCRIMINAL GAMBLING STATUTES

Some Federal statutes relating to gambling appear in contexts far removed from the criminal code. Although rarely of the significance in determining Federal policy toward gambling as the criminal statutes,[188] Federal laws in a variety of other settings form an essential part of that policy and occasionally have troublesome implications with respect to State proposals to decriminalize gambling activities.

Five separate provisions directly affect gambling in some way, but do not have independent policy significance. The Farm Labor Contractor Registration Act of 1963 prohibits Federal recognition and benefits for any would-be agricultural labor foreman who has been convicted of either a State or Federal gambling violation.[189] Immigration and nationality provisions restrict the opportunities of those whose income is derived principally from gambling activities or have been

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[188] A statute expressly designed to prohibit conduct and discussed in the legislature in light of establishing a new criminal sanction is logically a more reliable indicator of legislative policy than a restriction accompanying legislation designed for a separate reason.

[189] Pub. L. No. 88-582, Sept. 7, 1964, § 5, 78 Stat. 921. Codified at 7 U.S.C. § 2044 (1970), the statute provides in pertinent part:

> § 2044. Issuance of certificate of registration -- Persons qualified
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> . . .
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> (b) Upon notice and hearing in accordance with regulations prescribed by him, the Secretary may refuse to issue, and may suspend, revoke, or refuse to renew a certificate of registration to any farm labor contractor if he finds that such contractor --
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> . . .
>
> (7) has been convicted of any crime under State or Federal law relating to gambling . . .

twice convicted on gambling charges during a specified period.[190] A still-valid section of the Tariff Act of 1922 prohibits the importation of lottery tickets along with other "immoral articles."[191] The statutory framework establishing the Law Enforcement Assistance Administration includes "gambling" in its definition of activities in which elements of organized crime are engaged.[192] Finally, subject to the State-run lottery exceptions, the Federal law relating to broadcasting[193] allows

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[190] Immigration and Nationality Act, Pub. L. No. 414, ch. 477, June 27, 1952, 66 Stat. 172 (amended in other respects), as codified at 8 U.S.C. § 1101, includes the following proviso:

§ 1101. Definitions

(a) As used in this chapter --

. . .

(f) For the purposes of this chapter --

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was --

. . .

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

. . .

[191] Sept. 11, 1922, ch. 356, § 305, 42 Stat. 937, as amended by The Tariff Act of 1930, June 17, 1930, ch. 497, § 305, 46 Stat. 688. The section, codified at 19 U.S.C. § 1305, reads:

§ 1305. Immoral articles; prohibition of importation

(a) All persons are prohibited from importing into the United States from any foreign country any . . . lottery ticket, or any printed matter that may be used as a lottery ticket, or any advertisement of any lottery.

[192] Pub. L. No. 90-351, June 19, 1968, § 601, 82 Stat. 209, codified under public health and welfare, 42 U.S.C. § 3781.

[193] Communications Act of 1934, June 19, 1934, ch. 652, § 312, 48 Stat. 1086; 47 U.S.C. § 312:

§ 312. Administrative sanctions -- Revocation of station license or construction permit

. . .

(b) When any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of

the revocation of a station license for violations by the station of 18 U.S.C. § 1304, relating to the broadcasting of lottery information.[194]

The only recent Federal legislation that imposes a specific limitation on gambling-related activity regardless of State policy is the modification of the Federal banking laws made in 1967.[195] The purpose of the law was to "prohibit federally insured banks and thrift

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of Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action. . . .

[194]See note 14 supra.

[195]Pub. L. No. 90-203, Dec. 15, 1967, 81 Stat. 608. The act added five sections: Rev. Stat. § 5136A, relating to national banks, 12 U.S.C. § 25A; Federal Reserve Act § 9A, relating to State member banks, 12 U.S.C. § 339; Federal Deposit Insurance Act § 20, relating to banks insured under the act, 12 U.S.C. § 1829A; National Housing Act § 410, relating to federally-insured savings and loan institutions, 12 U.S.C. § 1730C, and 18 U.S.C. § 1306, make violations of the above statutes criminal. Each change in the banking laws is the same except for the applicable type of banking institution, and provides in pertinent part as follows:

Sec. 5136A. (a) A national bank may not --
(1) deal in lottery tickets;
(2) deal in bets used as a means or substitute for participation in a lottery;
(3) announce, advertise, or publicize the existence of any lottery;
(4) announce, advertise, or publicize the existence or identity of any participant or winner, as such, in a lottery.
(b) A national bank may not permit--
(1) the use of any part of any of its banking offices by any person for any purpose forbidden to the bank under subsection (a).
. . . [definitions section omitted]

institutions from selling lottery tickets to the public."[196] By the passage of the 1967 legislation, over strong argument, Congress demonstrated its

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[196] S. Rep. No. 727, 90th Cong., 1st Sess. 1; 1967 U.S. Code Cong. & Ad. News 2228 (1967). Enacted to remove federally-related banking institutions from the lottery business, the 1967 amendments to the banking laws had a unique history. The bill was introduced as H.R. 9892, 90th Cong. 1st Sess. (1967) on May 11, 1967, by Congressman Wright Patman. Patman said on the House floor that "It is not the purpose of this legislation to impede the New York State lottery in any manner, or to question the morality of such a lottery. But, rather, the legislation seeks to keep banks' activities limited to normal banking operations, which certainly do not include selling lottery tickets, 113 Cong. Rec. 15171 (June 8, 1967). Although even this statement could be construed as contradictory, Patman's remarks in connection with the bill (renumbered H.R. 10595) on July 12, 1967 on the House floor approach a personal vendetta. Patman began by arguing that the bill was consistent with longstanding Federal policy not to "participate in or condone gambling," and that the "bill will reaffirm the policy of the Federal Government as it has stood, unchallenged, since September 18, 1890, when, on the plea of President Benjamin Harrison to protect 'the people of all the States' from being 'debauched and defrauded' by the infamous Louisiana lottery, Congress outlawed all lottery materials from the U.S. mails." 113 Cong. Rec. 18582 (1967). Patman's assessment of the history of Federal legislation toward gambling is inconsistent with that outlined supra (see, e.g., discussion of Harrison's message in connection with note 56 supra; Champion v. Ames, notes 75-83 supra). Patman then argued that the New York lottery was not in the peoples' interest, 113 Cong. Rec. 18582 (1967):

> If Mr. Rockefeller wishes to support his State government by trickery, slickery, shell games, gambling, and fast buckism, that is a matter that rests between him and the voters of New York. But when he attempts to slip these ingredients into the Federal banking system, then it is time for Members of Congress to teach him a basic lesson in the proper and time-honored separation of State and Federal Governments.

Patman's ironic misapprehension of the Federal-State gambling problem should not be taken as indicative of the Congressional purpose at large 113 Cong. Rec. 18588-98 (1967) (remarks of Reid, Murphy, Robison, Fino, Gerald R. Ford). Nevertheless, the bill was adopted, although over heated objections:

> This bill represents an attempt of the Federal establishment to to interfere with a perfectly legal means of raising money established under constitutional authority by the citizens and legislature of a State. It should be made clear that it does not prohibit gambling nor lotteries . . . .

S. Rep. No. 727, 90th Cong. 1st Sess. 78; 1967 U.S. Code Cong. & Ad. News 2234 (1967) ("Minority Views.") Citing the congressional exemption of State lottery proceeds from the wagering tax provisions, the minority

unwillingness to permit the furtherance of gambling-related activity through institutions wholly controlled by the Federal Government.[197]

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report argued that Federal policy was not so strong, Id. at 15,16; 1967 U.S. Code Cong. & Ad. News at 2235, and that the current bill unnecessarily threatens State sovereignty, Id. at 15,16; 1967 U.S. Code Cong. & Ad. News at 2238 and 2240:

> We do not consider it necessary to discuss at length the danger to State sovereignty that is represented by a claim that it is appropriate for the Federal Government and its agencies to make determinations unrelated to their responsibilities and in contravention of State will on the basis of insurance through a Federal agency. . . .
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> . . .
>
> The question is whether the Federal Government is justified to interfere with a perfectly legal means of raising money established under constitutional authority by the citizens and governing authorities of a State, and whether it is appropriate to use insurance provided through the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation as a means to restrict State-chartered banks and State-chartered savings and loan institutions from carrying out functions for which authority has been specifically granted by the State.

In contrast to the views of the minority, the majority argued that:

> The Federal Government has a longstanding policy to deny lotteries the use of Federal facilities and the prohibition on the sale of lottery tickets by federally insured financial institutions is merely an extension of this longstanding policy.

They then cited 18 U.S.C. §§ 1302, 1304, Sen. Rep. No. 727; 1967 U.S. Code Cong. & Ad. News at 2229.

[197]Despite the assertions of its proponents, this legislation is the only recent expression of a Federal policy to exclude all gambling-related activity from federally controlled institutions and the first of any kind since the Communications Act of 1934 to restrict gambling activity regardless of local policy. As enacted, the 1967 banking statute still allows those lottery-related activities not exposed to the public eye, such as the keeping of records and the taking of deposits. Original plans to limit these activities as well by Congressman Patman did not survive the legislative process, S. Rep. No. 727 at 1, 6-8; 1967 U.S. Code Cong. & Ad. News 2228, 2231-32.

V. THE FEDERAL TAX LAWS

Federal tax provisions also affect gambling, having important practical implications with respect to all forms of gambling businesses. The wagering tax statutes[198] have played a significant role in the Federal limitation of syndicated gambling both as a revenue measure[199] and in conjunction with criminal statutes respecting gambling[200] until two landmark decisions of the Supreme Court in 1968 limited their applicability.[201] Congressional efforts to restore the wagering statutes within the bounds set by the Supreme Court[202] were unsuccessful until October, 1974, when several important alterations in the wagering excise taxes were approved by Congress.[203] Although the congressional response

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[198]Int. Rev. Code of 1954, §§ 4401-24; 61-63.

[199]Revenue raised under the wagering excise tax statutes from 1964 to 1968 was as follows:

	1964	1965	1966	1967	1968
Stamps sold	7,465	7,284	6,155	5,917	5,089
Collections	6,156,000	6,674,000	6,394,000	6,196,000	5,111,000
Seized Revenue	1,021,128	1,187,282	739,142	746,426	685,943

S. Rep. No. 92-764, 92d Cong., 2d Sess. 12 (1972).

[200]The original scheme had placed an affirmative duty on the IRS under Int. Rev. Code of 1954, § 6107 to make lists of taxpayers available to prosecutors, but this was repealed by Pub. L. No. 90-618, October 22, 1968, 82 Stat. 1235. Id. at 5. Such information was valuable in securing convictions under 18 U.S.C. §§ 1084, 1952, and 1953 also.

[201]Marchetti v. United States, 390 U.S. 39 (1968); United States v. Grosso, 390 U.S. 62 (1968)

[202]See notes 227-38 and accompanying text infra.

[203]Pub. L. No. 93-499, Oct. 29, 1974, 88 Stat. 1551. The changes were adopted as a rider to H.R. 7780, 93d. Cong., 2d Sess., having to do with the extension "for an additional temporary period existing suspension of duties on certain classifications of yarns of silk." 120 Cong. Rec. H 10515 (daily ed. Oct. 11, 1974).

eliminates the most glaring of the difficulties arising under the tax laws relating to gambling, significant questions remain with respect to constitutionality, statutory construction, and the application of the altered provisions on both legal and illegal gambling enterprises.[204]

A. Statutory Framework

The existing scheme of Federal tax laws relating to gambling falls into two categories--the general provisions of the tax laws as they affect gambling (since gambling is an income producing transaction within the Internal Revenue Code),[205] and the specific sections of the Code passed by the Congress expressly to reach gambling.[206] What follows is a description of the Federal tax policy relating to gambling.[207]

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[204] See notes 249-50 and accompanying text infra.

[205] See, e.g., Int. Rev. Code of 1954, §§ 1, 11, 61, 165(d), 1302(b)(3). See also note 250 infra.

[206] Int. Rev. Code of 1954, §§ 4401-24; 4461-64.

[207] For cases and discussion related to tax planning, see, e.g., 1 CCH 1974 Stand. Fed. Tax Rep. ¶¶ 681.244, 716.05; 2 CCH 1974 Stand. Fed. Tax Rep. ¶ 1581.27; CCH Fed. Excise Tax Rep. ¶¶ 4000-4450. See also 26 C.F.R. §§ 44.0-1 - 44.7805; Note, Federal Regulation of Gambling: Betting on a Long Shot, 57 Geo. L. J. 573 (1969); Comment, Applications of the Federal Gambling Stamp Tax Law, 8 De Paul L. Rev. 362 (1959) (In connection with which see note 200 supra).

Express tax provisions respecting wagering are the excise tax imposed on all wagers placed in a gambling business by section 4401,[208] the occupational tax on those who operate gambling businesses by section 4411,[209] and the tax on c: in-operated gaming devices,[210] section 4461. These provisions are accompanied by sections offering definitions,[211] requiring registration and periodic reporting,[212] imposing penalties,[213] and establishing special requirements for the confidentiality of tax

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[208]"§ 4401. Imposition of Tax.
(a) Wagers.
There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 2 percent of the amount thereof." Int. Rev. Code of 1954, § 4401, as amended by Pub. L. No. 93-499, Oct. 29, 1974, 88 Stat. 1551. See 120 Cong. Rec. H 10515 (daily ed. Oct. 11, 1974) for text of Pub. L. No. 93-499. The definition of "wager" for the purposes of § 4401 is as follows:
§ 4421. Definitions.
For purposes of this chapter --
(1) Wager.
The term "wager" means --
(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,
(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and
(C) any wager placed in a lottery conducted for profit.

[209]The former occupational tax required all those who were engaged in the business enterprise of gambling as defined in the Code to pay a $50 annual tax. The amount was raised to $500 per year by Pub. L. No. 93-499, Oct. 29, 1974, 88 Stat. 1551. See 120 Cong. Rec. H 10515 (daily ed. Oct. 11, 1974) for text of Pub. L. No. 93-499.

[210]Int. Rev. Code of 1954, §§ 4461-63, exacting $250 per machine per year.

[211]Id. § 4421.

[212]Id. §§ 4412, 4403, 6001.

[213]Id. §§ 7201, 7203.

returns and other information required under the wagering tax sections.[214] An immunity statute precludes the use of information required under the statute from use in any prosecution not arising under the tax laws.[215]

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[214] Id. § 4424. Added by Pub. L. No. 93-499, Oct. 29, 1974, 88 Stat. 1551. The section reads as follows (taken from 120 Cong. Rec. S 19166 (daily ed. Oct. 15, 1974)):

Sec. 4424. Disclosure of wagering tax information.

(a) General Rule.--Except as otherwise provided in this section, neither the Secretary or his delegate nor any other office or employee of the Treasury Department may divulge or make known in any manner whatsoever to any person--

(1) any original, copy, or abstract of any return, payment, or registration made pursuant to this chapter,

(2) any record required for making any such return, payment, or registration, which the Secretary or his delegate is permitted by the taxpayer to examine or which is produced pursuant to section 7602, or

(3) any information come at by the exploitation of any such return, payment, registration, or record.

(b) Permissible Disclosure.--A disclosure otherwise prohibited by section (a) may be made in connection with the administration or civil or criminal enforcement of any tax imposed by this title. However, any document or information so disclosed may not be--

(1) divulged or made known in any manner whatsoever by any officer or employee of the United States to any person except in connection with the administration or civil or criminal enforcement of this title, nor

(2) used, directly or indirectly, in any criminal prosecution for any offense occurring before the date of enactment of this section.

(c) Use of Documents Possessed by Taxpayer.--Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title--

(1) any stamp denoting payment of the special tax under this chapter.

(2) any original, copy, or abstract possessed by a taxpayer of any return, payment or registration made by such taxpayer pursuant to this chapter, and

(3) any information come at by the exploitation of any such document,

shall not be [used] against such taxpayer in any criminal proceeding.

(d) Inspection by Committee of Congress.--Section 6103(d) shall reply with respect to any return, payment, or registration made pursuant to this chapter.

[215] Id. § 4424(c).

In addition, gambling winnings,[216] as well as any illegal income whether or not from gambling,[217] are included within the statutory definition of gross income.[218] A specific provision[219] allows gambling losses to be used to offset winnings only to the extent of those winnings for the taxable year. Gambling losses may not be used to offset any other type of income.[220]

The wagering tax statutes were added by Congress to the Internal Revenue Code in 1951.[221] Through new taxes on gambling, Congress sought both to find additional sources of reverue[222] and to be responsive

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[216] See Winkler v. United States, 230 F.2d 766 (1st Cir. 1956).

[217] See United States v. Sullivan, 274 U.S. 259 (1927) (taxation of liquor held lawful).

[218] Int. Rev. Code of 1954, § 61.

[219] Id. § 165(d).

[220] Skeeles v. United States, 95 F. Supp. 242 (Ct. Clms. 1951).

[221] Revenue Act of 1951, Pub. L. No. 183, §§ 463, 471-72, Oct. 20, 1951, 65 Stat. 528. Only that part of the tax having to do with coin-operated amusement devices, §§ 4461-64, had existed prior to 1951. See Revenue Act of 1941, ch. 412, § 555, Sept. 20, 1941, 55 Stat. 722.

[222] H.R. Rep. No. 586, 82d Cong., 1st Sess.; 1951 U.S. Code Cong. & Ad. News 1781, 1838 (1951):

> Commercialized gambling holds the unique position of being a multibillion-dollar, Nationwide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation. Your committee is convinced that the continuation of this immunity is inconsistent with the present need for increased revenue [Korean War], especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens.

to recommendations of the Kefauver Committee[223] to increase the ability of the Federal Government to restrict revenue thought to be a significant source of income for elements of organized crime.[224] The modifications enacted in 1974[225] were designed to be consistent with the original

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[223]Original Kefauver Committee recommendations having to do with the Internal Revenue Service included the following:

> IV. . . . The Bureau of Internal Revenue should maintain on a current and continuing basis a list of known gangsters, racketeers, gamblers, and criminals whose income-tax returns should receive special attention by a squad of trained experts.
>
> . . .
>
> V. The Bureau of Internal Revenue should enforce the regulations which require taxpayers to keep adequate books and records of income and expenses against the gamblers, gangsters, and racketeers who are continually flouting them. Violation should be made a felony
>
> VI. Gambling casinos should be required to maintain daily records of money won and lost to be filed with the Bureau of Internal Revenue. . . . Where the casino is operating illegally, in addition to the aforementioned obligations, the operators of the casino should be required to keep records of all bets and wagers
>
> VII. The law and regulations of the Bureau of Internal Revenue should be amended so that no wagering losses, expenses, or disbursements of any kind . . . incurred in or as a result of illegal gambling shall be deductible for income tax purposes
>
> . . .
>
> IX. The internal revenue laws and regulations should be amended so as to require any person who has been engaged in an illegitimate business netting in excess of $2,500 a year for any of 5 years previously, to file a net-worth statement of all his assets, along with his income tax returns

The Kefauver Committee Report, Organized Crime 182-86 (Didier ed. 1951). See also Comment, The Use of Taxation to Control Organized Crime, 39 Cal. L. Rev. 226 (1951).

[224][Organized Crime's]"economic base is principally derived from its virtual monopoly of illegal gambling, the numbers racket, and the importation of narcotics." President Nixon's organized crime message to Congress, Doc. No. 91-105, House of Representatives, 91st. Cong., 1st Sess. at 1 (1969), quoted at S. Rep. No. 92-764, 92d Cong., 2d Sess. 6 (1972). See also materials cited at note 172 supra.

[225]Pub. L. No. 93-499, Oct. 29, 1974 88 Stat. 1551. See the conference report, H. Rep. No. 93-1401, 93d Cong., 2d Sess. printed in full at 120 Cong. Rec. H 9760-61 (daily ed. Oct. 1, 1974).

congressional purposes of raising revenue and limiting the revenue sources of organized crime.[226]

B. Constitutional Issues

The direct effect of the wagering tax statutes on illegal gambling operations was curtailed by the 1968 Supreme Court decisions of Marchetti v. United States[227] and United States v. Grosso.[228] These companion cases limited the application of tax enforcement provisions on fifth amendment grounds.[229] The Court held in Marchetti that ". . . these [tax] provisions may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination."[230] The

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[226]For criticism of this duality of motives, see Note, Federal Regulation of Gambling: Betting on a Long Shot, 57 Geo. L. J. 573, 588-89 (1969). Congress did seek to raise revenue, but was not able to grant IRS Commissioner Mortimer M. Caplin's request for 4,333 additional revenue agents in 1952 to enforce the law. Caplin, The Gambling Business and Federal Taxes, 8 Crime & Delinq. 371, 373 (1962). The Senate committee recommending the wagering excise taxes had foreseen the need of strengthening the IRS enforcement capability. S. Rep. No. 781, 82d Cong., 1st Sess. 1, 113-19; 1951 U.S. Code Cong. & Ad. News 1969, 2096 (1951). In any case, congressional power to tax selectively cannot be doubted. Principal motivation will not be questioned so long as the statute seems rational. See, e.g., License Tax Cases, 72 U.S. (5 Wall.) 462, 469 (1866); United States v. Doremus, 249 U.S. 86, 93 (1919); United States v. Sanchez, 340 U.S. 42, 44-45 (1950); United States v. Kahriger, 345 U.S. 22, 27 (1953).

[227]390 U.S. 39 (1968). [228]390 U.S. 62 (1968).

[229]"No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

[230]U.S. at 42. In so holding, the Supreme Court reversed prior authority of relatively recent vintage: United States v. Kahriger, 345 U.S. 22 (1953); Lewis v. United States, 348 U.S. 419 (1955). For a student note that anticipated the shift, see Comment, Self-Incrimination and The Federal Excise Tax on Wagering, 76 Yale L. J. 889 (1967).

Court insisted that the right to tax illegal enterprise was not limited by its holding,[231] which was confined strictly to the scope of the privilege:

> . . . The question is not whether petitioner holds a "right" to violate State law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted. . . .[232]

The result of these decisions was that for six years criminal enforcement of the wagering tax statutes was suspended as against those who failed to report under its provisions.[233]

C. Congressional Response

The elimination of the tax statutes as a means by which the Federal Government could reach organized gambling activity led to requests for action in Congress.[234] The first legislative effect of the Marchetti

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[231] 390 U.S. at 44. [232] Id. at 51.

[233] Except in Nevada, where dangers of self-incrimination were not real because of legalized gambling, in United States v. United States Coin and Currency, 401 U.S. 715 (1971), the Court held that the fifth amendment privilege from prosecution under Marchetti extended to forfeiture proceedings.

[234] See S. 1624, 91st Cong., 2d Sess. (1970). S. Rep. No. 91-840, 91st Cong., 2d Sess. (1970) recommended passage of S. 1624 by incorporating an immunity provision to circumvent the Marchetti obstacle. The report emphasized the problems of organized crime domination of gambling, Id. at 6, and revealed an awareness of the difficulties posed by the tax on legalized gambling in Nevada, Id. at 13. In the 92d Congress, S. 431, 92d Cong., 2d Sess. (1972) was introduced to serve the same purpose. S. Rep. No. 92-764, 92d Cong., 2d Sess. (1972) outlined the authority under which the addition of an immunity statute to the wagering excise taxes would meet the Marchetti limitations. S. Rep. No. 92-764 at 7-11 argued that the fifth amendment problem under the tax statutes was directly analogous to a similar weakness in Federal gun control legislation declared unconstitutional by the Supreme Court the same day as Marchetti and Grosso for similar reasons in Haynes v. United States, 390 U.S. 85 (1968). In Haynes at 390 U.S. 95 the Court held that the fifth amendment

and Grosso decisions was the passage of the Organized Crime Control Act of 1970,[235] giving the Federal Government a direct role in the prohibition of illegal gambling businesses. The addition of an immunity provision to the wagering excise tax chapter in 1974,[236] coupled with restrictions on the potential uses of information required by the taxing provisions[237] promise to make the wagering tax statutes viable again after years of dormancy.[238] Although the gambling taxes were originally designed to aid

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debilitations were based on the same guarantees in the gun registration and wagering tax registration situations. After change in the registration statutes by Congress providing for use immunity, 26 U.S.C. § 5812 (1970), the Supreme Court held that the fifth amendment difficulty in the gun registration provision had been overcome in United States v. Freed, 401 U.S. 601, 605 (1971). Reasoning that the two situations were essentially the same and could be cured in the same manner, the Senate Judiciary Committee recommended in S. Rep. No. 92-764 that such an immunity provision be added to the Internal Revenue Code for wagering tax self-incrimination problems, but the 92d Congress failed to enact its suggestions.

[235]Pub. L. No. 91-452, Oct. 15, 1970, 84 Stat. 922. See notes 171-85 and accompanying text supra.

[236]Pub. L. No. 93-499, Oct. 29, 1974, 88 Stat. 1551.

[237]Id., § 4424(c)

[238]Congress was probably encouraged by Freed to assume that an immunity provision would be sufficient to remove the Marchetti disability. The conference report, H.R. Rep. No. 93-1401, 93d Cong., 2d Sess. (1974), explains the purposes for which the rider to H.R. 7780, 93d Cong., 2d Sess. (1974), making the changes in the wagering excise taxes, was enacted:

> The amendment also provides specific restrictions as to the disclosure and use of information pertaining to taxpayer compliance with Federal wagering taxes. Although existing law (sec. 6103) provides broad limitations on the publicity of income tax returns, no such restrictions exist for returns and other documents related to the wagering taxes. In 1968 Congress repealed section 6107 of the Internal Revenue Code which provided for public inspection of the names of all persons paying occupational taxes, including the wagering occupational tax. Despite this repeal, current law remains ambiguous in that no specific provision exists barring disclosure of wagering tax information.
>
> Consequently, to resolve any remaining doubts which may exist under the rationale of the Marchetti v. U.S. (390 U.S. 39 (1968)) and

the active enforcement of criminal statutes limiting gambling,[239] effective prosecution of the new provisions could prove to be even more important to the overall effort aimed at limiting organized crime.[240]

Grosso v. U.S. (390 U.S. 62 (1968)) cases, the amendment provides that no Treasury Department official or employee may disclose, except in connection with the administration or enforcement of internal revenue taxes, any document or record supplied by a taxpayer in connection with such taxes . . .

It is expected that these changes in the law will remove any constitutional problems regarding enforcement of the wagering taxes.

H.R. Rep. No. 93-1401, 120 Cong. Rec. H 9760, H 9761 (daily ed. Oct. 1, 1974).

[239] See notes 211-26 supra.

[240] The wagering excise taxes, assuming § 4424 is found by the courts to overcome the Marchetti difficulties successfully, will restore the power of the Federal Government to prosecute gamblers for tax violations. Because of the secrecy provisions, voluntary payment may increase and mandatory payment, where the gamblers can be uncovered, may be enforced. Statistics based upon Treasury estimates given in conjunction with the previous attempt to pass an immunity provision for the tax statute, S. 431, 92d Cong. 2d Sess. (1972), were as follows:

Revenue (Per Annum)

	Pre-1968 (actual)	S. 1624 (estimated)
Occupational tax	$ 360,000	$6,757,500
Voluntary (percent)	60	53
Occupational tax	240,000	6,150,000
Enforced (percent)	40	47
Excise	3,300,000	6,969,000
Voluntary (percent)	59	65
Excise	2,300,000	3,562,500
Enforced (percent)	41	35

S. Rep. No. 92-764, 92d Cong., 2d Sess. 12 (1972).

This method of Federal involvement with gambling businesses would give the government the potential to reach a significant portion of the total volume of such operations without necessarily interfering with State decriminalization efforts.

The October 1974 changes in the wagering tax statute reduced the rate of the excise tax applied to gambling enterprises from ten to two percent of the total business volume.[241] The occupational tax for the proprietors of gambling ventures was increased from $50 each year to $500.[242] These changes should act to reduce the economic imbalance that has favored illegal gambling businesses since the Marchetti and Grosso decisions of 1968.[243] Under the law for the last six years, as a practical matter, only legal gambling businesses complied with the excise provisions of the Internal Revenue Code.[244] This severely limited the ability of State-authorized gambling enterprises to compete with illegal businesses that could not be prosecuted for failure to pay excise taxes.[245]

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[241] Pub. L. No. 93-499, Oct. 29, 1974, 88 Stat. 1551, 120 Cong. Rec. H. 10517 (daily ed. Oct. 11, 1974), § 3(a).

[242] Id., § 3(b)

[243] See notes 227-33 and accompanying text supra.

[244] Payment of taxes by illegal ventures was not required after Marchetti because this would have opened such businesses to prosecution under the State and Federal criminal laws. Legal gambling businesses, then prevalent only in Nevada, had to pay the taxes because filing of returns did not raise self-incrimination questions.

[245] Legal gambling enterprises would have had to have complied at least with the following tax provisions: Int. Rev. Code of 1954, § 4412, requiring registration; Id., § 4411, taxing "each person who is engaged in the business of accepting wagers" $50; Id., § 4401, taking 10% of the gross amount of all wagers placed as an excise tax; Id., § 4461, requiring payment of $250 for each "coin-operated gaming device" on the premises each year; and Id., § 11, requiring the payment of income taxes on the profits of the enterprise. Enforcement against illegal gamblers for noncompliance with any of the above except for the income tax would have been impossible wherever there would have been a risk of uncovering criminal activity.

Congressional action in decreasing the wagering excise tax, therefore, has made more feasible proposals for the selective decriminalization of some types of gambling under the auspices of State governments. It has been argued that the decriminalization of some forms of gambling in open, legal competition with illegal gambling would decrease the amount of revenue available for organized crime.[246] Such an argument depends upon the ability of legal gambling businesses to compete with covert operations.[247] The newly reduced Federal excise tax

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[246] See, e.g., Task Force on Legalized Gambling, Easy Money (Twentieth Century Fund 1974); Fund for the City of New York, Legal Gambling in New York (1972). Both reports outline means of competing with gambling activities now conducted by organized crime such as bookmaking, numbers, and sports cards. Arguments with respect to the effectiveness of New York Off Track Betting in decreasing the amount being spent in illegal bookmaking in New York are typical and remain controversial. The principal argument favoring open competition with illegal games hinges upon the potential of decreasing the amount of money circulating covertly, outside the sphere of legalized commercial activity and the reach of State and Federal taxes. Legalized gambling that takes customers away from syndicated gambling would thereby decrease the power of organized crime. A State-operated gambling venture that added new gamblers who had not previously gambled but did not attract those who gambled with illegal ventures would only increase the amount of capital being expended for gambling without having a crime-fighting effect.

[247] By reducing the excise tax from 10% to 2%, the government has potentially increased the ability of legalized gambling to compete with organized crime by 8%. There would be a number of variables to be faced by an enterprise that sought to compete with illegal gambling activities. Disregarding all but economic factors, a legal game would have to offer better odds than illegal games. The 10% tax on the gross volume of all legal games was an insurmountable barrier for legal games. Taking a typical numbers game, the economics would be as follows: Odds are 1000 to 1, while payoff is at most 540 to 1. The commission for neighborhood "runners" is 25%. This leaves the "house" $210 on each $1000 bet, a 20% profit. If the legal game had operating costs at the same 25% of the "runners'" commission, it would only have a 10% margin to offer better odds under the 10% excise tax, not accounting for income taxes and other expenses. With the reduced 2% tax, the legal game's margin would be increased to 18%. The $500 occupational tax averaged out over the year would not affect this calculus significantly. For further exploration of this type of analysis, see Fund for the City of New York, Legal Gambling in New York (1972). Omitted here is any discussion of information returns, see infra note 250.

will help the States to continue their study of possible legalization without the Federal Government taking an active role in the process, but maintaining its vigilant stance in the limitation of the activities of organized crime.[248]

Several potential difficulties remain in the relationship between the tax laws and gambling enterprises. Enforcement of the wagering excise tax statutes against illegal gambling businesses may prove to be unrealistic.[249] The burden of the tax laws in general will continue to be felt far more severely by legal rather than illegal gambling enterprises,[250] continuing to some extent the competitive disadvantage felt by legalized operations.

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[248]The collective impact of the changes made by Pub. L. No. 93-499 to the wagering excise taxes will be to increase revenues substantially. The reduced percentage of the excise tax may encourage voluntary payment, while legalization plans will be able to proceed on a more realistic footing. The Federal policy of fighting organized crime will be furthered by both developments. There is no Federal policy aimed at eradicating gambling per se.

[249]Congress would likely have to appropriate funds for investigation teams under the IRS similar to the proposals made when the wagering excise taxes were first enacted. See note 226 supra. It seems unlikely that considerable voluntary payment will be forthcoming from illegal gambling businesses despite the secrecy that would be attached to their returns. Nevertheless, see the Treasury statistics cited at note 240 supra.

[250]Legal businesses would be compelled to comply with income tax provisions through accurate records that may not be forthcoming from illegal enterprises. Disallowance of wagering loss deductions beyond gambling winnings under § 165(d) and the exemption of winnings from income averaging requirements under § 1302(b)(3) are further examples of tax incentives working against gambling activity that would affect legal enterprises but would not be noticed by illegal ventures. In addition, § 6041 requires payments of $600 or more to be reported to the IRS. This income derived from legal gambling would be made known to the IRS but corresponding illegal transactions would be unlikely to be reported. Allowing wagering losses to be deducted beyond winnings where engaged in for a profit would allow potentially vast earnings in unrelated contexts to be set off and thus exempted from tax if § 165(d) were to be rescinded. Sections 165(d) and 1302(b)(3) both seem to be directed against the extremes of losses and gains generally thought to be likely in gambling.

APPENDIX A

REGISTRATION OF MIGRANT FARM WORKER CREW LEADERS

as it relates to

GAMBLING

7 U.S.C. § 2044(b)(7)

J.J.D.

I. LEGISLATIVE HISTORY[1]

Title 7 U.S.C. § 2044 involves the registration of migrant farm worker crew leaders. Section (b)(7) provides, in part, that any person who has been convicted under any State or Federal law relating to gambling shall be unable to be registered as a crew leader.[2] The intent of Congress was to protect migrant farm workers from unscrupulous crew leaders who have been convicted of gambling or other violations.

This statute was introduced on January 24, 1963 by Senator Harrison Williams and others. It was introduced in the House on May 13, 1963.

Congress realized that migrant farm workers were not sufficiently protected by State laws. The House Report on the bill stated that crew leaders held a central position in the lives of the workers:

> A crew leader frequently organizes groups of workers in areas in which they live, usually provides means of transportation for members of his crew, and often lends them money if necessary, during the season; enters contracts with the growers; supervises workers on the job; helps to provide continuity of employment and unless there is a written agreement with the farmer, is responsible for social security taxes. He is the individual who has the most continuous relationship with these migrant workers.[3]

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[1]For text of pertinent parts of the statute as enacted see part III.

[2]This violation must be incident to activities involving migrant farm workers.

[3]H.R. Rep. No. 358, 88th Cong., 1st Sess. 2 (1963).

The corresponding Senate Report added:

> Many labor contractors perfrom their functions in a satisfactory and responsible manner. However, because of their dependency upon the contractors, migrant workers are particularly vulnerable to exploitation and abuse by irresponsible labor contractors. Moreover, the channels and instrumentalities of interstate commerce are being used to perpetuate such exploitation and abuse.[4]

The Senate Committee noted that many of the crew leaders have criminal records.[5] Congress found that one of the misuses of the power that crew leaders had was the organizing of fixed or rigged gambling. As was said in one Senate report, "the crew leader . . . is the source of weekend entertainment often consisting of whiskey, women, and 'Georgia Skin', a gambling game."[6] It was also stated in the House hearings that gambling rackets were often a sideline activity of crew leaders.[7]

The value of section (b)(7) was questioned in the House hearings, however:

> There has not been, in our judgment, sufficient documentation to show that a substantial number of crew leaders are engaging in the practices included in subsection (b)(7). As a nonattorney, it is my belief that there are in most States laws prohibiting gambling, prostitution, unlawful narcotics, and liquor sales. If this is true, the crew leaders should be indicted under the appropriate laws. Further, if they have been convicted of any of the aforementioned crimes, and have paid their debt, what more does society wish?[8]

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[4]S. Rep. No. 202, 88th Cong., 1st Sess. 2 (1963).

[5]Id.

[6]S. Rep. No. 167, 88th Cong., 1st Sess. 12 (1963).

[7]Hearings before the General Subcommittee on Labor, 88th Cong., 1st Sess. 143 (1963).

[8]Id. at 22.

This line of reasoning was rejected by the Committee. The provisions of section (b)(7) were compared to the Landrum-Griffin Act which prevents a convicted felon from being elected to union office even though he has "paid his debt to society."[9] This same line of reasoning appeared during the Senate Hearings:

> This section would permit the Secretary to suspend, revoke, or refuse to issue a registration certificate if the contractor had been convicted of certain crimes. We [the International Apple Association] believe some time limitation should be included.
>
> The present language would permit the Secretary to take such action even though the conviction was accomplished 5 years or even 15 years ago and the party's subsequent record was unblemished.[10]

There was no comment by the committee members. This issue was, therefore, before both the committees, and it was ultimately dismissed. Clearly, Congress felt that a person once convicted of a gambling violation involving his position as a crew leader would be a likely candidate for another violation.

Favorable views on section 2044 were presented by many farm and migrant worker organizations, as well as the Department of Labor, Department of Commerce, Department of Agriculture, Interstate Commerce Commission, and Bureau of Budget.[11] The Senate bill passed both houses and became law on September 7, 1964.[12]

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[9] Id. at 31.

[10] Statement of Fred W. Burrows, Hearings before the Subcommittee on Migratory Labor on S. 521, S. 522, S. 523, S. 524, S. 525, and S. 526, 88th Cong., 1st Sess. (1963).

[11] 1964 U.S. Code Cong. & Ad. News 3697, 3697-3699.

[12] Pub. L. No. 88-582, September 7, 1964, § 5, 78 Stat. 921.

II. COURT INTERPRETATION

There have been no cases involving section (b)(7) of 7 U.S.C. § 2044, and there have been no administrative hearings concerning crew leaders who fall under this section.

III. TEXT OF STATUTE

7 U.S.C. § 2044

(b) Refusal to issue certificates; suspension; revocation; refusal to renew.

Upon notice and hearing in accordance with regulations prescribed by him, the Secretary may refuse to issue, and may suspend, revoke, or refuse to renew a certificate of registration to any farm labor contractor if he finds that such contractor--

(7) has been convicted of any crime under State or Federal law relating to gambling. . . .

APPENDIX B

IMMIGRATION AND NATIONALITY ACT

as it relates to

GAMBLING

8 U.S.C. § 1101 and 8 U.S.C. § 1182

J.J.D.

I. LEGISLATIVE HISTORY[1]

The original bills to revise the Immigration, Naturalization, and Nationality laws[2] did not include section 101(f)[3] as it presently exists. However, section 212(a)(12),[4] which was included in the bills, provided for exclusion from admission of aliens "coming to the United States to engage in any other commercialized vice, whether or not related to prostitution."

In the joint hearings before the Subcommittees of the House and Senate Committees on the Judiciary on the bills to revise the laws relating to immigration, naturalization, and nationality,[5] a suggestion was made as to clarification of section 212(a)(12). Referring to gambling, Frank L. Auerbach, editor, Interpreter Releases, Common Council for American Unity, stated that this section would present difficulties of interpretation since some States did not consider gambling as a vice while others did.[6]

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[1]For text of pertinent parts of the statutes see part III.

[2]S. 716, H.R. 2379, and H.R. 2816, 82d Cong. 1st Sess. (1951).

[3]8 U.S.C.A. § 1101 was originally section 101 of Immigration and Nationality Act. For purposes herein, this section will be referred to as either 1101 or 101.

[4]8 U.S.C.A. § 1182 was originally section 212 of Immigration and Nationality Act. For purposes herein, this section will be referred to as either 1182 or 212.

[5]82d Cong., 1st Sess., March 6, 7, 8, 9, 12, 13, 14, 15, 16, 20, 21, and April 9, 1951.

[6]Testimony before Subcommittees of the House and Senate Committees on the Judiciary, Washington, D.C., Wednesday, March 21, 1951. Statement in regard to S. 716 and H.R. 2379 by Frank L. Auerbach. See Part II, Petition of Lee Wee.

H.R. 5678 was introduced[7] in the House on October 9, 1951, and was referred to the Committee on the Judiciary. It did not include section 101(f) in its present form, nor did it refer to gambling. The report on the recommended amendments on the bill also did not refer to gambling activities.[8]

In the Senate, S. 2055[9] was introduced to revise the laws relating to immigration and nationality and was referred to the Committee on the Judiciary. Having considered the bill, the Committee reported to the Senate, in lieu of S. 2055, an original bill, S. 2550 (known as the McCarran Bill or the Immigration and Nationality Act[10]) which was a

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[7]Rep. Walter of Pennsylvania introduced the bill. 82d Cong., 1st Sess. (1951).

[8]82d Cong., 2d Sess., February 14, 1952. Report No. 1365 on H.R. 5678, Union Calendar No. 425. Reported with amendments, committed to the Committee of the Whole House on the State of the Union.

In the report, Mr. Walter gave a brief history of Immigration and Nationality legislation, citing an 1891 act:

> In 1891, an act was passed (26 Stat. 1084) which added to the list of excludables . . . persons convicted of other infamous crimes or misdemeanors involving moral turpitude. . . .

[9]82d Cong., 2d Sess. (1952).

[10]In Senate Report No. 1137, 82d Cong., 2d Sess. (1952), Senator McCarran stated as to section 101(f):

> Section 101(f), while not defining the term "good moral character," provides standards as an aid for determining whether a person is one of good moral character within the meaning of those provisions of the bill which require that good moral character be established for certain periods in connection with a person's eligibility for certain benefits. By providing who shall not be regarded as a person of good moral character, it is believed that a greater degree of uniformity will be obtained in the application of the "good moral character" tests under the provisions of the bill.

proposal to enact a completely revised code and to repeal all other immigration and nationality laws. The McCarran Bill is the first bill to include section 101(f) in its present form, including the reference to illegal gambling activities in 101(f)(4) and 101(f)(5).[11] The bill changed the language of section 212(a)(12) to exclude "aliens coming to the United States to engage in any other unlawful commercialized vice. . . ." (Emphasis added.)

In April, 1952, H.R. 5678 still did not include section 101(f) in its present form, even though S. 2550 did. But the Conference Report included section 101(f)(4) and 101(f)(5), which were then adopted.[12]

II. COURT INTERPRETATION

The only Federal court decision found on these statutes as they relate to gambling was a 1956 case from the Southern District of California.[13] Petition of Lee Wee held section (f)(5) of 8 U.S.C.A. § 1101 not unconstitutional as failing to provide uniform laws of naturalization even though a person living in an area where gambling was permitted could be held to be a person of good moral character while a person committing similar acts in a jurisdiction where gambling was not permitted could not be considered of good moral character.

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[11]82d Congress, 2d Session, House Report No. 2096. "Immigration and Nationality Act," June 9, 1952. Mr. Walter, from the committee of conference, submitted the Conference Report.

[12]H.R. 5678, Pub. L. No. 82-414, ch. 477, June 27, 1952, 66 Stat. 163.

[13]Petition of Lee Wee, 143 F. Supp. 736 (No. 164879) (S.D.Calif. 1956).

In addition, several administrative decisions under the Immigration and Nationality laws have found aliens deportable when in violation of sections 1101(f)(4) and (5).[14]

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[14](a) Matter of G--, 1 I&N Dec. 59, March 21, 1941. 560401601
A Cuban visa applicant was convicted on the charge of being in possession of "policy slips" in violation of New York Penal Law and received a suspended sentence of 10 days in the workhouse; he was later convicted on a similar charge for which he paid a fine. The Immigration Board concluded that "(1) The offenses . . . are not considered to involve the element of moral turpitude; (2) That by reason of the foregoing conclusion, the applicant would not be inadmissible to the United States solely on the ground of this conviction. . . ."
This case, however, was decided prior to the enactment of section 101(f)(4) and (5).

(b) Matter of A--, 6 I&N Dec. 242, July 26, 1954.
In DEPORTATION proceedings, E-081282.
An Italian Alien applied for suspension of deportation; he had been arrested seven times, including arrests for "lottery" and "traffic in lottery" and a conviction for "bookmaking and pool selling." The court held the conviction as within the purview of section 101(f) of the Immigration and Nationality Act, which precluded a finding of good moral character.

(c) Matter of S--K--C--, 8 I&N Dec. 185, Nov. 14, 1958.
In DEPORTATION Proceedings, A-3656158.
A Chinese national applied for suspension of deportation. He had been employed as a dealer in the gambling games of Chinese dominoes and fan-tan at a recreation club in Seattle at a salary of $35 weekly, his only income. The gambling activities were illegal under the Washington Revised Code. Because of such activities, he was held deportable because section 101(f)(4) precluded a finding of "good moral character" in the case of an alien who has committed the 'forbidden acts' . . . .

III. TEXT OF STATUTES

8 U.S.C.A. § 1101. Definitions

(f) For purposes of this chapter--

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was--

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

8 U.S.C.A. § 1182. Excludable Aliens

(a) General Classes

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(12) . . . aliens coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution;

APPENDIX C

PROHIBITION OF BANKS FROM SELLING

STATE LOTTERY TICKETS

12 U.S.C. §§ 25A, 339, 1730C, 1829A

D.F.D.

I. LEGISLATIVE HISTORY

Soon after New York became the second State to begin operating a State-sponsored lottery in 1967,[1] Congress passed and the President signed into law a statute amending sections of the National Banking Act, the Federal Reserve Act, the Federal Deposit Insurance Act, the Federal Savings and Loan Insurance Act and Title 18 of the United States Code, prohibiting national banks and banks insured or supervised by agencies of the Federal Government from acting as sales agents for a State lottery.[2] Though the arguments of the sponsors and various proponents of the measure differed to some extent, it is fair to generalize that the Act was meant both as an expression of congressional disapproval of State-sponsored gambling in terms of morality and as an attempt to maintain the respectability of the Nation's banks.

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[1]The New York State Lottery began selling tickets on June 1, 1967. The lottery was made possible by an amendment to article I, section 9, subdivision 1 of the State constitution, approved by the voters of the State by a wide margin on November 8, 1966. The statute authorizing the lottery is found in N.Y.Unconsol.Laws §§ 9541-9556 (McKinney 1974). The other State operating a lottery at the time was New Hampshire.

[2]Pub. L. No. 90-203, 81 Stat. 608; To prohibit certain banks and savings and loan associations from fostering or participating in gambling activities, December 15, 1967. The various provisions are contained in the United States Code at 12 U.S.C. §§ 25a, 339, 1829a and 1730c, and 18 U.S.C. § 1306. The act is set forth in section III.

The provision of the act adding § 1306 to 18 U.S.C. provides for a fine and imprisonment in case of a "knowing" violation of the act, but there was apparently some uncertainty in both the House and Senate committees about the state of mind requirement. The House committee twice referred to the provision in its report as penalizing "willfull" violations, and the Senate committee did the same. H.R. Rep. No. 382, 90th Cong., 1st Sess. 6 (1967), S. Rep. No. 727, 90th Cong., 1st Sess. 8 (1967), reprinted in 1967 U.S. Code Cong. & Ad. News 2228, 2234.

On May 11, 1967, Congressman Wright Patman of Texas introduced the bill, H.R. 9892, on the floor of the House and left no doubt as to where his sympathies lay. Calling gambling "an unmitigated evil," Patman explained his bill as a measure to "prohibit gambling activities by public service institutions." New York's lottery was about to begin, and Patman read into the record two newspaper articles outlining plans for banks to act as agents for the sale of lottery tickets. Bank participation in "these evil activities" would be "a great boost to the gambling interests," Patman said, and this would open the door to "eventual domination or outright takeover of these banks by the gambling syndicates."[3] The bill was referred to committee.

Patman expressed a similar moral disposition during the hearings before the House Committee on Banking and Currency, which he chaired, observing from the beginning that the measure would

> . . . make it clear that such gambling activities do not, in any way, have the sanction of the U.S. Congress or the Federal Government.[4]

Subsequent committee debate and the committee's report, however, make it clear that, although some of the bill's other sponsors shared their chairman's convictions,[5] most saw the proposal as an attempt to preserve

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[3]113 Cong. Rec. 12346 (1967). Patman later de-emphasized the "takeover" theme, with the exception of a portion of his testimony before a Senate committee three months later, when he said that "You can't keep up with these gamblers and hoodlums. They are way ahead of us. They can think of things that we never thought of." Hearings on H.R. 10595 before the Subcomm. on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 23 (1967).

[4]Hearings on H.R. 9892 before the Committee on Banking and Currency of the House of Representatives, 90th Cong., 1st Sess. 2 (1967).

[5]Id. at 16-17, 79-80 (Representative Gonzalez), 14 (Representative Mize), 19 (Representative Gettys).

consistency in Federal policy and to maintain the stability and dignity of banking institutions.

The Federal policy argument was the most convincing, and became the keynote of both the House report and the later Senate report. Under long-established Federal law there have been prohibitions against mailing lottery tickets, information, or advertising, and against broadcasting lottery information and mailing newspapers containing lottery information or lists of winners.[6] "H.R. 10595," the committee's report said, "simply carries out clear public policy and conforms to the intent of Congress in dealing with lotteries over the years."[7] The Report of the Senate Committee on Banking and Currency, issued several months later, similarly concluded that the act would be

> . . . merely an extension of this longstanding policy. The bill does not represent a radical or new departure from existing Federal law.[8]

This assertion of Federal policy went virtually unchallenged.[9]

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[6]18 U.S.C. §§ 1302 and 1304. The House and Senate reports both claimed that these provisions were upheld by the Supreme Court in United States v. Fabrizio, 385 U.S. 263 (1966), though that case actually dealt with 18 U.S.C. § 1953 only. H.R. Rep. No. 382, 90th Cong., 1st Sess. 2 (1967), S. Rep. No. 727, 90th Cong., 1st Sess. 2 (1967), reprinted in 1967 U.S. Code Cong. & Ad. News 2228, 2229.

[7]H.R. Rep. No. 382, 90th Cong., 1st Sess. 2 (1967). The Committee reported the measure favorably by a vote of 24-8 on June 22, 1974, though the bill was so changed by amendment that it was labeled a "clean" bill and numbered H.R. 10595.

[8]S. Rep. No. 727, 90th Cong., 1st Sess. 2 (1967), 1967 U.S. Code Cong. & Ad. News 2228, 2229.

[9]Only Senator Jacob Javits of New York, the bill's most vocal opponent in the Senate, argued that State-sponsored lotteries were an exception from the general anti-lottery rule of Federal policy. Javits noted that the Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, 79 Stat. 136, had exempted State lottery proceeds from the wagering tax and

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More vigorously debated in committee and on the floors of Congress, however, was the contention that allowing banks to sell lottery tickets would undermine the solidarity of banking institutions. Thus Representative Wylie, a supporter of the proposal, argued during the House hearings that

> . . . there is a certain element of dignity and trust about a bank and action on the part of the Federal Government, the State and so forth, which would allow banks to sell lottery tickets is not proper, in my judgment.[10]

Similarly, Representative Horton during the House floor debate voiced the opinion that "I do not feel this is an appropriate function for financial institutions, the traditional bastions of thrift and frugality."[11]

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did not require lottery ticket sellers to purchase a gambling tax stamp. Javits concluded that "Congress has refrained from exerting its authority where a State has instituted a lottery," and pointed out further that Congress is not required to "inhibit such State action in order to maintain the consistency of Federal policy." Hearings on H.R. 10595 before the Subcomm. on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 26, 31 (1967).

A more important argument for the bill's opponents was that the bill attempted to "impose the morality of a few upon the unwilling many" by using Federal insurance connections for regulatory purposes. H.R. Rep. No. 382, 90th Cong., 1st Sess. 29 (1967) (dissenting views of Representative Fino). "Anything one wishes," said Javits, "could be legislated under the guise of regulating banks on grounds of respectability or morality or ethics." 113 Cong. Rec. 32193 (1967)

[10] Hearings, supra note 4, at 19.

[11] 113 Cong. Rec. 18669 (1967).

Perhaps the key reason for this conclusion was the widespread feeling that, as one Representative put it, there would be "a conflict with fundamental banking operations."[12] The fear was not only that those who walk into the bank would spend the money rather than deposit it, but also that those cashing welfare and social security checks would be tempted to put the money on the lottery instead of buying necessities. "[T]he Federal Government," concluded one Senator, "should not be a participant in pandering to and promoting the passions."[13]

Another important link in the argument was the inference that the New York banks were not entirely willing participants in the State's lottery, though their role was theoretically voluntary. The banks had been originally chosen as the sales vehicles because of the safe and efficient service they could provide,[14] but, as the Report of the Senate Committee suggested,

> . . . [t]he committee seriously doubts . . . that many banks would sell lottery tickets if not prevailed upon to do so by the State banking commission and if they had no fear of suffering a competitive disadvantage with respect to banks who were selling lottery tickets.[15]

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[12] Hearings, supra note 4, at 85. (statement of Representative Galafianakis).

[13] 113 Cong. Rec. 32197 (1967) (remarks of Senator Lausche).

[14] Hearings on H.R. 10595 before the Subcomm. on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 30 (1967) (telegram from Mr. Anthony Travia, Speaker of the New York State Assembly).

[15] S. Rep. No. 727, 90th Cong., 1st Sess. 4 (1967), 1967 U.S. Code Cong. & Ad. News 2231.

Pursuing the latter argument much further than Representative Patman and his House colleagues, Senate supporters of the bill developed a new argument, based on the theory of competitive disadvantage. Communications from the Comptroller of the Currency and the Board of Governors of the Federal Reserve System, available to the Congressmen during their respective hearings, made clear that these officials saw no objection to bank participation in lotteries,[16] but the Bureau of Federal Credit Unions ruled that Federal credit unions had no authority to participate, and the General Counsel of the Federal Home Loan Bank Board was of the opinion that the sale of lottery tickets by Federal savings and loan associations would be "inconsistent with their objectives as thrift institutions."[17] Feeling that this prohibition would give commercial banks an unfair advantage over the savings and loan associations, the Senators promoting the bill argued that the measure was necessary to restore "competitive equality" among the banking institutions.[18]

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[16]H.R. Rep. No. 382, 90th Cong., 1st Sess. 9-13 (1967).

[17]H.R. Rep. No. 382, 90th Cong., 1st Sess. 13-18 (1967), reprinted in the Senate Hearings, supra note 14, at 96, 53-56.

[18]S. Rep. No. 727, 90th Cong., 1st Sess. 4 (1967), 1967 U.S. Code Cong. & Ad News 2231. The committee's minority members objected on the ground that commercial banks and savings and loan associations "were never intended to be equal in all respects" and thus naturally had "differing restrictions and authority." Id. at 20, 1967 U.S. Code Cong. & Ad. News 2239.

Such arguments did not deter the bill's principal sponsor from pursuing his original justification for the legislation. Denouncing the New York system as an attempt to "use the Government's name or its facilities as devices to hustle customers," Representative Patman took the House floor during general debate to emphasize that

> . . . the purpose of the bill is to reaffirm the traditional policy of Congress and of all branches of the Federal Government to shun gimmickry, deception, gambling, huckstering, and all fastbuck activities; and instead to meet the Federal obligations on a high plane of ethics. Between the lines of the legalisms written into this bill, you may read--and I hope Members of Congress and all other citizens will read--this statement: "The Federal Government of the United States is too proud to work as a shill for gamblers."[19]

Warming to the subject, Patman attacked the New York lottery as "simply another Rockefeller scheme to dodge a fair and equitable tax program."[20] The family of the then-Governor of New York had "always operated on the assumption that the rich should get richer and that the poor should get fleeced,"[21] he said, and added that "it is easier for a camel to pass through the eye of a needle than for a Rockefeller to consider taxing himself and his financial peers."[22]

> He is asking the people of New York, and the supporters of his position in Washington are asking Congress, to go along with the rotten philosophy, 'if you can't lick the crooks, join 'em.[23]

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[19] 113 Cong. Rec. 18582 (1967).

[20] Id. at 18582.

[21] Id. at 18583. Armed with tables of financial data, Patman assailed the Rockefeller foundations and other members of the Rockefeller family, including the Governor's brother, Winthrop Rockefeller, then the Governor of Arkansas, who was nothing more than a "cuff-links cowboy." 113 Cong. Rec. 18584-87, 18585 (1967).

[22] 113 Cong. Rec. 18585 (1967).

[23] Id. at 18586.

Although numerous members of the House quickly disassociated themselves from Patman's harangue,[24] the moral issue behind the bill still loomed as a significant justification for its passage. It was left to Senator Proxmire to formulate the real moral import of the bill and to tie it in with the other rationales advanced.

Proxmire's subcommittee had been told by Patman during its hearings on the bill that "we cannot escape the broader moral question that is inevitably tied up with gambling,"[25] and Proxmire, who agreed, took the Senate floor to argue the proposition that banks cannot be involved with activity which, even inaccurately, might be labeled "immoral." Noting that commercial and savings banks "play a unique and vital role in our economy," Proxmire contended that the maintenance of sound financial institutions is "extremely vital to our economic health."

> Banks and savings and loan associations must not only be free from misdealing, but they must be free from any appearance of misdealing. Like Caesar's wife, they must be above suspicion.[26]

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[24] Representative Reid of New York called Patman's diatribe "an incredible personal attack" which "demeans this House." Representative Halpern termed the comments "vicious mouthings," and Representative Robison of New York said he would vote against the bill because of the remarks. Several members pointed out that Governor Rockefeller had opposed the lottery until New York's voters overwhelmingly approved it. 113 Cong. Rec. 18590 passim (1967).

[25] Hearings on H.R. 10595 before the Subcomm. on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 20 (1967).

[26] 113 Cong. Rec. 32099 (1967).

Since government-sponsored gambling operations had in years past fallen prey to criminal elements, the Senate should be concerned that such a circumstance may recur.[27] Furthermore, gambling was considered by "a substantial segment of public opinion" to be "morally objectionable."[28] These factors, said Proxmire, coupled with the fact that a lottery is especially harmful to the poor,[29] "undermine the respect of the people for banks and demean the banks in their eyes . . . ."[30] He concluded: "Maybe lotteries gain respectability that way, but it is certain that banks do not gain respectability."[31]

Banks were not to be denied all ties with State lotteries, however. At the urging of supporters of the New Hampshire lottery,[32] which did not use banks to sell tickets but did use banking services in other ways, the Senate committee reporting the bill added several amendments to make it clear that banks could still "engage in record-keeping activities and . . . perform other custodial functions on behalf of the State lottery."[33] Such functions included data

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[27] Id. at 32099. The bill's proponents, during its consideration, pointed to the history of an old and corrupt New York lottery, which was abolished in 1833, and a similar operation in Louisiana just before the turn of the century. See, e.g., the Senate Hearings, supra note 25, at 18, and 113 Cong. Rec. 32099 (1967).

[28] 113 Cong. Rec. 32099 (1967).

[29] Id. at 32191.

[30] Id. at 32190.

[31] Id. at 32190.

[32] Senate Hearings, supra note 25, at 21 (statement by Senator McIntyre). See also 113 Cong. Rec. 35955 (1967) (remarks of Representative Ashley).

[33] S. Rep. No. 727, 90th Cong., 1st Sess. 5 (1967), 1967 U.S. Code Cong. & Ad. News 2232.

processing, acceptance of the proceeds of the lottery ticket sales for transfer to the State, distribution of lottery tickets to sales agents, and making payment to lottery winners. These amendments merely allowed banks to perform services "which are already performed for other bank customers,"[34] but had the added effect, as the committee's minority pointed out, of allowing banks "to participate in all phases of the program except those that would be seen by bank customers."[35]

This dichotomy, said Proxmire, was entirely consistent with the rationale for the bill:

> As long as a bank is not actively engaged in the open sale or promotion of the lottery, it is not closely identified with the lottery in the eyes of the public.[36]

The essence of the Senate's version was not to protect the banks but to protect their public image.

The original version of H.R. 10595 passed the House by 271-111 on July 13, 1967,[37] and the amended version was approved by the Senate without a roll call vote on November 12.[38] At a subsequent conference to iron out the differences, managers on the part of the House and the Senate agreed on most of the Senate amendments authorizing banks to perform unseen services for the State lotteries, and accepted a House provision prohibiting banks from collecting and distributing the tickets,

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[34] Id. at 5, 1967 U.S. Code Cong. & Ad. News at 2232.

[35] Id. at 16, 1967 U.S. Code Cong. & Ad. News at 2236 (minority views).

[36] 113 Cong. Rec. 32100 (1967).

[37] Id. at 18676.

[38] Id. at 32200.

accepting proceeds, and paying lottery winners.[39] The conferees felt that the Senate amendment authorizing those services might, in Senator Proxmire's words, "go beyond existing legally authorized banking services."[40] To clarify the congressional intention, the conferees added a new subsection indicating that nothing in the act would prevent a bank from performing any lawful banking service, such as accepting deposits or handling checks, for a State-operated lottery.[41]

Final statements by the conferees prior to adoption of the conference version by the respective houses indicated that there were still some differences on the moral issue. The mood of the Senate, as evidenced by comments of Senator Proxmire, was still that only the visible aspects of lottery participation by banks should be restricted and that

> the intent of the recommendations of the conference committee is to permit banks and savings and loan associations to perform for lotteries any services presently authorized under law.[42] Nothing in the legislative history should be construed otherwise.

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[39] Id. at 35954 (remarks of Representative Patman). Senator Proxmire, reporting the conference results to the Senate, phrased the outcome somewhat differently. 113 Cong. Rec. 35658 (1967). The conference report itself is found at 113 Cong. Rec. 35658 and 35953 (1967). The managers for the House issued a separate statement at the time, printed at 113 Cong. Rec. 35953 (1967) and reprinted at 1967 U.S. Code Cong. & Ad. News 2242.

[40] 113 Cong. Rec. 35658 (1967).

[41] This new subsection is (d) in the act. The act is printed in section III of this appendix. The statement of the House managers accompanying the conference report further emphasized the point:

> No inference is to be drawn of any leglislative intention to grant banks or other financial institutions any authority which they would not possess in the absence of this legislation.

113 Cong. Rec. 35953, 1967 U.S. Code Cong. & Ad News 2242.

[42] Id. at 35659 (remarks of Senator Proxmire).

Members of the House, however, apparently clung to the belief that banks should be completely prohibited from dealing with State lotteries. Representative Patman, in apparent recognition of this difference, considered the conference acceptance of some of the Senate amendments as the regrettable product of inevitable compromise,[43] and restated Proxmire's point in a revealingly negative fashion:

> [T]he conferees' agreement to insert language in the bill that allows financial institutions to perform normal banking services for the lotteries in no way is to be interpreted as granting any authority to the bank-lottery relationship that is not specifically contained in banking law.[44]

Despite different viewpoints as to what the final bill really meant, it passed both the Senate[45] and the House[46] with little opposition, and was signed into law by the President on December 15, 1967.[47]

II. COURT AND AGENCY INTERPRETATION

Public Law 90-203 has been mentioned in court decisions only twice since its enactment, and in both cases was used only as an example of Federal regulation of otherwise legal lotteries. In Martin v. United States,[48] the issue was the constitutionality of 18 U.S.C. § 1084, which prohibits the transmission of wagering information in interstate commerce by a wire communication facility. Arguing that the statute in question

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[43] Id. at 35954.

[44] Id. at 35954.

[45] Id. at 35659.

[46] Id. at 35956, by a vote of 289-74.

[47] Id. at 37387.

[48] 389 F.2d 895 (5th Cir. 1968), cert. den. 391 U.S. 919 (1969).

is "part of a Federal policy aimed at those who would, in furtherance of any gambling activity, employ any means within direct Federal control,"[49] the court listed several statutes, including Pub. L. No. 90-203, as evidence for its proposition.[50] The act was used in a similar manner in New York State Broadcasters Association v. United States.[51] In that case, the Federal Communications Commission had ruled, at the request of the appellants, that 18 U.S.C. § 1304, prohibiting the broadcasting of lottery information, applied to both legal and illegal lotteries. The Association appealed the ruling in a declaratory judgment action, but the court upheld the ruling, observing that "Congress long ago stopped differentiating between legal and illegal lotteries," citing U.S.C. § 1306, which was added to the Code by Section V of Public Law No. 90-203, as a recent example.[52]

There has been no direct court interpretation of the provisions of Pub. L. No. 90-203 to date, for the reason that no State or government-insured bank has decided to challenge the law.

Subsection (e) of each amendment made by the act to the various bank statutes provides that the agency having supervision of the banking institutions

> shall issue such regulations as may be necessary to the strict enforcement of this section and the prevention of evasions thereof.

Apparently, none of the agencies responsible for such supervision have promulgated such regulations.

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[49] Id. at 898. [50] Id. at 898, n. 8.

[51] 414 F.2d 990 (2d Cir. 1969)

[52] Id. at 996.

A letter of Chesten B. Feldberg, Secretary of the Board of Governors of the Federal Reserve System, dated July 29, 1974, however, indicates that the Board is reviewing State lottery plans on a case by case basis instead of issuing broad regulations.[53] The Board is giving a liberal interpretation to the phrase in subsections (d) of the act permitting banks to perform "lawful services for a State operating a lottery," allowing banks to distribute lottery tickets from their head offices to outlying branches, retain receipts and unsold tickets for safekeeping, and keep records of tickets consigned to, and receipts from, each ticket-selling agent. In support of such a construction the Board cited the Senate report on the original bill and the provisions of the law itself, Section 9A of the Federal Reserve Act. This construction is similar to that of the Federal Deposit Insurance Corporation and the Comptroller of the Currency, who have allowed banks under their supervision to engage in similar activity.

III. TEXT OF STATUTE

SECTION I. (a) Chapter I of title LXII of the Revised Statutes is amended by inserting, immediately after section 5136, the following new section:

Sec. 5136A. (a) A national bank may not--

(1) deal in lottery tickets;

(2) deal in bets used as a means or substitute for participation in a lottery;

(3) announce, advertise, or publicize the existence or identity of any participant or winner, as such, in a lottery.

(b) A national bank may not permit--

(1) the use of any part of any of its banking offices by any person for any purpose forbidden to the bank under subsection (a), or

(2) direct access by the public from any of its banking offices to any premises used by any person for any purpose

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[53]The Board must oversee the activities of member banks, with regard to the act, as provided in section 2 of the act, 12 U.S.C. § 339.

forbidden to the bank under subsection (a).

(c) As used in this section--

(1) The term 'deal in' includes making, taking, buying, selling, redeeming, or collecting.

(2) The term 'lottery' includes any arrangement whereby three or more persons (the 'participants') advance money or credit to another in exchange for the possibility or expectation that one or more but not all of the participants (the 'winners') will receive by reason of their advances more than the amounts they have advanced, the identity of the winners being determined by any means which includes--

(A) a random selection;

(B) a game, race, or contest; or

(C) any record or tabulation of the result of one or more events in which any participant has no interest except for its bearing upon the possibility that he may become a winner.

(3) The term 'lottery ticket' includes any right, privilege, or possibility (and any ticket, receipt, record, or other evidence of any such right, privilege, or possibility) of becoming a winner in a lottery.

(d) Nothing contained in this section prohibits a national bank from accepting deposits or cashing or otherwise handling checks or other negotiable instruments or performing other lawful banking services for a State operating a lottery, or for an officer or employee of that State who is charged with the administration of the lottery.

(e) The Comptroller of the Currency shall issue such regulations as may be necessary to the strict enforcement of this section and the prevention of evasions thereof.

SECTION 2. The Federal Reserve Act is amended by inserting immediately after section 9 the following new section:

SECTION 9A. PARTICIPATION IN LOTTERIES PROHIBITED

[Subsections (a) through (d) are identical to those same subsections in section I. of the act.]

(e) The Board of Governors of the Federal Reserve System shall issue such regulations as may be necessary to the strict enforcement of this section and the prevention of evasions thereof.

SECTION 3. The Federal Deposit Insurance Act is amended by redesignating sections 20 and 21 as 21 and 22, respectively, and by inserting immediately after section 19 the following new section:

Sec. 20.

[Subsections (a) through (d) are identical to those same subsections in section I. of the act.]

(e) The Board of Directors shall prescribe such regulations as may be necessary to the strict enforcement of this section and the prevention of evasions thereof.

SECTION 4. Title IV of the National Housing Act is amended by adding the following new section at the end:

Sec. 410.

[Subsections (a) through (d) are identical to those same subsections in section I. of the act.]

(e) The Federal Home Loan Bank Board shall prescribe such regulations as may be necessary to the strict enforcement of this section and the prevention of evasions thereof.

SECTION 5. (a) Chapter 61 of title 18 of the United States Code is amended by adding the following new section at the end:

§ 1306. Participation by financial institutions

Whoever knowingly violates section 5136A of the Revised Statutes of the United States, section 9A of the Federal Reserve Act, section 20 of the Federal Deposit Insurance Act, or section 410 of the National Housing Act shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SECTION 6. The amendments made by this Act shall take effect on April 1, 1968.

APPENDIX D

TRANSPORTATION OF GAMBLING DEVICES IN INTERSTATE AND FOREIGN COMMERCE

15 U.S.C. §§ 1171-1178

W.C.W.

I. LEGISLATIVE HISTORY of the Johnson Act

In February, 1950, the delegates attending an important conference of local law enforcement and government officials in Washington, D.C.,[1] adopted a resolution encouraging the passage of a Federal law prohibiting the transporation of gambling devices in interstate and foreign commerce.[2] This was not the first time interest in Federal antigambling legislation had been shown,[3] but the resolution did come during a period of increased

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[1]The Attorney General's Conference on Organized Crime was convened in Washington, D.C., on February 15, 1950. Its importance is evidenced by a Presidential address to the delegates, who were mayors, police chiefs and State attorney generals, representing the citizens of practically every State in the union. 96 Cong. Rec. 15,102 (1950).

[2]The resolution read:

> Resolved, That this conference endorse the idea of Federal legislation to prohibit the shipment of gambling devices into or out of any State where the possession or use of such devices is illegal. Further, requiring Federal registration of all machines sold within the States.

Id.

[3]During the period 1919-1941 17 different bills dealing with the shipment of gambling devices in interstate or foreign commerce were introduced in either the House or Senate. Hearings on S. 3357 Before the House Comm. on Interstate and Foreign Commerce, 81st Cong., 2d Sess., at 259-60 (1950). In addition, Congress had enacted similar laws barring interstate transportation of contraband and other undesirable items. e.g., The Webb-Kenyon Act and Wilson Act, 27 U.S.C. §§ 121, 122 (1913) (intoxicating liquors); The Ashurst-Sumners Act, 18 U.S.C. §§ 1761, 1762 (1935) (prison-made goods); The Connolly "Hot Oil" Act, 15 U.S.C. § 715 (1941) (contraband oil); and The Lacey Act, 16 U.S.C. § 668d (1900) (illegally taken birds and game).

concern on the part of many citizens and political leaders who were calling for action against the criminal elements of society.[4] As a result, the then Attorney General of the United States, J. Howard McGrath, and his staff drafted two pieces of legislation which were transmitted to the Senate to be introduced on April 4, 1950, by Senator Edwin C. Johnson of Colorado, Chairman of the Committee on Interstate and Foreign Commerce.[5] Action on one bill, outlawing the use of interstate communications facilities to transmit gambling information,

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[4]During 1949 President Harry S. Truman focused national attention on the problems of organized crime in a series of public statements, and shortly thereafter, Tom C. Clark, then serving as Attorney General of the United States, ordered J. Edgar Hoover, Director of the Federal Bureau of Investigation, to compile a complete report on crime conditions in the country. This report and the publicity surrounding its release led to an effort by the administration to seize the initiative by calling the February conference (see note 1, supra) to gain the support of Federal, State and local officials for tough, new Federal legislation. This encouraged Congress to develop several measures and to establish the Special Committee to Investigate Crime in Interstate Commerce, popularly known as the Kefauver Committee. This committee, which thrust its chairman, Senator Estes Kefauver of Tennessee, into the Presidential spotlight, held numerous public hearings across the nation, many of which were televised, in cities such as Miami, Tampa, New Orleans, Kansas City, Cleveland, St. Louis, Detroit, Los Angeles, San Francisco, Las Vegas, Philadelphia, Washington, D.C., Chicago, and New York. Over 800 witnesses were interviewed and millions of words of testimony were heard. Hearings Before a Special Committee to Investigate Organized Crime in Interstate Commerce Pursuant to S. Res. 202 (81st Cong., 2d Sess.) and S. Res. 60 and 129 (82d Cong., 1st Sess.) in 19 parts (1950-51). The public outcry against the perceived horrors of organized crime was overwhelming. Fifty of the Nation's leading newspapers organized a clearinghouse to analyze and report as much news as possible about the national crime syndicates and their leaders, and numerous State and city crime commissions were established. E. Kefauver, Crime in America 313-22 (1951). These events formed the context for debate of the Johnson Act, the only significant anticrime legislation passed during this period as part of the Federal criminal code.

[5]S. 3357, 81st Cong., 2d Sess. (1950) (a bill to outlaw the interstate and foreign transportation of gambling devices); S. 3358, 81st Cong., 2d Sess. (1950) (a bill to outlaw the interstate transmission of gambling information).

was deferred,[6] but the complete text of the other bill, which came to be known as the Johnson Act, was passed in its original form by the Senate on April 19, 1950, without any public hearings or debate.[7]

The bill that passed the Senate was a comprehensive piece of legislation, subdivided into eight sections.[8] In the first section the

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[6]96 Cong. Rec. 16, 597 (1950).

[7]Id. 5368.

[8]The bill passed by the Senate read as follows:

AN ACT

To prohibit transportation of gambling devices in interstate and foreign commerce.

That as used in this Act the term "gambling device" means any machine or mechanical device, or parts thereof, designed or adapted for gambling or any use by which the user as a result of the application of any element of chance may become entitled to receive, directly or indirectly, any thing of value.

Sec. 2. It shall be unlawful knowingly to transport or cause to be transported in interstate or foreign commerce any gambling device, or knowingly to take, receive, possess, or dispose of any gambling device transported in violation of this Act: That the provisions of this section shall not apply to the course of unbroken interstate transportation of any gambling device into any State where the use of such device is legal, as certified by the governor of the State to the Attorney General of the United States and published by the Attorney General in the Federal Register. In the absence of such certification and publication, the use of gambling devices in any State shall, for the purposes of this Act, be presumed to be illegal; and all persons and officials affected by the provisions of this Act shall be entitled to act in reliance upon the presumption.

Nothing in this Act shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act, as amended (15 U.S.C. 41058).

Sec. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the collector of internal revenue for each district in which such business is to be carried on, his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the collector of internal revenue for each district in which he maintains a place or places of business an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding

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calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

Sec. 4. 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.

Sec. 5. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, the Territories and possessions of the United States, on any lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof or within Indian country as defined in 18 United States Code 1151.

Sec. 6. Whoever violates any of the provisions of section 2,3,4, or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Whoever violates any of the provisions of section 3 or 4 of this Act shall be fined not more than $2,000 or imprisoned not more than one year, or both.

Sec. 7. 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 laws; 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

term,"gambling device", was defined in broad terms to include practically any type of machine or device that could be used for gambling. The second section made it illegal to knowingly transport or cause to be transported in interstate or foreign commerce any gambling device or to knowingly take, receive, possess, or dispose of any gambling device transported in violation of the act unless the governor of the State into which the device was transported had certified to the Attorney General of the United States that use of the device in the State was legal. All dealers and manufacturers of gambling devices were required to register and file detailed monthly reports with the collector of internal revenue for each district in which such business was carried on according to the terms of the third section. The remaining sections detailed marking requirements for all containers in which gambling devices were shipped, prohibited the use of gambling devices on all Federal lands, including the territories and possessions, prescribed penalties for violations of the Act, provided for the forfeiture of all

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incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: 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.

Sec. 8. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Id.

gambling devices transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed or used in violation of the Act, and allowed the severance of any section of the Act held invalid by the courts.

The bill was referred to the House Committee on Interstate and Foreign Commerce,[9] which at the time was holding public hearings on a similar measure.[10] Eventually, the bill was dropped,[11] and the bill approved by the Senate was reported out with several amendments.[12] In general, the amendments were designed to narrow the definition of "gambling device", alter somewhat the manner in which a State could avoid the effects of the statute and extend the prohibition against the use of gambling devices to include their use on all American flagships.

Specifically, the committee substituted its own definition of "gambling device" to exclude all types of coin-operated machines except slot machines.[13] Drafting an acceptable definition proved to be a

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[9] Id. 5497.

[10] H.R. 6736, 81st Cong., 2d Sess. (1950), which had been introduced by Congressman Prince H. Preston, Jr., of Georgia on January 12, 1950.

[11] Preston agreed to drop his measure since S. 3357 (see note 5, supra) had already been accepted by the Senate and the purpose of both bills was the same. Hearings on S. 3357 Before the House Comm. on Interstate and Foreign Commerce, 81st Cong., 2d Sess. (1950).

[12] H.R. Rep. No. 2769, 81st Cong., 2d Sess. (1950).

[13] The committee rewrote § 1171 to read as follows:

> . . . that as used in this Act 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

difficult problem because the committee wanted to limit the definition to include slot machines only while at the same time making the definition broad enough to cover all variations of the traditional slot machine which might be introduced to avoid the effects of the law. After lengthy consideration of this problem the committee decided to include the general language reflected in subsection (2) of § 1171.[14]

The committee amended the provisions of § 1172 by eliminating the prohibition against the exportation of gambling devices[15] and by altering the process in which a State could exempt itself from the sanction of the Act. Under the terms of the amended version, a State could exempt

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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; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

[14] See note 13, supra.

[15] The committee amended § 1172 to read as follows:

Sec. 2. It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a Territory or possession of the United States from any place outside of such State, the District of Columbia, or a Territory or possession: Provided, That this section shall not apply to transportation or any gambling device to a place in any State which has enacted a law providing for the exemption of such subdivision from the provisions of this section.

Nothing in this Act shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act, as amended (15 U.S.C. § 41058).

The amended language is underlined. The committee members dropped the ban against shipping gambling devices to foreign countries where they were legal because they felt it would represent an unnecessary and unfair burden on American manufacturers. H.R. Rep. No. 2768, 8, 81st Cong., 2d Sess. (1950).

itself if the State legislature passed a law expressly exempting the State or a subdivision of the State from the provisions of the Act. The members of the committee felt it was best to transfer this responsibility from the executive to the legislative body of each State in order to avoid the serious conflicts that would undoubtedly arise if the governor and legislature differed in their respective interpretations of the State's law.

Since responsibility for enforcement of the statute rested with the Justice Department, § 1173 was amended to require all manufacturers and dealers to register and file their monthly reports with the Attorney General in lieu of the Collector for the collection district in which the business was carried on.[16] Finally, the committee modified § 1175 to extend the prohibition against the use of gambling devices on all

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[16]The committee amended § 1173 to read as follows:

Sec. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for

Federal lands to include their use on American flagships[17] and recommended consolidation of the penalties reflected in § 1176.[18]

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identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

This seemingly insignificant amendment led to a great deal of confusion because the House neglected to strike the words "such district" when it substituted "the Attorney General" for "the Collector of Internal Revenue in the collection district." In a subsequent Supreme Court decision two justices felt the confusion engendered by this congressional oversight was substantial enough to void the statute as being unconstitutionally vague. United States v. Five Gambling Devices, 346 U.S. 441 (1953) (Black and Douglas, JJ, concurring).

[17]The committee amended § 1175 to read as follows:

Sec. 5. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, the Territories and possessions of the United States, on any lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof or within Indian country as defined in 18 United States Code 1151.

See remarks of Hezelton H. E. Paine explaining the meaning and purpose of this amendment. 96 Cong. Rec. 13, 650-51 (1950).

[18]The committee amended § 1176 to read as follows:

Sec. 6. Whoever violates any of the provisions of section 2,3,4, or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both.

The Attorney General expressed his approval of these amendments in the following letter:

Dear Senator Johnson: In response to your request, we have examined S. 3357, an Act to prohibit transportation of gambling devices in interstate and foreign commerce, as it was amended and passed by the House of Representatives August 28, 1950. While the amendments effect substantial changes in the measure as it passed the Senate, April 19, 1950, it is our belief that these amendments do not alter the basic objectives of the original bill. In our view, if the House amendments are accepted by the Senate, the Congress will have enacted a highly creditable piece of legislation, in keeping with the recommendation made on the subject of gambling devices by the Attorney General's Conference on Organized Crime.

Letter from Peyton Ford, Deputy Attorney General, to Senator Edwin C. Johnson, as quoted in 96 Cong. Rec. 15, 108 (1950).

An unsuccesful fight against the bill was led by Nevada Congressman Walter S. Baring in both the committee and on the floor of the House. Baring felt the law would adversely affect the legalized gambling industry in his State[19] and that it represented an infringement on States' rights. He argued that the power to regulate gambling emanated from the police power, which is reserved to the States, and that it was unreasonable for Congress to attempt such regulation under its power to regulate interstate commerce. Proponents of the bill pointed out that State officials themselves had asked for the Federal legislation in order to complement, not replace, their role in the fight against organized crime.[20] They emphasized that the States could exempt themselves from coverage if they desired, that the law dealt with transportation of the devices in interstate commerce which was beyond the jurisdiction of the States, that it did not attempt to create a Federal antigambling law and that efforts of the States to enforce their own laws had been seriously undermined by their powerlessness to prevent the importation of such devices.[21]

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[19]During the debate on the floor of the House, Congressman Baring introduced into the record several letters from his constituents who feared they would not be able to return their slot machines to factories in other States for repairs and that no new machines could be brought into the State without enabling legislation. He argued that these facts alone would inflict serious harm on the legalized gambling industry in Nevada and the slot machine manufacturing industry, located chiefly in Louisiana and the Chicago area. 96 Cong. Rec. 13, 642-43 (1950).

[20]Congressman Rogers of Florida quoted the following passage expressing the feelings of the Attorney General when he was called on to explain the purpose of this legislation: "The purpose of this Act is to stop in channels of commerce the shipment of these machines which the States are powerless to keep out of the channels of interstate commerce. Actual enforcement against those people who gamble or use these machines wrongfully in the States is left to the States . . . ." Id., 13, 643.

[21]Congressman Baring also argued that the measure was discriminatory in that it singled out reel or drum type slot machines while there were

Several congressmen questioned the effectiveness of this law which left the principal responsibility for enforcing the gambling statutes with the same local authorities who had refused to enforce them in the past. Congressman Tacket of Arkansas said he felt like he was being asked to vote "against sin" because in his opinion no slot machines could be found in localities where people did not want them in the first place.[22]

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numerous different types, and he pointed out that the law would be difficult to enforce. He suggested that manufacturers could avoid the effects of the law by shipping the pay boxes and machines separately and that it would be nearly impossible to trace shipments of the slot machine parts effectively, many of which could be purchased in a common hardware store. During the committee hearings, he introduced an amendment to delete the prohibition against shipping parts or subassemblies, but the amendment was voted down by the members who felt such a change would make it too easy to circumvent the law. Several other congressmen voiced concern about the adverse effect the Act could have on many worthwhile activities which are supported by the proceeds from slot machines in facilities operated by fraternal and social organizations such as the VFW, Elks and Knights of Columbus. Others questioned the adverse effect the outright prohibition of gambling devices on Federal property would have on the morale of the armed forces since the slot machines would have to be removed from all service clubs. The bill's proponents questioned the real significance of allowing these organizations to retain these machines but pointed out that enforcement of the antigambling laws against the private establishments which already had machines would be left up to the local authorities at any rate. 96 Cong. Rec. 13,644, 13,651-53 (1950).

[22] Id., 13,655.

After passing the House,[23] the bill was returned to the Senate, which rejected the House amendments and requested a conference.[24] The conference committee accepted the House version and sent it back to the Senate where it was vigorously challenged by Senator Malone of Nevada. He expressed doubt about the constitutionality of the Act which he felt at least indirectly revoked Nevada's law legalizing gambling in that it required the passage of additional legislation by the Nevada legislature before new slot machines could be imported into the State.[25] He said he could have accepted the original version of the bill but he could not agree to the changes in § 1172 approved by the House. Proponents countered that the bill did not have anything at all to do with gambling conducted within the several States, expressing their agreement that the procedure was necessary to avoid conflicts between the governors and the State legislatures.[26]

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[23]Congressman Rogers introduced one amendment on the floor of the House which made it possible for Alaska, Hawaii, Puerto Rico, the Virgin Islands and Guam to exempt themselves from the provisions of the Act in the same way as the States, and it was approved prior to passage of the Act. Id., 13,650.

[24]The House conferees rejected two amendments proposed by Senator Johnson. One would have allowed States in which slot machines were legal to authorize shipment of the machines out of the State for repairs. The amendment was voted down because it would have in effect nullified the entire statute by allowing slot machine owners in States like Nevada to ship their machines into any other State whether or not use of the machines was legal in that State. They pointed out that under the House version a State with a manufacturing facility could exempt shipments to that facility by enacting the appropriate legislation. The other amendment would have allowed operation of slot machines on Federal property located in States where use of slot machines was legal, but the House conferees felt this would establish a far-reaching precedent regarding State control over Federal property. Conf. Rep. No. 3111, 81st Cong., 2d Sess. 7 (1950).

[25]See note 20 and accompanying text, supra.

[26]96 Cong. Rec. 15,357 (1950).

Senator Malone was joined by several senators from States in which pari mutuel gambling had been legalized who feared that the definition of gambling devices in the House version was still broad enough to cover devices such as pinball machines and pari-mutuel machines. During the floor debate Senator Johnson assured these senators that this was not the case and that only slot machines were proscribed.[27]

Eventually, all these objections were overcome; the conference report was accepted by both the House and the Senate;[28] and the bill was forwarded to the President, who signed the Johnson Act into law on January 2, 1951.[29]

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[27]During Senate debate of the measure on December 19, 1950, the following colloquy took place between Senator Johnson and Senator O'Conor of Maryland:

> S. Johnson: "The intention of the committee, the intention of the crime commission, the intention of the Attorney General, the intention of the Senate Committee on Interstate and Foreign Commerce, of which the Senator from Maryland is an honored and very useful member, the intention of the Senate itself, and the intention of the conferees appointed by the Senate were to confine the proposed legislation specifically to slot machines, and to nothing else."
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> S. O'Conor: "Carrying out the Senator's thought, it is my understanding that legal opinion has already been secured which supports the Senator's statement in that respect."
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> S. Johnson: "That is correct."

Id., 16,734. Throughout the debates in the Senate and the House several Congressmen and Senators expressed the opinion that the slot machine was a particularly sinister gambling device that warranted special attention of the Congress. See, e.g., the remarks of Congressman Preston at 96 Cong. Rec. 13,638 (1950).

[28]The Senate accepted the Conference Report on December 19, 1950, and the House accepted it on December 20, 1950.

[29]Pub. L. 81-906, 64 Stat. 1134, January 2, 1951.

II. COURT INTERPRETATION of the Johnson Act

The courts have experienced some difficulty in interpreting the Johnson Act, and their opinions have not always been consistent. In general, the courts have upheld the constitutionality of the Act[30] and applied it to a wide range of machines and devices,[31] with the exception of two important limitations.

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[30] e.g., § 1172 does not deprive a person of his property without due process in that its terms do not apply to property already in a State as long as it remains in the State. United States v. 65 Slot Machines, 102 F. Supp. 922 (W.D.La. 1952). § 1172 does not violate the Equal Protection Clause because it promulgates a uniform, nationwide policy without State action and any State has an equal right to take such action. Id. The Act does not fail to satisfy the requirements of due process because of vagueness. No. Beach Amusement Co. v. United States, 240 F.2d 729 (4th Cir., 1957); United States v. 46 Gambling Devices, 138 F. Supp. 896 (D. Md. 1956). The registration requirements of § 1173 do not violate the Fifth Amendment protection against self-incrimination since mere possession of gambling devices is legal, and the protection is not prospective in its application. United States v. Ansani, 138 F. Supp. 451 (N.D. Ill. 1955); United States v. 19 Automatic Pay-Off Pinball Machines, 113 F. Supp. 230 (W.D. La. 1953).

[31] When applying the definition of "gambling device", codified in § 1171, some courts showed a willingness to read the statute liberally to cover almost any type of gambling device or machine that was activated by a coin or token, United States v. 24 Digger Merchandising Machines, 202 F.2d 647 (8th Cir., 1953), cert. denied, 345 U.S. 998 (1953); United States v. Brown, 156 F. Supp. 121 (N.D. Iowa 1957); or which had been "designed or manufactured as a gambling device." United States v. 19 Automatic Pay-Off Pinball Machines, 113 F. Supp. 230 (W.D. La. 1953). Other courts, noting the restrictive language of this section and the penal character of the entire Act, construed the language strictly and refused to apply the statute unless the device was a traditonal slot machine with the traditional insignia, United States v. Three Gambling Devices, Known as Jokers, 161 F. Supp. 5 (W.D. Pa. 1957), including "drums" or "reels", United States v. One Electric Pointmaker, 149 F. Supp. 427 (N.D. Ind. 1957), or unless the device was clearly an "essential part" or "subassembly" of such a machine. United States v. Ansani, 240 F.2d 216 (7th Cir., 1957), cert. denied, 353 U.S. 936 (1957); United States v. McManus, 138 F. Supp. 164 (D. Wyo. 1952). This situation led to great confusion, as it was possible for a machine to be covered in one circuit and not covered in another. For example, pinball machines were generally excluded, United States v. Korpan, 237 F.2d 676 (7th Cir., 1956); United States v. Five Gambling Devices, 252 F.2d 210 (7th Cir.,

The first limitation was applied when Federal authorities attempted to prosecute several persons who had not been directly involved in any interstate transactions since passage of the Johnson Act for their failure to comply with the registration and filing requirements of § 1173. The lower courts consistently dismissed the charges on the ground that Congress could not constitutionally apply any conditions or restrictions to purely intrastate activities.[32] The Supreme Court agreed to review three of these cases,[33] and while their decisions did not definitely affirm this reasoning, it did uphold the decisions of the

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1958); United States v. McManus, 138 F. Supp. 164 (D. Wyo. 1952), but the United States District Court for the western district of Louisiana applied the Act to pinball machines that had originally been used for gambling, even though the pay-off devices had been removed prior to passage of the Act. United States v. 19 Automatic Pay-Off Pinball Machines, 113 F. Supp. 230 (W.D. La. 1953). In several cases "digger machines" which are commonly found at carnivals were declared to be "gambling devices", usually because they had a "slot" into which the player inserted coins. United States v. 24 Digger Merchandizing Machines, 202 F.2d 647 (8th Cir., 1953), cert. denied, 345 U.S. 998 (1953); United States v. 10, More or Less, Digger Machines, 109 F. Supp. 825 (E.D. Mo. 1952); United States v. Two Hollycrane Slot Machines, 136 F. Supp. 550 (D. Mass. 1955). Most courts applied it to "booster machines" that enabled a bartender or other person to operate a slot machine without a coin deposit or pay-out box by remote control. United States v. Ansani, 240 F.2d 216 (7th Cir., cert. denied, 353 U.S. 936 (1957), and one court applied it to "booster machines" that were being used in conjunction with other types of machines. United States v. Three Trade Boosters, 135 F. Supp. 24 (M.D. Pa. 1955).

[32]United States v. Denmark, 119 F. Supp. 647 (S.D. Ga. 1953); United States v. Braun, 119 F. Supp. 646 (S.D. Ga. 1953); United States v. Five Gambling Devices, 119 F. Supp. 641 (N.D. Ga. 1952); United States v. 15 Mills Blue Bell Gambling Machines, 119 F. Supp. 74 (M.D. Ga. 1953); United States v. 178 Gambling Devices, 107 F. Supp. 394 (S.D. Ill. 1952).

[33]United States v. Five Gambling Devices, 119 F. Supp. 74 (M.D. Tenn. 1953); United States v. Denmark, 119 F. Supp. 647 (S.D. Ga. 1953); United States v. Braun, 119 F. Supp. 646 (S.D. Ga. 1953).

lower courts.[34] The government argued that read literally the Act reached all dealers, transactions and unreported possession of such devices without reference to their interstate or intrastate character and that such reporting was necessary to effectively enforce the prohibition against interstate shipments.

The Court admitted that Congress possesses the sole power to regulate interstate commerce and an "inexact power" to make all laws necessary to carry out this power enumerated in Article I, § 8 of the Constitution,[35] but the Court also stated that Congress had not made its intentions clear. Therefore, the Court ruled that it must exercise restraint by interpreting the statute so as not to raise "grave constitutional questions", and as a result, it refused to overrule the interpretation of the lower courts.[36]

In a vigorous dissent four justices argued that there was no imperative which forced the Court to adopt a restrictive interpretation in the absence of a clear congressional intent to exercise its full power under the Commerce Clause when to do otherwise would require the Court to face a serious constitutional question. The dissenters felt the Court should have gone on to answer affirmatively the basic question of "whether Congress is empowered by the Constitution to require information, reasonably necessary and appropriate to make effective and enforceable a concededly valid ban on interstate transportation of gambling devices, from persons not shown to be themselves engaged in interstate activity."[37]

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[34] United States v. Five Gambling Devices, 346 U.S. 441 (1953).

[35] Id. at 447. [36] Id. at 448.

[37] Id. at 460 (Dissenting opinion).

The first limitation was applied when Federal authorities attempted to prosecute several persons who had not been directly involved in any interstate transactions since passage of the Johnson Act for their failure to comply with the registration and filing requirements of § 1173. The lower courts consistently dismissed the charges on the ground that Congress could not constitutionally apply any conditions or restrictions to purely intrastate activities.[32] The Supreme Court agreed to review three of these cases,[33] and while their decisions did not definitely affirm this reasoning, it did uphold the decisions of the

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1958); United States v. McManus, 138 F. Supp. 164 (D. Wyo. 1952), but the United States District Court for the western district of Louisiana applied the Act to pinball machines that had originally been used for gambling, even though the pay-off devices had been removed prior to passage of the Act. United States v. 19 Automatic Pay-Off Pinball Machines, 113 F. Supp. 230 (W.D. La. 1953). In several cases "digger machines" which are commonly found at carnivals were declared to be "gambling devices", usually because they had a "slot" into which the player inserted coins. United States v. 24 Digger Merchandizing Machines, 202 F.2d 647 (8th Cir., 1953), cert. denied, 345 U.S. 998 (1953); United States v. 10, More or Less, Digger Machines, 109 F. Supp. 825 (E.D. Mo. 1952); United States v. Two Hollycrane Slot Machines, 136 F. Supp. 550 (D. Mass. 1955). Most courts applied it to "booster machines" that enabled a bartender or other person to operate a slot machine without a coin deposit or pay-out box by remote control. United States v. Ansani, 240 F.2d 216 (7th Cir., cert. denied, 353 U.S. 936 (1957), and one court applied it to "booster machines" that were being used in conjunction with other types of machines. United States v. Three Trade Boosters, 135 F. Supp. 24 (M.D. Pa. 1955).

[32]United States v. Denmark, 119 F. Supp. 647 (S.D. Ga. 1953); United States v. Braun, 119 F. Supp. 646 (S.D. Ga. 1953); United States v. Five Gambling Devices, 119 F. Supp. 641 (N.D. Ga. 1952); United States v. 15 Mills Blue Bell Gambling Machines, 119 F. Supp. 74 (M.D. Ga. 1953); United States v. 178 Gambling Devices, 107 F. Supp. 394 (S.D. Ill. 1952).

[33]United States v. Five Gambling Devices, 119 F. Supp. 74 (M.D. Tenn. 1953); United States v. Denmark, 119 F. Supp. 647 (S.D. Ga. 1953); United States v. Braun, 119 F. Supp. 646 (S.D. Ga. 1953).

lower courts.[34] The government argued that read literally the Act reached all dealers, transactions and unreported possession of such devices without reference to their interstate or intrastate character and that such reporting was necessary to effectively enforce the prohibition against interstate shipments.

The Court admitted that Congress possesses the sole power to regulate interstate commerce and an "inexact power" to make all laws necessary to carry out this power enumerated in Article I, § 8 of the Constitution,[35] but the Court also stated that Congress had not made its intentions clear. Therefore, the Court ruled that it must exercise restraint by interpreting the statute so as not to raise "grave constitutional questions", and as a result, it refused to overrule the interpretation of the lower courts.[36]

In a vigorous dissent four justices argued that there was no imperative which forced the Court to adopt a restrictive interpretation in the absence of a clear congressional intent to exercise its full power under the Commerce Clause when to do otherwise would require the Court to face a serious constitutional question. The dissenters felt the Court should have gone on to answer affirmatively the basic question of "whether Congress is empowered by the Constitution to require information, reasonably necessary and appropriate to make effective and enforceable a concededly valid ban on interstate transportation of gambling devices, from persons not shown to be themselves engaged in interstate activity."[37]

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[34] United States v. Five Gambling Devices, 346 U.S. 441 (1953).

[35] Id. at 447. [36] Id. at 448.

[37] Id. at 460 (Dissenting opinion).

The second limitation involved the filing requirements contained in § 1173. The courts said that although the registration requirements of this section were valid,[38] the filing requirements violated the Fifth Amendment protection against self-incrimination since they required a dealer to file evidence documenting any and all illegal transactions with the Attorney General.[39] Thus it became virtually impossible for the Federal agencies to obtain the documentary evidence necessary to trace the individual gambling devices or their parts into the channels of interstate commerce. Taken together, these two restrictions and the fact that the Act applied only to slot machines made it very difficult for the Federal Government to make any headway in its fight against organized crime syndicates.[40]

III. LEGISLATIVE HISTORY OF THE GAMBLING DEVICES ACT OF 1962

The shortcomings of the Johnson Act were recognized almost immediately after its passage, and moves to clarify its terms and toughen its sanctions were initiated shortly thereafter. Countless public statements were issued,[41] and between 1951 and 1962 over 25 bills to

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[38] United States v. Ansani, 240 F.2d 216 (7th Cir., 1957), cert. denied, 353 U.S. 936 (1957).

[39] United States v. Ansani, 138 F. Supp. 451 (N.D. Ill. 1955).

[40] See note 41, infra.

[41] The Kefauver Committee went out of existence on September 1, 1951, but before it did, it issued three interim reports and a final report summarizing its findings and making 22 major recommendations. S. Rep. No. 2370, 81st Cong., 2d Sess. (1950); S. Rep. No. 141, 82d Cong., 1st Sess. (1951); S. Rep. No. 307, 82d Cong., 1st Sess. (1951); S. Rep. No. 725, 82d Cong., 1st Sess. (1951). One of these recommendations was to extend the coverage of the Johnson Act to include all gambling devices and machines, not just slot machines. E. Kefauver, Crime in

to amend the Act were introduced in Congress.[42] However, no effective action was taken until Congress passed the Gambling Devices Act of 1962

America 326 (1951). On June 6, 1961, Robert F. Kennedy, then Attorney General of the United States, made the following remarks when testifying before the Senate Judiciary Committee in support of S. 1658:

> Ten years of experience in enforcement of this act show that there are serious flaws and loopholes, and that a major revision is necessary.
>
> The Johnson Act now covers a machine which has a drum or wheel with symbols thereon, oranges, cherries, plums and here and there a jackpot. This is the "one-arm bandit." The Johnson Act describes the operation of this machine as having some element of chance which may deliver or entitle the player to receive money or property. It further describes a machine which is coin operated and, of course, the machine covered by the act. It also covers the so-called "digger" or "crane" merchandise machine and some variations thereof. However, it does not cover roulette machines or many other devices common to gambling casinos.
>
> Frankly, Mr. Chairman, there is no logical reason why these devices should not be banned from interstate commerce. In addition, the existing definition will not extend to a machine in current use which is in every practical respect a "one-arm bandit," even to the extent of its physical appearance. The machine I refer to is called a "point maker." On its face is a glass on which are painted the traditional slot machine symbols which I mentioned. Behind the glass are a series of lights which flash on and off until one remains in each column. The machine registers free games which can be played off or paid off. This machine has been contrived by the gamblers to evade the provisions of the Johnson Act. Because it has no drum or wheel, is not coin operated, and does not deliver any money directly to the player, it is not covered by the act.

S. Rep. No. 645, 86th Cong., 1st Sess. 2 (1961).
The following excerpt from a letter to Congressman Oren Harris from Herbert J. Miller, Deputy Attorney General of the United States, dated June 8, 1962, was introduced into the record during committee hearings: "Although the complete pattern of racketeer control in this industry has not been exposed to public view since the hearings of the Special Committee to Investigate Organized Crime in Interstate Commerce in 1950-51, intelligence activities conducted by Federal investigative agencies indicate the influence of organized crime in slot machines and related gambling devices has not diminished since the time of the hearings." H.R. Rep. No. 1828, 86th Cong., 1st Sess., Appendix A (1961).

[42]For example, the earliest bill introduced to amend the Johnson Act by requiring that all records filed with the Attorney General be made available for public inspection was introduced by Congressman Bennett of Michigan on March 19, 1951. In early 1953 a comprehensive crime control

as part of then Attorney General Robert F. Kennedy's legislative program to combat organized crime and racketeering.[43]

In its original form the bill included several controversial sections designed to give the Attorney General broad powers to combat organized crime. Most important from the Attorney General's point of view were the provisions which 1) expanded the definition of gambling devices reflected in § 1171 to include almost any type of machine (with

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bill was introduced by Senators Kefauver, Wiley, and Tobey, all of whom were members of the Kefauver Committee. One section of this bill would have amended the definition of gambling devices in the Johnson Act to include any gambling device except those used at a legalized pari-mutuel racetrack. Similar measures were introduced in both houses of Congress in 1957 and 1959. Following the Supreme Court's decision in United States v. Five Gambling Devices, 36 U.S. 441 (1953) several measures to clarify the registration requirements of the Act were considered, but no final action was taken on any of them. All these bills would have applied the registration requirements to purely intrastate activities and the feeling of some was that such a rule would have exceeded Congress's power to regulate interstate commerce. Memo from Warren Olney, II, Assistant Attorney General, Criminal Division, to William P. Rogers, Deputy Attorney General, dated April 22, 1955. Other bills would have increased the Federal Bureau of Investigations' access to records compiled under the act, given the Attorney General power to grant immunity to key witnesses in certain cases, and expanded the record-keeping requirements of § 1173.

[43]When Senator Eastland of Mississippi, Chairman of the Senate Judiciary Committee, introduced S. 1658, 86th Cong., 1st Sess. on April 18, 1961, he also introduced the bulk of the Attorney General's program in the form of five other bills (S. 1653 - to amend Title 18 to prohibit travel in aid of racketeering enterprises; S. 1654 - to amend § 1073 of Title 18 known as the Fugitive Felony Act; S. 1655 - to amend Chapter 95 of Title 18 to authorize compelling of testimony under certain circumstances and the granting of immunity in connection therewith; S. 1656 - to amend Chapter 50 of Title 18 regarding the transmission of bets, wagers and related information; and S. 1657 - to prohibit interstate transportation of gambling paraphernalia).

the exception of pari-mutuel machines) that could be used for gambling,[44] 2) revised the registration and marking provisions contained in § 1173 by clarifying who must comply with these provisons and what information they must furnish, 3) eliminated the filing requirements in § 1173 to avoid the Fifth Amendment self-incrimination problem that arose under the Johnson Act,[45] and 4) added three new subsections to § 1173, giving

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[44] That section 1(a) (2) of the Act of January 2, 1951 (64 Stat. 1134; 15 U.S.C. 1171), is amended to read as follows:

(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, provided that the provisions of this subsection shall not apply to pari-mutuel betting equipment or materials used or designed for use at racetracks where betting is legal under applicable State laws; or

[45] Sec. 4. Section 3 of such Act is amended to read as follows:

Sec. 3. (a) It shall be unlawful for any person during any calendar year to engage in the business of manufacturing, repairing, reconditioning, dealing in, or operating 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, or sells, ships, or delivers such device in interstate or foreign commerce, or sells, ships, or delivers such device knowing that it will be introduced into interstate or foreign commerce, unless such person shall, during the month prior to engaging in such business in that year, register with the Attorney General of the United States his name and trade name and the address of each of his places of business, designating his principal place of business within the United States

(b) Every person required to register under the provisions of this Act shall maintain an inventory record of all gambling devices owned, possessed, or in his custody as of the close of each calendar month. The record shall show the individual identifying mark and serial number of each assembled gambling device and the quantity, catalog listing, and description of each separate subassembly or essential part, together with the location of each item listed therein.

(c) Every person required to register under the provisions of this Act shall maintain for each place of business a record for each calendar month of all gambling devices sold,

continued

delivered, or shipped in intrastate, interstate, or foreign commerce. The record of sales, deliveries, and shipments for each place of business shall show the individual identifying mark and serial number of each assembled gambling device and the quantity, catalog listing, and the description of each separate subassembly or essential part sold, delivered, or shipped together with the name and address of the buyer and consignee thereof and the name and address of the carrier.

(d) Every person required to register under the provisions of this Act shall maintain for each place of business a record for each calendar month of all gambling devices manufactured, purchased, or otherwise acquired. This record shall show the individual identifying mark and serial number of each assembled gambling device and the quantity catalog listing, and description of each separate subassembly or essential part, manufactured, purchased, or otherwise acquired together with the name and address of the person from whom the device was purchased or acquired and the name and address of the carrier.

(e) Every manufacturer required to register shall number seriatim each assembled or partially assembled gambling device which is to be sold, shipped, or delivered, and shall stamp on the outside front of each such assembled or partially assembled gambling device so as to be clearly visible the number of the device, the name of the manufacturer, and the date of manufacture. And every person required to register under the provisions of this Act shall record the data herein designated in the records required to be kept.

(f) Each record required to be maintained under the provisions of this Act shall be kept for a period of five years.

(g) (1) It shall be unlawful for any person required to register under the provisions of this Act to sell, deliver, ship, or possess any gambling device which is not marked and numbered as required by this Act or for any person to remove, obliterate, or alter the manufacturer's name, the date of manufacture, or the serial number on any gambling device;

(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; and

(3) It shall be unlawful for any person who has failed to register as required by this Act or who has failed to maintain the records required by this Act to manufacture, recondition, repair, sell, deliver, ship, or possess any gambling device.

the Federal Bureau of Investigation access to these records,[46] providing for a grant of immunity to individuals who may be forced to testify or produce their records,[47] and giving the Attorney General the power to promulgate all regulations necessary to carry ou the purposes of this Act,[48] and 5) banned the shipment of gambling devices in foreign commerce.[49]

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[46](h) Agents of the Federal Bureau of Investigation shall, at the principal place of business within the United States of any person required to register by this Act, at all reasonable times have access to and the right to copy any of the records required to be kept by this Act, and in case of refusal by any person registered under this Act to allow inspection and copying of the records required to be kept, the United States district court where the principal place of business is located shall have jurisdiction to issue an appropriate order compelling production.

[47](i) No person shall be excused from maintaining the records designated herein, producing the same or testifying before any grand jury or court of the United States with respect thereto for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a criminal penalty or forfeiture. But upon asserting the privilege against self-incrimination any natural person may be required to open the records designated herein to inspection or to testify before any grand jury or court of the United States with respect thereto: That no such person shall be criminally prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing disclosed as a result of the inspection of such records or testimony with respect thereto. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this Act.

[48](j) The Attorney General is authorized and directed to make and enforce such regulations as may in his judgment be necessary to carry out the purposes of this Act and the breach of any of such regulations shall be punishable as provided in section 6 of this Act.

[49]Sec. 2. Section 1 of such Act is further amended by adding thereto the following subsections:

(d) The term "interstate commerce" includes commerce between one State, possession, or the District of Columbia and another State, possession, or the District of Columbia.

(e) The term "foreign commerce" includes commerce with a foreign country.

(f) The term "intrastate commerce" includes commerce wholly

In substance, the Senate went along with these changes, but the Senate Committee on the Judiciary also proposed two additional amendments that were accepted by the Senate. The first one made it easier to qualify for an exemption by exempting the shipment of gambling equipment into a State where the use of the equipment was legal under State laws.[50] The second one dropped the prohibition against shipping gambling devices to foreign countries for reasons similar to those which had motivated the rejection of a similar provision in the Johnson Act.[51]

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within one State, the District of Columbia, or possession of the United States.

Section 3. The first paragraph of section 2 of such Act is amended to read as follows:

It shall be unlawful knowingly to transport any gambling device in interstate or foreign commerce: 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.

[50](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, Provided that the provisions of this subsection shall not apply to parimutuel or other betting equipment or materials used or designed for use at racetracks or other licensed gambling establishments where betting is legal under applicable State laws; or

(emphasis added).

[51]S. Rep. No. 645, 86th Cong., 1st Sess., 2-3 (1961). See note 15 supra.

Although the House Committee on Interstate and Foreign Commerce rewrote the entire bill, the only substantive change made in the House version was the addition of § 1178 which expressly exempted pari-mutuel machines and certain amusement devices covered under the Johnson Act in several circuits.[52]

When the bill went to conference, several conferees voiced the concerns of the members of both houses who had expressed their reservations about the important new provisions of § 1173 regarding immunity[53] and the authority of the Attorney General to promulgate regulations.[54] In the end these arguments won out and both provisions were dropped. The House and Senate quickly accepted this weakened version, and the bill was signed into law on October 18, 1962.[55]

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[52] See note 31 supra.

[53] Objections to this provision were first voiced by Senator Jacob Javits of New York, who questioned the wisdom of forcing a man to incriminate himself by enacting such a broad immunity provision. He did not feel the Fifth Amendment protection against self-incrimination should be so easily circumvented. 108 Cong. Rec. 13,945 (1961). He was joined in his remarks by Senator John A. Carrol, who pointed out that there were already 22 similar laws on the books, and Congressman Oren Harris, who emphasized the fact that this provision was "violently opposed by labor unions." Id., 22,617.

[54] Several senators and representatives were afraid this provision represented an unconstitutional delegation of legislative authority to the executive branch of government. Conf. Rep. No. 2319, 87th Cong., 1st Sess. (1962).

[55] Pub. L. 87-840, October 18, 1962, 76 Stat. 1075.

IV. COURT INTERPRETATIONS OF THE GAMBLING DEVICES ACT OF 1962

The Gambling Devices Act of 1962 greatly increased the usefulness of the Johnson Act by expanding its scope and eliminating its most serious ambiquities. In most cases, the courts have been willing to accept a broad definition of "gambling devices" and to apply it to a wide range of machines not expressly exempted by § 1178.[56] The courts have also been consistent in upholding the constitutionality of the Act against claims that it is too vague[57] or that it violates the Fifth Amendment protection against self-incrimination.[58] Most importantly, however, the registration requirements set forth in § 1173 have been enforced, and the courts, apparently influenced by developments in other areas of the law, have been willing to recognize Congress's power under the Commerce Clause to regulate purely intrastate activities as long as these activities affect in some way, no matter how insignificantly, interstate commerce.[59]

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[56](Pinball machines) United States v. Various Gambling Devices, 368 F. Supp. 661 (N.D. Miss. 1973); United States v. Five Gambling Devices, 346 F. Supp. 999 (W.D. La. 1972); United States v. Two Coin-Operated Pinball Machines, 241 F. Supp. 57 (W.D. Ky. 1965); (Trade boosters) United States v. 11 Star-Pack Cigarette Merchandising Machines, 248 F. Supp. 933 (E.D. Pa. 1966); (Bonanza machines) United States v. Wilson, 475 F.2d 108 (9th Cir., 1973).

[57]United States v. H.M. Banson Distributing Co., 398 F.2d 929 (6th Cir., 1968).

[58]United States v. Five Gambling Devices, 346 F. Supp. 999 (W.D. La. 1972). The judge in this forfeiture proceeding refused to rule that this Federal forfeiture statute (§ 1176) violated the due process requirements of the Constitution, but he did note that the dicta in United States v. U.S. Coin and Currency, 401 U.S. 715 (1971) did cast a shadow over the due process aspects of all forfeiture statutes. Id., at 1004.

[59]United States v. Five Gambling Devices, 346 F. Supp. 999 (W.D. La. 1972), citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), which upheld the public accommodations sections of the Civil Rights Act of 1964.

The enactment of the bulk of the Attorney General's legislative program to combat organized crime in 1961 and 1962, of which the Gambling Devices Act of 1962 was a part,[60] signaled a major shift in the investigative activities of the Federal Bureau of Investigations away from the cold war emphasis on political subversion to increased emphasis on the threat of organized crime. Aided by these new laws and an increased number of agents assigned to criminal investigations, the FBI began to make substantial progress in spite of the fact that the really dramatic gains did not come until after the enactment of the Omnibus Crime Control & Safe Streets Act of 1968[61] and the Organized Crime Control Act of 1970.[62]

V. TEXT OF STATUTE

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

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[60] See note 43 supra.

[61] Pub. L. 90-351, 82 Stat. 197, June 19, 1968.

[62] Pub. L. 91-452, 84 Stat. 922, October 15, 1970.

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.

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

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, 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.

Nothing in this chapter shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act.

Sec. 1173. Registration of manufacturers and dealers -- Activities requiring registration; contents of registration statement

(a)(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.

Numbering of devices

(b)(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.

Records; required information

(c)(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)(3) 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 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.

Retention of records

(d) 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 for the year with respect to which such record is required to be maintained.

Dealing in, owning, possessing or having custody of devices not marked or numbered; false entries in records

(e)(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.

Authority of Federal Bureau of Investigation

(f) 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.

Sec. 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.

Sec. 1175. Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited

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.

Sec. 1176. Penalties

Whoever violates any of the provisions of sections 1172 to 1174 or 1175 of this title shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 1177. Confiscation of gambling devices and means of transportation; laws governing

Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter 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 laws; 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 chapter, 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 chapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

Sec. 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 pari-mutuel 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.

APPENDIX E

BRIBERY IN SPORTING CONTESTS

18 U.S.C. § 224

W.C.W.

I. LEGISLATIVE HISTORY

Although athletic competition is a very important part of the American way of life,[1] the sports world has, from time to time, been plagued by scandals involving "fixed contests" or players who have been bribed not to do their best.[2] For the most part, regulation of these

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[1]Sports in America is big business, employing thousands of people and accounting for millions of dollars in revenue each year, but more than that, athletic competition is viewed by many Americans with a special reverence not reserved for other forms of activity. For whatever psychological or sociological reasons sports events represent to them the epitome of our competitive system which encourages men to work hard to win, being bound only by the restraints of good sportsmanship. They believe that the best man will always win and that more often than not that man will be the one who has worked hardest and practiced longest. Many educators and parents feel the lessons a boy or girl learns on the athletic fields are the ones which will lead to success in later life. Our military academies are greatly influenced by the words of General Douglas MacArthur, who said, "On the fields of friendly strife are sown the seeds that on other days in other fields will reap the fruits of victory." As a result the best teams and individual performers are often widely acclaimed and held in high esteem by large segments of our population. They are held out as the finest examples of American manhood or womanhood whose lives should be emulated by our young people. This is why a scandal involving sports figures is so distasteful to so many people. See, e.g., 109 Cong. Rec. 2016 (1963); 110 Cong. Rec. 923 (1964).

[2]Most people are familiar with the Black Sox Scandal of 1919 or the allegation that many boxers have intentionally lost a fight or "taken a dive" as it is commonly known, but another particularly notorious example which vividly demonstrates the threat to collegiate athletics posed by organized criminal elements involved the Bradley University basketball team. On December 7, 1950, Bradley, which at the time was ranked number one in the nation, defeated Oregon State by a score of 77-74 in an important intersectional contest. The captain of the team, Gene Melchiorre, and the leading scorer, Fred Schlicter, each scored 21 points. No one noticed anything unusual, assuming that the Bradley team, which had been favored by nine points, had faced a determined Oregon State team. However, several months later during the course of an investigation of organized crime in New York City, evidence was developed which indicated that Bradley had shaved points in order to win by fewer than nine points. Melchiorre was the contact man with a large gambling organization, headed by Salvatore Tarto Sollazzo, which on this particular night had paid $4000 to the members of the Bradley team. 108 Cong. Rec. 19,175 (1962).

events has been left to the States[3] and various private athletic associations who can apply sanctions against their members,[4] but in 1960 and 1961 two major scandals involving college basketball focused attention on the need for Federal legislation. Both scandals concerned the payment of bribes to athletes from several different schools in order to influence the outcome of games in many States.[5] The payments were controlled by nationwide criminal syndicates that successfully avoided the sanctions of the Federal Government, the various State and local governments and private athletic associations. The Federal Government had not enacted

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[3]As of January 22, 1964, 38 States had passed laws making it illegal to bribe anyone in order to influence the outcome of a sporting event. 110 Cong. Rec. 920 (1964).

[4]e.g., National Collegiate Athletic Association (NCAA), American Football Coaches Association, National Association of Basketball Coaches, National Association of Collegiate Coaches, Eastern College Athletic Conference (ECAC), National Football League (NFL), and National Association of Professional Baseball Leagues.

[5]Both scandals involved successful attempts by gamblers to bribe college basketball players. In one case a New York City attorney attempted to fix 25 games in 10 different States. 110 Cong. Rec. 921 (1964). The other one involved 50 games in 23 cities and 17 States. 107 Cong. Rec. 11,706 (1961). In total, 26 men from 15 schools were found to have accepted $44,000 in bribes. 108 Cong. Rec. 19,175 (1962). One particularly disturbing aspect of these scandals from an enforcement point of view was the fact that the modus operandi of the gamblers had changed. Instead of approaching the favored teams, gamblers like Joseph Hacken and Aaron Wagman bribed members of the underdog team to lose by more than had been predicted. Several players confessed that it was normal to go full-speed on offense so the boxscore would look good while loafing on defense to allow the other team to score more than they would have. This method of shaving points was difficult to detect and almost impossible to prove. 108 Cong. Rec. 19,175 (1962).

laws giving it authority to assert its full power in this area;[6] the State governments were handicapped by either the absence of adequate laws[7] or jurisdictional limitations;[8] and the athletic associations could only take limited action such as censure or expulsion against their own members.[9]

In order to remedy this situation Senator Kenneth B. Keating of New Jersey introduced a bill in the Senate on June 29, 1961,[10] after

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[6]Letter from Byron R. White, Deputy Attorney General, to Senator James O. Eastland, Chairman, Committee on the Judiciary, March 23, 1962. In 1961 the Congress passed three laws which had some effect in this area. 18 U.S.C. § 1084, which prohibited the use of wire communication facilities for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers, may have some applicability to a sports bribery situation, but it is clearly insufficient to do the entire job. 18 U.S.C. § 1953, which prohibits interstate or foreign travel or transportation in aid of racketeering enterprises, is clearly inadequate to give the Federal Government jurisdiction over the typical fixed-game operation. Finally, 18 U.S.C. § 1952, which prohibits the use of any facility in interstate commerce, including the mail, to promote, carry on or facilitate any unlawful activity, would apparently cover extortion or bribery in violation of the law of the State in which committed or of the United States. However, it would not apply to these crimes committed in the 12 States without sports bribery laws. Memo of minority counsel, House Committee on the Judiciary, quoted at 110 Cong. Rec. 922 (1964).

[7]Letter from Byron R. White, Deputy Attorney General, to Senator James O. Eastland, Chairman, Committee on the Judiciary, March 23, 1962. See note 3 supra.

[8]Typical of the jurisdictional problems faced by the States was the inability of Michigan authorities to gain jurisdiction in the following case. A University of Oregon football player was approached by a well-known Miami Beach gambler who offered him a bribe prior to a game with the University of Michigan at Ann Arbor. The player reported the bribe attempt, but before the gambler could be apprehended by Michigan authorities, he had left the State. 110 Cong. Rec. 921 (1964). Letter from Byron R. White, Deputy Attorney General, to Senator James O. Eastland, Chairman, Committee on the Judiciary, March 23, 1962.

[9]110 Cong. Rec. 921 (1964).

[10]S. 2182, 87th Cong., 1st Sess. (1961), the text of which read:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 11,

continued

United States Code (entitled "Bribery and Graft"), is amended by adding at the end thereof the following new section:

§ 224. Bribery of participants in sporting contests

(a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence by bribery the outcome of any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery the outcome of that contest, shall be fined not more than $5,000, or imprisoned not more than 10 years, or both.

(b) In any prosecution under this section--

(1) proof that any person gave, or offered or promised to give, to any individual any valuable consideration, with intent to induce that individual (A) to refrain from participating in any sporting contest, (B) to refrain as a participant in any such contest from exerting his best effort to gain victory in that contest, or (C) to perform his duties as an official in any such contest knowingly in a manner unfair or prejudicial to any contestant in that contest, shall be prima facie proof that the person who gave, or offered or promised to give, such valuable consideration was carrying into effect a scheme in commerce to influence by bribery the outcome of that contest with knowledge of the purpose of that scheme;

(2) proof that any individual solicited, or received or agreed to receive, from any person engaged in carrying into effect any scheme in commerce to influence by bribery the outcome of any sporting contest, any valuable consideration in exchange for the agreement or promise of that individual (A) to refrain from participating in any sporting contest, (B) to refrain as a participant in that contest from exerting his best effort to gain victory in that contest, or (C) to perform his duties as an official in that contest knowingly in a manner unfair or prejudicial to any contestant in that contest, shall be prima facie proof that such individual was engaged in a scheme in commerce to influence by bribery the outcome of that contest with knowledge of the purpose of that scheme.

(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this section, is necessary to the public interest, he, upon the written approval of the Attorney General, or an Assistant Attorney General designated by him, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be

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prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under the provisions of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

(d) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, Territory, Commonwealth, or possession of the United States, and no law of any State, Territory, Commonwealth, or possession of the United States, which would be valid in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section.

(e) As used in this section--

(1) The term 'scheme in commerce' means any scheme effectuated in whole or in part through the use of any facility for transportation or communication in interstate or foreign commerce;

(2) The term 'sporting contest' means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence;

(3) The term 'participant' as used with regard to any sporting contest, means any individual engaging in that contest as a contestant individually or as a member of a team, or participating therein on behalf of a contestant or team of contestants as a manager, coach, assistant, or other retainer;

(4) The term 'best effort to gain victory,' as used with regard to the effort of any participant in a sporting contest, means the use by that participant of his maximum skill and capacity to gain victory in that contest for himself, the team of which he is a member, or the contestant served by him at the earliest time and by the most decisive margin permitted by the rules applicable to the sport in which that participant is engaging; and

(5) The term 'person' means any individual and any partnership, corporation, association, or other entity.

(b) The analysis of chapter 11, title 18, United States Code, is amended by adding at the end thereof the following new item: "224. Bribery of participants in sporting contests."

conferring with Walter Byers, Executive Director of the NCAA, and Asa S. Bushnell, Commissioner of the ECAC.[11] This bill included four major sections.[12] The first section made it illegal to conspire in interstate commerce in order to influence by bribery the outcome of any sporting event. It also specified a fine of not more than $5000, or imprisonment for not more than 10 years, or both, for violations of this section.[13] The second section established a presumption that there was a scheme in interstate commerce to influence the outcome of a sporting event whenever sufficient evidence to prove a bribe attempt could be introduced.[14] This somewhat controversial section was justified, Senator Keating argued, on the grounds that 1) there were precedents for such provisions in the Federal criminal code[15] and 2) evidence disclosed in recent investigations had made it reasonable to conclude that these bribe attempts were controlled by national crime syndicates which necessarily utilized interstate commerce.[16] The third section gave the Justice

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[11] 108 Cong. Rec. 19,174 (1962).

[12] A fifth section, subsection (e), reflected the definitions of important terms contained in the Act. See note 10 supra.

[13] Subsection (a). See note 10 supra.

[14] Subsection (b). See note 10 supra.

[15] See, e.g., 21 U.S.C. § 174.

[16] For example, an assistant District Attorney for New York County who testified before the House Committee on the Judiciary on behalf of Frank Hogan, then District Attorney for New York County, stated that:

> The experience gained from two investigations by this office into corruption in sports discloses that it is national in scope and that the criminal element does use interstate facilities of communication and transportation to carry out their nefarious schemes.

as quoted by Congressman Emanuel Celler, Chairman, Committee on the

Department the authority to request immunity for particular witnesses when it was deemed to be in the public interest to compel their testimony.[17] The last major section clearly stated that the provisions of this Act were not meant to affect in any way the authority of State and local governments to deal with this problem.[18]

The bill was stalled in committee for more than a year before a substantially altered version was reported out on September 7, 1962, near the end of the 87th Congress.[19] The committee version dropped the

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Judiciary, at 110 Cong. Rec. 921 (1964). Senator Keating emphasized that sports gamblers are forced to use interstate methods of communication and transportation because of the nature of organized sports and the requirements of gambling organizations such as the necessity of a reliable line on the contest with up to the minute advice, a method of laying-off bets and a system of finding out results quickly. 107 Cong. Rec. 11,705 (1961). Finally, Congressman William M. McCulloch of Ohio stated that the findings of the House Committee on the Judiciary indicated that interstate methods of communication such as the mail, telegraph and telephone were widely used to contact athletes and other bookmakers in both single-state and multistate fixes. 110 Cong. Rec. 921 (1964).

[17]Subsection (c). See note 10 supra and note 20 infra.

[18]Subsection (d). See note 10 supra.

[19]108 Cong. Rec. 18,814 (1962). The text of the reported version read:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 11, United States Code (entitled "Bribery and Graft"), is amended by adding at the end thereof the following new section:
>
> § 224. Bribery of participants in sporting contests
>
> (a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence by bribery the outcome of any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery the outcome of that contest, shall be fined not more than $5,000, or imprisoned not more than 10 years, or both.
>
> (b) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, territory, Commonwealth, or possession of the United States, and

controversial presumption clause and the immunity provisions. Their reasons for the immunity change were never stated,[20] but the presumption clause was dropped at the suggestion of the Justice Department which felt the clause did not satisfy the test enunciated by the Supreme Court in Tot v. United States.[21] There the Court held that the validity of a presumption created by statute depends on whether a rational connection exists between the facts proved and the fact presumed.

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no law of any State, territory, Commonwealth, or possession of the United States, which would be valid in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section.

(c) As used in this section--

(1) The term 'scheme in commerce' means any scheme effectuated in whole or in part through the use of any facility for transportation or communication in interstate or foreign commerce;

(2) The term 'sporting contest' means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence;

(3) The term 'person' means any individual and any partnership, corporation, association, or other entity.

(b) The analysis of chapter 11, title 18, United States Code, is amended by adding at the end thereof the following new item:

§ 224. Bribery of participants in sporting contests.

[20]In the opinion of the Justice Department the immunity clause in subsection (c) was phrased in terms which had been held to confer immunity from prosecution in State courts under the holdings in Ullman v. United States, 350 U.S. 422 (1950) and Reina v. United States, 364 U.S. 507 (1960). In United States v. Murdock, 284 U.S. 141 (1931) the Court said the fifth amendment does not mandate a grant of immunity from prosecution in State courts, and the provisions of subsection (d) said the Act was not intended to affect State laws in any way whatsoever. The inconsistency between subsections (c) and (d), therefore, could void these sections of the Act or the entire Act because of vagueness in their opinion. S. Rep. No. 2003, 87th Cong., 2d Sess. 6 (1962).

[21]319 U.S. 463 (1943).

Although Keating felt these changes substantially weakened the bill, he urged its swift passage, pointing out that it was still strongly endorsed by the Justice Department, the NCAA and the ECAC.[22] The Senate passed the bill with the committee amendments and referred it to the House Committee on the Judiciary where it died at the conclusion of the session.

At the beginning of the 88th Congress, three bills in the form of the bill accepted by the Senate during the prior session were introduced in the House and Senate.[23] The Senate version quickly cleared committee, and it was passed by the Senate without amendment. When it was referred to the House Committee on the Judiciary, the House bills were dropped, and the Senate version was reported out with several minor amendments, primarily designed to insure that the Act 1) applied to all efforts to influence any aspect of a contest such as the point spread not just the ultimate outcome,[24] 2) covered the bribery of all persons connected with the sporting event, not just the players,[25] and 3) proscribed illegal

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[22]108 Cong. Rec. 19,174 (1962).

[23]S. 741, 88th Cong., 1st Sess. (1963) introduced by Senator Keating. H.R. 3696, 88th Cong., 1st Sess. (1963) introduced by Congressman McCulloch. H.R. 4855, 88th Cong., 1st Sess. (1963) introduced by Congressman Lindsey.

[24]This amendment simply eliminated all references to "participants" in order to cover "bribery of any person in connection with the sporting event." H.R. Rep. No. 1053, 88th Cong., 1st Sess. 5 (1963).

[25]The members of the committee were afraid that the references to "outcome" in the Senate version might preclude coverage of situations where the ultimate result remains the same, but the point spread is changed or the fight ends in a different round. They, therefore, struck the term "outcome." Id. at 5.

activities carried on or attempted in interstate commerce only.[26] In this form the Act, which had faced very little opposition since the day it was introduced,[27] was quickly accepted by both houses of Congress and signed into law by the President on June 9, 1964.[28]

II. COURT INTERPRETATION

There have been few reported cases dealing with this statute. Its validity has never been challenged directly on appeal,[29] and in one

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[26]This amendment simply required a minor change to the wording of subsection (c)(1). Id. at 5. Other changes included some minor language changes and alteration of the prescribed penalties, so that they would conform with the penalties in the other Federal bribery statutes. Id. at 5.

[27]109 Cong. Rec. 2016, 20,597 (1963); 110 Cong. Rec. 921 (1964). The only serious objection to the bill was voiced by Congressman Meader of Michigan who was very concerned that this Act might set a Federal precedent for the regulation of sporting events as being in interstate commerce. He feared such a precedent would have an adverse effect on professional baseball with respect to the antitrust laws. At that time, several controversial court decisions had ruled that professional football was involved in interstate commerce and was subject to the antitrust laws while baseball was not. During the floor debate he was assured by several congressmen, including the Chairman of the Committee on the Judiciary and the chief sponsor of the bill in the House, that this was not the case. They responded that passage of this bill was based on the theory that Congress could enforce sanctions against bribery attempts conducted in interstate and foreign commerce and that the bill in no way inferred that sporting events generally were to be considered part of interstate commerce. Id. at 920-22.

[28]Act of June 6, 1964, Pub. L. No. 88-316, § 1(a), 78 Stat. 203.

[29]The only two reported cases as of November 1, 1974, that dealt with the direct application of this Act were United States v. Nolan, 420 F.2d 552 (5th Cir.), cert. denied, 400 U.S. 819 (1969), which involved an effort to bribe a college football player, and United States v. Donaway, 447 F.2d 940 (9th Cir. 1971), which involved a complex scheme to fix horse races. Both cases were appealed on grounds unrelated to the application of this statute.

reported case the conviction was reversed for unrelated reasons.[30] The statute appears to be technically sound.

III. TEXT OF STATUTE

§ 224. Bribery in sporting contests

(a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(b) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, territory, Commonwealth, or possession of the United States, and no law of any State, territory, Commonwealth, or possession of the United States, which would be valid in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section.

(c) As used in this section--

(1) The term "scheme in commerce" means any scheme effectuated in whole or in part through the use in interstate or foreign commerce of any facility for transportation or communication;

(2) The term "sporting contest" means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence;

(3) The term "person" means any individual and any partnership, corporation, association, or other entity.

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[30] United States v. Donaway, 447 F.2d 940 (9th Cir. 1971).

APPENDIX F

PROHIBITION OF GAMBLING SHIPS

AND WATER TAXIS

18 U.S.C. §§ 1081-1083

J.J.D.

I. LEGISLATIVE HISTORY

The Gambling Ship Statute[1] was largely a result of the operation of gambling ships off the coast of California in the late 1930's and the 1940's. After being prosecuted under California's antigambling laws for operation within the State's three mile jurisdictional limit, gambling ship owners moved beyond the three mile limit transporting patrons by water taxis and evading further prosecution.[2] Although some of these operations were halted by the Federal Government where violations of a coastwise license occurred,[3] the Gambling Ship Statute was enacted by Congress to prevent the commercial operation of gambling ships in defiance of State antigambling laws,[4] especially where no coastwise license was involved.[5] The House Report clearly stated that this statute applied to large scale commercial gambling only, and was not to be used to harass the vast number of private yachtsmen.[6]

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[1]For complete text of statutes as enacted see part III.

[2]Federal Regulation of Gambling, 60 Yale L.J. 1396, 1406 & note 62 (1951).

[3]1948 U.S. Code Cong. Serv. 1487, 1488, Letter from Attorney General Tom C. Clark to Senate Judiciary Committee as set out in H.R. Rep. No. 1700, 80th Cong., 2d Sess. (1948).

[4]1948 U.S. Code Cong. Serv. 1487, 1488, H.R. Rep. No. 1700, 80th Cong., 2d Sess. (1948).

[5]See note 3 supra.

[6]See note 4 supra.

The Treasury Department expressed approval of the bill; it considered it adequate for the purpose intended, and it anticipated no great difficulties in enforcing its provisions.[7] The Attorney General recommended a provision for forfeiture of the vessel for violation of the act as an added deterrent, a provision found in the final bill.[8] Otherwise, he found no objection to enactment of the bill.[9]

The statute was approved April 27, 1948,[10] and was codified at 18 U.S.C. §§ 1081-1083 on May 24, 1949.[11]

A 1961 Amendment to 18 U.S.C. § 1081 added the term "wire communication facility" to the definitions provided,[12] primarily in conjunction with the newly added section 1084.[13] This new section prohibited the use of wire communication facilities in the transmission of bets or wagers and gambling information in interstate and foreign commerce.

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[7] 1948 U.S. Code Cong. Serv. 1487, 1489, Letter from Secretary of the Treasury John W. Snyder to Senate Judiciary Committee as set out in H.R. Rep. No. 1700, 80th Cong., 2d Sess. (1948).

[8] See note 3 supra.

[9] Id.

[10] Pub. L. No. 80-500, ch. 235, April 27, 1948, 62 Stat. 200.

[11] Pub. L. No. 81-72, ch. 139, May 24, 1949, § 23, 63 Stat. 92.

[12] Pub. L. No. 87-216, Sept. 13, 1961, § 1, 75 Stat. 491.

[13] Id. at § 2.

The definitions as used in Chapter 50-Gambling (18 U.S.C. §§ 1081-1084) are provided in section 1081.[14] Section 1082 makes it unlawful to operate any gambling ship or to gamble on such ship if it 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. Penalties for violation of this section include a fine of up to $10,000 and/or imprisonment for not more than two years, and forfeiture of the vessel together with her tackle, apparel, and furniture, to the United States.[15]

Section 1083 makes unlawful the operation of vessels as water taxis between the United States and a gambling ship not within the jurisdiction of any State, except in case of an emergency. Civil penalties are provided in the amount of $200 for each passenger carried by an operator of a water taxi and $300 for the master or other person in charge of the water taxi, such penalties constituting liens against the vessel and enforceable by libel proceedings.[16]

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[14] See part III for complete text of statute as enacted.

[15] Id.

[16] Id.

II. COURT INTERPRETATION

United States v. Black,[17] a 1968 case from the southern district of New York, was the only reported case prosecuted under these sections. The court, in deciding pretrial motions, held that the statute was not unconstitutional, and it found that the statute was designed to help enforce State gambling laws outside of the State's jurisdiction. If the violation occurred on the high seas and beyond the territorial waters of the United States, citizenship alone would confer upon the United States jurisdiction over such extraterritorial violations.

III. TEXT OF STATUTE

§ 1081. Definitions

As used in this chapter:

The term "gambling ship" means a vessel used principally for the operation of one or more gambling establishments.

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.

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[17] United States v. Black, 291 F. Supp. 262 (S.D. N.Y. 1968).

§ 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 not more than $10,000 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.

§ 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.

APPENDIX G

THE TRANSMISSION OF GAMBLING INFORMATION

18 U.S.C. § 1084

S.C.T.

I. LEGISLATIVE HISTORY

On September 13, 1961 the President signed into law S. 1656,[1] which was designed to restrict the transmission of wagers and certain wagering information. The criminal provisions of the statute prohibit sending wagers, certain gambling-related information, or money orders to pay off gambling debts, by means of a wire communication facility in interstate or foreign commerce. The statute's civil provisions require telephone or telegraph suppliers to discontinue service to a subscriber, after written notice from a law enforcement agency that the subscriber is using a communication facility in violation of the statute. The customer is given reasonable notice that his service will be discontinued, and thus has an opportunity to obtain an injunction against the threatened action.[2]

In its original form, this legislation was forwarded to the Congress by the Attorney General,[3] along with two other proposals

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[1]S. 1656, 87th Cong., 1st Sess. (1961). Pub. L. 87-216, 75 Stat. 491. The text of the statute is included as section IV, infra.

[2]At the hearing on the injunction, the law enforcement agency in question will usually intervene as a party, presenting evidence of the subscriber's illegal use of the communication facility in support of the supplier's action. Such intervention is important in obtaining the common carrier's cooperation, because it is acting on the direction of the law enforcement agency in discontinuing service to the subscriber, and probably does not itself have the necessary information to defend against the suit.

[3]See the Attorney General's letter to the Vice President, April 6, 1961, reproduced in S. Rep. No. 588, 87th Cong., 1st Sess. 4 (1961), and to the speaker of the House, April 6, 1967, reproduced in H. Rep. No. 967, 87th Cong., 1st Sess. 4 (1961).

relating to gambling,[4] in April, 1961. These three proposals comprised the Attorney General's Program to curb organized crime and racketeering. Its purpose was twofold.[5]

The major purpose of the Attorney General's Program was to assist the States in effectuating their almost uniform policy against gambling. Information and wagers were frequently transmitted into a local jurisdiction from out-of-State racetracks, enabling local bookmakers to receive and place bets on out-of-State races. Because of the limited jurisdiction of local and State law enforcement agencies, they were unable to cut off these sources of information and to freeze out the local bookmaking operations.[6] Because these interstate wagering

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[4]The other proposals became S. 1653, which prohibits interstate travel and use of interstate facilities with intent to further a gambling business enterprise; and S. 1658, which prohibits interstate transportation of gambling devices. These bills were also signed into law on September 13, 1961, and can be found in sections 1952 and 1953 title 18 U.S.C.

[5]Attorney General Kennedy testified before the House Judiciary Committee as follows:

> . . . This bill is designed, first to assist the States and territories in the enforcement of their laws pertaining to gambling and like offenses. Second, the bill would in that regard help suppress "organized" gambling by prohibiting the use of wire communications for the transmission of gambling information in interstate and foreign commerce.

Legislation Relating to Organized Crime: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, U.S. House of Representatives, on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039, 87th Cong., 1st Sess. (May 17, 18, 19, 24, 25, 26, 31, 1961) at 26. [Hereinafter House Hearings.]

[6]The purpose of the bill . . . is . . . to assist the several States in the enforcement of their laws pertaining to gambling and to aid in the suppression of organized gambling activities by restricting the use of wire communication facilities.

S. Rep. No. 588, 87th Cong. 1st Sess. 2 (1961).

organizations were dependent upon rapid wire and telephone communications,[7] section 1084 was proposed to make the use of these facilities for gambling operations illegal.

Second, S. 1656 was part of a Federal program to eradicate the nationwide organized crime syndicates. The means chosen to achieve that goal was cutting off the major source of financial support for organized crime's illegal operations--gambling. As the Attorney General stated in testimony before the Senate Judiciary Committee in June, 1961:

> Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. . . . because profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime. . . .
>
> . . . . . .
>
> It is quite evident that modern commercial gambling operations are so completely intertwined with the Nation's communication systems that denial of their use to the gambling fraternity would be a mortal blow to their operations.
>
> This is the precise purpose of the proposed legislation.[8]

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[7]Because of bookmakers' need for the latest information on entries, scratches, jockey changes, betting odds, weather conditions, winners and prices paid in prior races, etc., nationwide or regional wire services existed to transmit this information to their subscribers who in turn would distribute it to the bookmakers. With this information, the bookmakers could decide what odds to give on any particular horse up to the start of the race. Also, in a "past-post" betting operation, the winning horses could be determined by the bookmaker before they became generally known, and wagers accepted on a race already run. Having received too many wagers on a particular entry, a bookmaker will "lay-off" some of these with a larger bookmaker in order to balance his book, and this will often be done by long distance telephone. This use of the telephone is restricted by the statute.

[8]Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before the Committee on the Judiciary, U.S. Senate, on S. 1653, S. 1654, S. 1657, S. 1658, S. 1665, 87th Cong., 1st Sess. (June 6, 19, 20, 21, and 26) 1961, 11, 6 [Hereinafter Senate Hearings].

S. 1656 was introduced in the Senate by Senator Eastland on April 18, 1961.[9] As initially drafted, the bill proposed to stop the transmission of wagers and information useful to wagering operations by penalizing common carriers who intentionally suppled wire and telephone service to these professional wagering operations for the transmission of wagering information.[10]

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[9]107 Cong. Rec. 6040 (1961). A companion bill, H.R. 7039, 81st Cong., 1st Sess. (1961), was introduced by Representative Celler on May 15, 1961. 107 Cong. Rec. 8002 (1961).

[10]S. 1656 as referred to the Senate Judiciary Committee read:

A Bill

To amend chapter 50 of title 18, United States Code, with respect to the transmission of bets, wagers, and related information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1081 of title 18 of the United States Code is amended by adding the following paragraph

The term "wire communication facility" means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, and delivery of communications) used or useful in the transmission of writing, 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. 2. Chapter 50 of such title is amended by adding thereto a new section 1084 as follows:

§ 1084. Transmission of wagering information; penalties

(a) Whoever leases, furnishes, or maintains any wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest, or knowingly uses such facility for any such transmission, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, territory, possession, or the District of Columbia.

Sec. 3. The analysis preceding section 1081 of such title is amended by adding the following item:

§ 1084. Transmission of wagering information; penalties.

In hearings before the Senate Judiciary Committee, concern was expressed that this approach to the problem was both indirect--because the proper target of the legislation was the professional gambler, not the telephone and telegraph companies--and unduly burdensome to common carriers. Senator Keating, for example, argued that the responsibility of investigating the uses to which a subscriber puts a communication facility should be on a law enforcement agency, not on the common carriers. As drafted, he said, the statute placed upon the common carriers:

> . . . the problem of deciding whether they are going to decline service and run the hazard of suit or perhaps penalties, or grant service and run the hazard of criminal prosecution . . . .[11]

The Judiciary Committee followed Senator Keating's point of view in amending subsection (a), and adding a new civil provision to the bill. The penal provision, as amended, was limited by the committee to users of a wire communication facility in interstate commerce, engaged in the business of gambling. The new subsection (d) (which is similar to proposals introduced in earlier Congresses)[12] denies the use of wire

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[11] Senate Hearings at 298.

[12] Section 4 of S. 3542, 83d Cong., 2d Sess. (1954) is similar to subsection (d) of S. 1656 in that it requires termination of service after notification. Reasonable notice and opportunity to obtain an injunction against termination of service, however, were not guaranteed to the subscriber. Criminal penalties were provided for common carriers which intentionally supplied service to those illegally transmitting wagering information in interstate commerce. Section 3 of S. 3542 resembled subsection (a) of S. 1656 as amended by the Senate Judiciary Committee in that it prohibited the transmission of wagers and wagering information by communication facility in interstate commerce.

S. 3542 was substantially the same as S. 2314, 83d Cong., 1st Sess. (1953); S. 2116, 82d Cong., 1st Sess. (1951).

services and long-distance telephones to bookmaking operations, while removing the onus of enforcement from the common carriers. In discussing a similar feature of a bill which was before the 83d Congress, Mr. Warren Olney III of the Criminal Division stated that it puts:

> . . . the legitimate communication facility . . . in a position where they [sic] can justifiably and lawfully refuse to give service where they know it is going to be used for this unlawful purpose.[13]

The aim of subsection (d) was to secure the cooperation of common carriers with law enforcement agencies in curbing professional gambling operations, and the removal of criminal sanctions directed at common carriers and their immunization from suits resulting from termination of service under the statute were offered as effective means to that end. Of course, a telephone company which refused to terminate service to a bookmaker, after notification by a law enforcement agency, would be subject to criminal penalty.[14]

A second Senate Judiciary amendment limited the scope of the criminal provision to persons "engaged in the business of betting or wagering." As drafted by the Justice Department, the proposed penalties of subsection (a) would have applied to the social bettor as well as the professional gambler. Senator Kefauver thought that the focus of the statute should be on the professional, not the social gambler.[15]

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[13]Testimony of Mr. Warren Olney III, Assistant Attorney General for the Criminal Division, Department of Justice, before the Subcommittee on Business and Consumer Interests, Comm. on Interstate and Foreign Commerce, U.S. Senate; as quoted in S. Rep. No. 1652, 83d Cong., 2d Sess. 4 (1954).

[14]S. Rep. No. 588, 87th Cong., 1st Sess. 3 (1961); House Hearings, supra at 362.

[15]Senate Hearings at 278-279.

With a further minor amendment to subsection (a),[16] S. 1656 was reported to the full Senate,[17] where an exemption was added to subsection (b) which allowed transmission of parimutuel wagering information from a State where such betting is legal, into Nevada where off-tract betting is legal.[18] The amendment does not legalize the transmission of bets or wagers into Nevada, however.

This amendment demonstrated the importance to the Congress of respecting the independence of the States in adopting a policy toward gambling in a Federal system. Since Nevada allowed off-tract betting, the Congress did not interfere.[19]

The exemption in subsection (b) for transmission of racing and other potentially gambling related information by or for a news reporting business was processed without amendment.[20]

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[16]Sending money orders by interstate wire communication facility in payment of gambling debts was prohibited under subsection (a).

[17]S. Rep. No. 588, 87th Cong. (1961).

[18]The exemption is for ". . . the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event is legal into a State in which such betting is legal." 107 Cong. Rec. 13900-13901 (1961).

[19]Subsection (c) of section 1084 title 18 U.S.C., which proceeded through the Congress without amendment, also demonstrates this sensitivity to the States' role in dealing with an essentially local problem. The provision makes clear that there is no congressional intent to pre-empt the field of gambling legislation.

[20]Any governmental limitation on freedom of speech and press raises constitutional problems under the First Amendment. In legislative proposals considered by earlier Congresses, the drafters had sought to deal with the issue by totally prohibiting transmission of the gambling related information for a limited period of time--until the race had begun, or was over. (See S. 3358, 81st Cong., 1st Sess. (1950).)
The 87th Congress allowed transmission of the information for news reporting in S. 1656, however, this information when published or

The bill, as amended, was passed in the Senate on July 28, 1961,[21] and transmitted to the House Committee on the Judiciary, where only minor changes were made[22] before passage of the bill by the House on August 21, 1961.[23] As the Senate concurred in these amendments[24] there was no need for a conference committee, and the Act was sent to the President, who signed it into law on September 13, 1961.[25]

II. COURT INTERPRETATION

The courts have had no difficulty in upholding the jurisdictional basis of section 1084 under the Commerce Clause.[26] Arguments that section 1084 infringes upon the police power reserved to the States by

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broadcast could be of some assistance to the professional gambler and bookmaker. The advantage to the bookmaker of access to information concerning upcoming races was evidently felt to be minimal when compared with the importance of allowing the public access to the news.

[21] 107 Cong. Rec. 13901 (1961).

[22] A technical amendment was made; and the Commonwealth of Puerto Rico was added to subsection (c), H.R. Rep. No. 967, 87th Cong., 1st Sess. 1 (1961). Hearings on H.R. 7039 (the companion bill to S. 1656) were held in the House Judiciary Committee in May, 1961. See note 5 supra.

[23] 107 Cong. Rec. 16533 (1961).

[24] 107 Cong. Rec. 17694 (1961).

[25] See note 1 supra.

[26] "Congress has undoubted authority respecting interstate commerce . . . ." United States v. Kelley, 254 F. Supp. 9 (S.D.N.Y. 1966); United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964). For case analysis of 18 U.S.C. § 1084, see generally Annt. 5A L.R.F. 166 (1970).

the Tenth Amendment have been dismissed, since

> . . . the Congress, in the exercise of its pervasive control over interstate commerce, may attempt to prevent the use of interstate means for the furtherance of crime.[27]

In fact, as the legislative history of section 1084 reveals, the congressional intent was not to usurp the power of the States to control gambling activity, but to aid them in effectuating their nearly uniform policy against gambling.[28]

As noted above, the Senate revealed a sensitivity to the need in a Federal system to allow the States to adopt their own policies with regard to gambling, which had led to an amendment to permit transmission of certain gambling information into a State in which wagering was legal.[29] In the Fifth Circuit it was later argued that the statute must permit transmission of bets and wagers into Nevada, because to prohibit this "defeat[s] the policies of Nevada while not aiding in the enforcement of the laws of any other State."[30]

The Court's response, based on the legislative history of section 1084, was twofold. First, the wagering was illegal under other State laws, and hence prosecution was in aid of these States' policy:

> For it is clear that if the policy of Nevada is not "defeated" in some way, then the policy of every other State that prohibits what Nevada allows could be defeated.[31]

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[27] United States v. Kelley, supra at 18. Also United States v. Borgese, supra at 296-297.

[28] See notes 6-8 and accompanying text, supra.

[29] See note 18 and accompanying text, supra.

[30] Martin v. United States, 389 F.2d 895, 897 (5th Cir. 1968).

[31] Id. at 898.

If citizens of States where off-track wagering was illegal were allowed to bet on races in Nevada, the laws of these States would be ineffective in preventing their citizens from engaging in the prohibited activity.

Second, the Court perceived an independent Federal policy against use of interstate facilities for gambling purposes,[32] which could override an inconsistent State policy.

> The power of Congress under the commerce clause . . . clearly extends to an absolute prohibition, regardless of State public policy . . . .[33]

It is to be expected whenever a limitation is placed upon an individual's right to communicate that an attack will be made on that limitation for infringing free speech. Because the transmission of bets and wagers and gambling information violates State penal statutes, however, the courts have held that this communication is not protected by the First Amendment.[34] Section 1084 has also been uniformly upheld when challenged as vague and uncertain under the due process clause of the Fifth Amendment.[35] Similarly, section 1084(d) (calling for discontinuance of service after notification by a law enforcement agency

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[32]Furthermore, assistance to the States directly was only part of the reason for enactment of section 1084. This section was part of an omnibus crime bill that recognized the need for independent Federal action to combat interstate gambling operations. . . . Moreover, this series of legislation does not stand alone, but appears as part of an independent Federal policy aimed at those who would, in furtherance of any gambling activity, employ any means within direct Federal control.
Martin v. United States, supra at 898.

[33]Id. at 899.

[34]Truchinski v. United States, 393 F.2d 627 (8th Cir. 1969), cert. denied, 393 U.S. 831, 89 S.Ct. 104, 21LEd.2d 103 (1968); United States v. Kelley, 254 F. Supp. 9 (S.D.N.Y. 1966); United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964); United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962).

[35]Katz v. United States, 369 F.2d 130 (9th Cir. 1966), reversed on

that the subscriber is in violation of section 1084(a)) has been challenged on the basis that it results in the imposition of a penalty without the constitutional protections that must be afforded a defendant in a criminal trial.[36] Since the purpose of subsection (d) was preventive, not punitive,[37] and the discontinuance of service did not subject the subscriber to the criminal penalties of subsection (a) without a separate proceeding, the provision, however, has been sustained.[38]

Construction

Section 1084 has been interpreted broadly by the courts, in recognition that the legislative history shows no congressional intent to limit the scope of its involvement in this area.[39]

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other grounds, 389 U.S. 347 (1967) ("The plain and unambiguous language used in the statute is entitled to its ordinary and reasonable interpretation." 369 F.2d at 135); Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir. 1964); Bass v. United States, 324 F.2d 168 (8th Cir. 1963); United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964); United States v. Teemer, 214 F. Supp. 952 (N.D.W.Va. 1963); United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962).

[36] Telephone News System, Inc. v. Illinois Bell Telephone Co., 220 F. Supp. 621 (N.D. Ill., E.D. 1963), affirmed, 376 U.S. 782 (1964).

[37] Telephone News System, Inc. v. Illinois Bell Telephone Co., 220 F. Supp. at 629-631.

[38] Telephone News System Inc. v. Illinois Bell Telephone Co., 220 F. Supp. at 631.

[39] The Court remarked in United States v. Yaquinta, "I find no evidence of the spirit of abnegation on the part of the Congress in the legislative history surrounding this enactment." 204 F. Supp. 276, 279 (N.D.W.Va. 1962).

Nevertheless, one important limitation on prosecutions under section 1084 imposed by the Congress, and recognized by the courts, is that the defendant must be a person engaged in the business of gambling.[40] The Ninth Circuit observed:

> As the government states, "Section 1084 was not designed to be applicable to isolated acts of wagering by individuals engaged in the business of wagering." "The legislative history of Section 1084 clearly indicates that the purpose of the legislation was to curb the activities of the professional gambler."[41]

A proprietary interest in the enterprise, however, is not required for a person to be engaged in the business of gambling; an agent as well as an owner is liable. The Court stated in Cohen v. United States:

> . . . the purpose of section 1084 is better served by imposing the duties and penalties upon those who would use communications facilities in the day-to-day operation of the gambling business, and who would therefore be best able to comply.[42]

Once a person has been determined to be in the business of gambling, the reach of the statute is extensive. A social wager by a professional gambler violates the statute when made by interstate wire communication facility,[43] even when the bet is placed after the event is over ("past-post betting").[44]

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[40]This limitation was added by an amendment in the Senate Judiciary Committee. As drafted by the Justice Department and introduced in the Congress, S. 1656 would have covered social bettors as well as professional gamblers. See note 15 and accompanying text, supra.

[41]Cohen v. United States, 378 F.2d 751, fn. 8 at 756 (9th Cir. 1967).

[42]Cohen v. United States, supra at 758.

[43]Id.

[44]United States v. Bergland, 318 F.2d 159 (7th Cir.), cert. denied; Cantrell v. United States, 375 U.S. 861 (1963).

The court's liberal attitude is also reflected in the holding that a call placed from one point to another within a single State, but which passes through a second State, is considered to be an interstate communication in violation of the statute when gambling information is transmitted.[45] Prosecution of the offense may be in a State where the communication was either transmitted or received;[46] one call may constitute a single offense.[47]

The Circuit Courts of Appeal have split on the question of whether "transmission" in subsection (a) includes receiving the prohibited gambling information[48] or is limited to sending it.[49] The broader interpretation of "transmission" would allow prosecution under the statute of bookmakers receiving bets placed by long-distance telephone. It would also reach information received from agents at the race track.[50] Both prosecutions of wire services sending gambling information and agents calling in race information would be included.

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[45] United States v. Yaquinta, supra.

[46] Cohen v. United States, supra; United States v. Synodinos, 218 F. Supp. 479 (D. Utah 1963).

[47] United States v. Swank, 441 F.2d 264 (9th Cir. 1971); United States v. Kelley, 395 F.2d 727 (2d Cir. 1968), cert. denied 393 U.S. 963 (1968).

[48] United States v. Sellers, 483 F.2d 37 (5th Cir. 1973); United States v. Taneo, 459 F.2d 445 (10th Cir. 1972), cert. denied 409 U.S. 914 (1972); Sagansky v. United States, 358 F.2d 195 (1st Cir. 1966) cert. denied, 385 U.S. 816 (1966).

[49] United States v. Stonehouse, 452 F.2d 455 (7th Cir. 1971); see also Telephone News System, Inc. v. Illinois Bell Telephone Co., 220 F. Supp. 621, 638 (N.D. Ill. 1963).

[50] Compare section 1084(d), which includes both "transmitting or receiving" in its scope.

The drafters of section 1084 and the Congress were aware of the possibility that the public's right to receive news information was potentially limited by the proscription of subsection (a) of the statute. This recognition led to the inclusion of the news reporting exemption of subsection (b).[51] The exemption has been interpreted broadly to include transmission of information to racing news publications ("scratch sheets"), as well as to general circulation publications, so long as the "scratch sheet" is sold to the general public, and no bets or wagers are accepted by the publication.[52]

"Knowledge" is an essential element of the offense defined by section 1084(a). A person engaged in the business of betting must "knowingly" make use of an interstate wire communication facility to transmit a bet and wager or gambling information.[53] "Actual" knowledge,

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[51]In testimony before the House Judiciary Committee, the Attorney General stated:

> Press information is not vital to the gamblers, but it is important to the American public. Therefore, this bill carries an exception for legitimate news reporting of sports events. There is nothing in this bill which would in any way affect the press, radio, or TV in its reporting of sports events.

S. Rep. No. 588, 87th Cong., 1st Sess. 3 (1961).

[52]Kelly v. Illinois Bell Telephone Co., 325 F.2d 148 (7th Cir. 1963). The plaintiffs were successful in obtaining an injunction against the Telephone Company's threatened discontinuance of service under section 1084(d). See also United States v. Kelly, 328 F.2d 227, 236 (6th Cir. 1964) where the court indicated that it would be unreasonable to limit the news reporting exemption to general news publications, which carry the same racing information as the "scratch sheets", even though they may be more widely used by bookmakers.

[53]In United States v. Barone, 467 F.2d 247 (2d Cir. 1972) the appellant DiBuono had been charged and convicted only of conspiracy to violate section 1084 title 18 U.S.C. With regard to his appeal, the court said:

however, need not be shown. "Knowledge" will be found if the defendant could have reasonably foreseen or anticipated the consequences of his act.[54]

In addition, the Ninth Circuit has held that knowledge of the illegality of the transmission of bets and gambling information via a wire communication facility in interstate or foreign commerce is an element of the offense under section 1084(a). The courts found, however, that there is a rebuttable presumption[55] that the defendant had such

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> The appellants and the Government both assume, and we agree, that a conviction of conspiracy to violate 18 U.S.C. § 1084 requires a showing that the defendant knew or could reasonably foresee that interstate communication would be used in furtherance of the plan of action. 467 F.2d at 249.

It could be argued that a distinction should be made between conspiracy to commit an offense--where knowledge of the act planned must logically be present--and the substantive offense--which can be committed unknowingly. Section 1084 title 18 U.S.C., however, apparently requires knowledge that an interstate communication facility is being used: "Whoever . . . knowingly uses a wire communications facility for the transmission in interstate or foreign commerce of bets . . . ."

A recent case in the 9th circuit, however, has inexplicably held to the contrary: that ". . . the knowing use of interstate facilities is not an essential element of either the substantive offense or the conspiracy to commit it." United States v. Swank, 441 F.2d 264, 265 (9th Cir. 1971). The court does not explain this statement which, upon reading the language of the statute, appears to be unsupportable, unless knowledge is read to limit "facility" and "bets" but not "interstate."

[54] See United States v. Pereira, 347 U.S. 1 (1953).

[55] Cohen v. United States, 378 F.2d 751 (9th Cir. 1967). In explaining the rationale for its holding, the court said:

> If knowledge of illegality is an element of the section 1084(a) offense, those innocent of intentional wrongdoing are afforded a defense. . . . In contrast with the occasional or social bettor, the professional gambler will find it difficult to go forward with evidence of ignorance of the law pertaining directly to his business, and even more difficult to prevail on that issue with the fact finders. 378 F.2d at 756-757.

knowledge of the law.[56]

Section 1952 title 18 U.S.C.,[57] which became law along with section 1084 as part of the Attorney General's Program to Curb Organized Crime and Racketeering,[58] overlaps with section 1084. It has presented some interesting construction issues:

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[56]The Ninth Circuit, however, is also the court which later held that knowledge of transmission by means of an interstate communication facility is not an element of the section 1084(a) offense. See note 53 supra.

[57]§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub. L. 87-228, § 1(a), Sept. 18, 1961, 75 Stat. 498, and amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212.

[58]See note 4 and accompanying text, supra.

The basic elements of section 1952 are travel, or use of a facility in interstate commerce with intent to distribute the proceeds of, commit a crime of violence to further, or to otherwise promote any business enterprise involving gambling and the performance of any of the subsequent acts. "Facility" has been held to include a communication facility.[59]

The basic elements of section 1084 are the use of a wire communication facility in interstate commerce in the business of gambling for transmission of wagers or gambling information. With the exception of "in the business of gambling," these elements are also within the scope of section 1952, since transmission of bets or gambling information is part of the promotion, or the carrying on of a gambling business.

Although the same activity may be reached under either statute, a defendant is not placed in double jeopardy when prosecuted under both, it has been held, since different facts must be proven under the two statutes.[60] An intent to promote a gambling business must be proven under section 1952. Under section 1084, the prosecution must prove that the defendant was engaged in the business of gambling.

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[59]In United States v. Smith, 209 F. Supp. 907, 916 (D.C. Ill. 1962), the court said:

> Congress intended that communication facilities in interstate commerce should be included in the scope of the prohibitions of the statute, and to limit the application of the statute to . . . the actual physical transportation of material substances in commerce, would defeat the intent and purpose of Congress in passing the statute.

Also see United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964).

[60]United States v. Smith, supra at 919.

Although section 1952 might appear to be broader in its application to communication of gambling information than section 1084, because it is not limited to persons in the business of gambling and does not include a news reporting exemption, this has not been the case. Both news publications and the individual social bettor are protected by the element of "intent" under section 1952:

> But § 1952 obviously poses no threat to innocent citizens. Its application is limited to those who act with intent to further unlawful activity. . . .[61]

It would, therefore, seem that sections 1084 and 1952 could be used interchangeably to prosecute persons who use an interstate wire communication facility to transmit bets or wagering information as part of a professional gambling operation.

III. ENFORCEMENT EXPERIENCE

When section 1084 title 18 U.S.C. became law in 1961, along with section 1952 and 1953, the Justice Department anticipated that its use as part of the program to cripple interstate gambling syndicates would be significant.[62]

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[61] Erlenbaugh v. United States, 409 U.S. 239, 248 (1972).

[62] There are wire service activities in many cities throughout the country. Each of these organizations services the gambling fraternity in a multiState area. . . . Necessarily the [Organized Crime and Racketeering] section intends to pursue only those operations with interstate aspects or ramifications suggesting a relation with more extensive syndicated activity.

In addition, the civil implications of the Transmission of Gambling Information Act promise to increase the section's workload substantially.

Testimony of H.J. Miller, Jr., Assistant Attorney General, Criminal Division, Departments of State and Justice, The Judiciary, and Related Agencies Appropriations for 1963, Hearings Before a Subcommittee of the Comm. on Appropriations of the House of Representatives. 88th Cong., 1st Sess. 107 (1961). [Such hearings hereinafter cited as "House Appropriations Hearings" by Fiscal Year.]

In 1963, Attorney General Kennedy was able to tell the Congress:

> These three laws have had the immediate effect of forcing many of the Nation's major racing wire services and several telephone gambling services to shut down. IRS figures show a sharp decline in gambling in the past year.[63]

From 1961 to 1962--the first year in which section 1084 was in operation--the number of cases received by the Organized Crime and Racketeering Section of the Criminal Division increased by 33 percent,[64] due at least in part to activity under the new statutes.

In the third year of the antigambling laws' operation (1964-1965), the Congress was told that:

> The utility of the 1961 antigambling laws is being demonstrated not only by increased prosecutive action, but also by numerous intelligence reports showing that large interstate gambling operations are either shutting down or becoming intrastate and relatively minor in scope and profit.[65]

In 1965, the Criminal Division delegated more authority under the new statutes to the United States Attorneys' Offices.[66] Separate figures for prosecutions under section 1084 are not available, but composite figures for the years 1967 to 1973 for sections 1084, 1952 and 1953 show an increasing number of cases brought and convictions under the three statutes.[67]

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[63] House Appropriations Hearings Fiscal Year 1964, 8-9 (1963).

[64] 403 cases were received in fiscal year 1961, and 526 in fiscal year 1962. House Appropriations Hearings Fiscal Year 1963, 108 (1962); and Fiscal Year 1964, 105 (1963).

[65] House Appropriations Hearings Fiscal Year 1966, 88 (1965).

[66] Ibid.

[67] Continued on next page.

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Year	Total Defendants	Dismissed	Acquitted	Convicted & Sentenced	Percentage
1967	152	48	6	98	65%
1968	108	14	8	86	80%
1969	122	37	12	73	60%
1970	166	72	13	81	49%
1971	380	202	15	163	43%
1972	360	101	46	213	59%
1973	319	102	38	179	56%

The conviction rate for all Federal crimes is much higher than under the three antigambling laws passed in 1961:

All Federal Crimes	Percent Convicted
1967	83
1968	80
1969	81
1970	77
1971	72
1972	75
1973	75

Derived from Administrative Office of the United States Courts, Statistical Report for the Commission on the Review of the National Policy Toward Gambling, July 1974.

IV. TEXT OF STATUTE

§ 1081. Definitions

As used in this chapter:

The term "gambling ship" means a vessel used principally for the operation of one or more gambling establishments.

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. Added May 24, 1949, c. 139, § 23, 63 Stat. 92, and amended Sept. 13, 1961, Pub. L. 87-216, § 1, 75 Stat. 491.

§ 1084. Transmission of wagering information; penalties

(a) 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 or information assisting in the placing 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 than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting

on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored. Added Pub. L. 87-216, § 2, Sept. 13, 1961, 75 Stat. 491.

APPENDIX H

PROHIBITION OF THE IMPORTATION OR TRANSPORTATION OF LOTTERY TICKETS

18 U.S.C. § 1301

M.E.B.

I. LEGISLATIVE HISTORY

The Federal lottery statutes have recently received nationwide attention. Since 1964, 13 states have retreated from a former policy of prohibition and now operate their own lotteries.[1] Concern over a possible conflict between these lotteries and Federal law[2] has precipitated a recent act of Congress,[3] which exempts State-run lotteries from the antilottery provisions of the United States Code.[4] The act represents a substantial change in the Federal policy towards lotteries, which developed in the late 19th century. The last element in the construction of this policy was the precursor of 18 U.S.C.§ 1301. Passed in 1895, it prohibited the importation or interstate transportation of lottery materials.[5]

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[1]New Hampshire, New York, New Jersey, Massachusetts, Connecticut, Pennsylvania, Michigan, Maryland, Illinois, Ohio, Delaware, Rhode Island, and Maine.

[2]Attorney General William B. Saxbe sent the governors of each State currently permitting lotteries a telegram stating that "Serious questions have arisen concerning the lottery that is being conducted in your State," and that "[t]here is a distinct possibility that there are violations of the criminal provisions of the Federal code," N.Y. Times, Aug. 31, 1974, at 1, col. 1. "Attorney General William B. Saxbe promised representatives of 13 States at a meeting here [Washington] yesterday that he will not act to shut down their State-run lotteries for at least 90 days in order to give Congress time to amend Federal antilottery laws," Washington Post, Sept. 7, 1974, at 1, col. 8.

[3]Act of Jan. 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916.

[4]18 U.S.C. §§ 1301-1304 (1970); 39 U.S.C. § 3005 (1970).

[5]See section III.

Lotteries flourished in the United States from the colonial period through the 1830's and 1840's.[6] Usually sanctioned by law, they were not only popular, but respectable.[7]

> For many years after lotteries began to prevail it was not regarded at all as a kind of gambling; the most reputable citizens were engaged in these lotteries, either as selected managers or as liberal subscribers. It was looked upon as a kind of voluntary tax for paving streets, erecting wharves, buildings, etc., with a contingent profitable return for such subscribers as held the lucky numbers.

By 1840, many fraudulent lottery schemes had been uncovered, and all lotteries fell into disrepute.[8] One by one, many States amended their constitutions, barring their legislature from authorizing any lotteries.[9] Nevertheless, numerous lotteries flourished; many operated in States which supposedly forbade them, others were sanctioned by the remaining prolottery States.[10] These firms used the United States mail as a conduit to solicit business in the antilottery States,[11] which were powerless to interfere because of Congress' plenary power over the mail.[12]

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[6]See A. Spofford, "Lotteries in American History," S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 173 (1893) and J. Ezell, Fortune's Merry Wheel (1960).

[7]Spofford, supra, at 174-5

[8]Spofford, supra.

[9]Id. at 193.

[10]Spofford, supra.

[11]J. Ware, Letter of the Solicitor of the Post Office Department, S. Misc. Doc. No. 57, 39th Cong., 1st Sess. (1866) and D. Key, Letter from the Postmaster General, H.R. Exec. Doc. No. 22, 46th Cong., 2d Sess. (1880).

[12]"The Congress shall have Power . . . To Establish Post-Offices and Post-Roads. . . ." U.S. Const. art. 1 § 8, cl. 7.

Since the lotteries were not violating any Federal statute, these companies were able to operate unchecked. In response to this situation, statutes were passed to deal with lottery material in the mail,[13] culminating in 1876 with the proscription of mailed circulars concerning lotteries.[14] Opponents of the bill perceived this as a dangerous encroachment on States' rights, since it would be illegal for a citizen of a lottery State to mail lottery material to another citizen of that State.[15] The bill passed because of the public outrage directed towards lotteries and the absence of alternative methods to suppress them.[16] However, the act was unenforceable because it did not specifically give postal authorities the power to detain letters which violated the statute[17] and because the Fourth Amendment prohibited the inspection of the contents of sealed letters.[18]

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[13]Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194 provided that "it shall not be lawful to . . . be sent by mail, any letter or circulars concerning lotteries. . . ."

Act of June 8, 1872, ch. 335, § 149, 17 Stat. 283 reworded the above statute. The only substantial change was that only illegal lotteries were made subject to the prohibition.

[14]Rev. Stat. § 3895, Act of July 12, 1876, ch. 186, 19 Stat. 90.

[15]Remarks of Mr. Whyte, 4 Cong. Rec. 4262 (1876).

[16]See report on 18 U.S.C. § 1302, infra, in Appendix I.

[17]In 1878, Attorney General Devens determined that Rev. Stat. § 3895 did not give the Postal Department the power to seize mail which violated the statute. A fine was the sole means of enforcement contemplated in the statute. Cf. Cammerford v. Thompson, 1 Fed. Rep. 417 (Ky. 1880). Congress gave the Postmaster General this power in 1895. Act of March 2, 1895, ch. 191, 28 Stat. 963.

[18]It has always been held that one has a right to an expectation of privacy with regard to his letters while they are in the mail. Ex Parte Jackson, 96 U.S. 727 (1877).

In 1890, a new statute was passed. All newspapers containing lottery advertisements were prohibited from the mail.[19] These advertisements were a major source of lottery ticket sales. Since unsealed newspapers are not protected by the Fourth Amendment,[20] their contents may be inspected. Postal officials were, therefore, able to execute the law prohibiting this type of mailed lottery solicitation and cripple these lotteries. Debates over this bill again saw the protagonists and antagonists arguing the rights of a State to sanction its own institutions versus the inability of the other States to handle the problem.[21] In addition, this statute raised First Amendment questions. Did newspapers have a First Amendment right to print lottery advertisements? Was a prohibition of one means of circulation of a paper an infringement on the freedom of the press?[22] Once again the exigencies of the situation prevail over the countervailing constitutional arguments.

The infamous Louisiana State Lottery was an essential factor in the passage of both of these acts. In 1868, a New York gambling syndicate secured an exclusive lottery franchise from a bribed Louisiana legislature.[23] Declaring that the franchise would increase State revenues and stop the flow of Louisiana gambling dollars out of the State, the

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[19]Act of September 19, 1890, ch. 908 § 1, 26 Stat. 465.

[20]Ex Parte Jackson, 96 U.S. 727 (1877).

[21]See report on 18 U.S.C. § 1302, infra, in Appendix I.

[22]Id.

[23]Ezell, supra, at 243. "But as later revealed in testimony by the officers and incorporators in a fight over the profits, the issue was not left to stand or fall on its own merits, for the syndicate had liberally bribed carpetbagger and Negro legislators, Id.

legislature gave the syndicate a lucrative monopoly by prohibiting the sale of other lottery tickets in the State.[24] The lottery was not without foes in the State, but its supporters were able to prevent attempts to revoke the franchise or authorize a second lottery in the State.[25] Because of the unenforceability of the 1876 statute,[26] the Louisiana State Lottery was able to continue its operation in flagrant violation of Federal law and embarked on its most profitable decade.[27] By 1884, this was the only lottery sanctioned by State law and the company had a virtual national monopoly.[28] Ninety-three percent of its revenue was coming from out of State sales.[29] Scores of petitions flooded Congress begging for Federal eradication of the Louisiana lottery.[30] The 1890 act injured the Louisiana lottery,[31] but the final blow came in 1892, when the Louisiana legislature, emboldened by the congressional action and dazed by the intensity of national outrage,

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[24] Id. at 243-4.

[25] "The ease with which these measures were passed seem to justify the repeated claim that the company controlled every Louisiana legislature from 1868 to 1892." Id. at 245.

[26] See discussion, supra.

[27] Ezell, supra, at 249.

[28] Only two other States, Vermont and Delaware, permitted State-sanctioned lotteries, but they did not authorize any during this period. Minority Report, H.R. Rep. No. 787, Pt. 2, 50th Cong., 1st Sess. 2 (1888).

[29] Ezell, supra, at 251.

[30] Ezell reports a concerted petitioning campaign undertaken by the clergy at 268. A large number of such petitions were printed in the Congressional Record from 1880 to 1895.

[31] Report of the Postmaster General, 1890, H.R. Exec. Doc. No. 1, Part 4, 51st Cong., 2d Sess. 14 (1890-1891).

refused to renew the lottery's charter.[32] The lottery company found a nominal home in Honduras and held its drawings there.[33] The rest of its operation was conducted in Florida.[34] The company found a new means of communicating with the populace. It organized an express company to act as a "private post office," channeling circulars, tickets and money into the other States.[35]

Foes of the Louisiana lottery sprang into action and public outrage was again employed to secure new Federal legislation.[36] The

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[32]Ezell, supra, at 267.

[33]26 Cong. Rec. 2356 (1894).

[34]Id. Mr. Pasco, Senator from Florida, explains that his State has been duped.

> A bill, apparently intended to provide additional penalties for the suppression of lotteries, was passed through the Legislature, but the real intention of the new law seems to have been to prohibit only those lotteries actually operated in Florida.

[35]Id.

[36]Ezell, supra, at 268. Remarks of Mr. Broderick explain the need for further legislation at 27 Cong. Rec. 3031 (1895):

> Mr. Speaker, in 1890 Congress forbade the use of the United States mails to companies and individuals for the purpose of advertising lottery schemes. That law has been evaded by using for such purposes the express, and it has been deemed necessary to amend the law so as to prohibit carrying in any way matter intended to advertise lotteries. . . . This bill has been commended by the Post Office Department. The law as it exists has given the Department much trouble . . . (An excerpt from the Postmaster General's most recent prior annual report on the subject was read at this point, urging that a bill such as the one under consideration would "strike at the root of this great evil and eradicate it.") A few years ago we had but one lottery in the United States. Public sentiment was aroused against it. When the institution was driven out by the legislation of the Congress and by the States it was reorganized in the territory of Honduras, and has been operating from that territory throughout the States of the Union, so that today, instead of having one lottery, as we had a few years ago, we have a number. This lottery business has grown to such an extent that it has shocked the moral sense of the people of the entire country, and it ought to be suppressed.

precursor of 18 U.S.C. § 1301, forbidding the importation or interstate transportation of lottery material was passed in 1895.[37] Power to enact the previous statutes had been found in Congress' plenary jurisdiction over the Post Office.[38] The 1895 act is significant in that, for the first time, Congress used its jurisdiction over interstate commerce[39] to defeat this lottery. Constitutional issues were not raised in the

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[37]Act of March 2, 1895, ch. 191, 28 Stat. 963. Sections 2, 3, and 4 of the 1895 act were designed to integrate the new measure into prior statutes relating to gambling, such as Rev. Stat. §§ 3894, 3929, and 4041, last revised at 26 Stat. 465. Section 4 empowered the Postmaster General to refuse to deliver ordinary letters which violated the statute, (See n. 17, supra). The new aspects of the 1895 statute unrelated to the postal authority of Congress were contained in § 1 as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift-concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than $1,000, or both, and in the second and after offenses by such imprisonment only.

[38]Ex Parte Jackson, 96 U.S. 727 (1877) held that Congress had the power to determine what should be excluded from the mails. Id. at 732.

[39]"The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian tribes. . . ." U.S. Const. art. 1, § 8, cl. 7.

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congressional debate. In fact, the most important issue discussed was whether charitable lotteries should be exempted.[40] Congress had found that drafting a statute limited in its impact to destroying one lottery was difficult.

The antilottery statutes were codified in 1909,[41] and the Act of March 2, 1895, ch. 191, 28 Stat. 963 became 18 U.S.C. § 237. With the recodification of 1948,[42] it became 18 U.S.C. § 1301.

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[40]The following occurred immediately before passage of the 1895 measure on the Senate side at 26 Cong. Rec. 4313 (1894):

> Mr. GORMON: Mr. President, I agree with the Senator from Missouri (Mr. Vest) that this bill is too sweeping. I have not the slightest objection to confining it to the lottery business, but to provide that the offering of prizes shall be a penal offense at innocent church fairs and other little enterprises of that sort, it seems to me, is going beyond what we ought to attempt.
>
> As I understand the law now, as sustained by the decision of the Supreme Court, lottery tickets pure and simple are excluded from the mails. There is no question as to that. I think every provision that can be made should be made to reach the great Louisiana lottery and other enterprises of that sort, but I understand they are absolutely excluded from the mails today.
>
> Mr. HOAR: Perhaps the Senator did not hear my statement. The law excluded from the mails today lottery tickets, and also required postmasters to refuse to deliver registered letters to persons and corporations who advertise themselves as engaged in the lottery business; but it does not extend to other letters, and this will only change the existing statute so as to cover other letters.
>
> Mr. GORMAN: There will be no objection to extending it to other letters, but when you propose to extend it to all these little gift enterprises and fairs, I think it is going too far. If the bill were confined to letters other than those registered, there would be no objection to it.
>
> Mr. HOAR: That part of it is not applicable to church fairs; it is only applicable to persons and corporations who advertise themselves as engaged in the lottery business, as the Senator will find when he refers to the statute.

[41]Act of March 4, 1909, ch. 321, 35 Stat. 1129.

[42]Act of June 25, 1948, ch. 645, 62 Stat. 683.

II. COURT INTERPRETATION

The Supreme Court affirmed Congress' power under the commerce clause to limit interstate lottery traffic in Champion v. Ames.[43] Appellants argued two points. First, the statute violated the Tenth Amendment because the avowed purpose of the statute, the destruction of lotteries,[44] is exclusively within the jurisdiction of the police power reserved to the States.[45] Second, it was argued that lottery tickets were not articles of commerce.[46] The court, by a 5-4 majority, decided the case under the theory of Gibbons v. Ogden[47] as a straight commerce clause issue.[48] Since the court found that Congress was authorized

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[43] 188 U.S. 321 (1903).

[44] Act of March 2, 1895, ch. 191, 28 Stat. 963.

[45] 188 U.S. at 326-9. Appellants contend that if the States favored lotteries, this legislation would be deemed an "unwarranted interference with the police power reserved to the States." Id. at 329.

[46] Id. at 329-30. "Lottery tickets at most, are mere evidences of contacts made wholly within the boundaries of a State." Id. at 327.

[47] 22 U.S. (9 Wheat.) 1 (1824).

[48] The Champion court (Harlan, J.) quoted from Mr. Chief Justice Marshall's opinion in Gibbons v. Ogden extensively, 188 U.S. at 346-47. (Italics by the Champion court):

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . the power over commerce with foreign nations and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constittution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

under the commerce clause to pass the antilottery statutes,[49] the Tenth Amendment issue was dismissed by the statement that "the power to regulate commerce among the States has been expressly delegated to Congress."[50] The propriety of congressional action was not for the courts to determine; the constitutionality was abundantly clear.[51]

> If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce, which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

The contrary position was argued by the dissenters in Champion v. Ames.[52] For them, the Tenth Amendment precluded Congress from acting in an essentially local matter, and the "scope of the commerce clause of the Constitution . . . [should not] be enlarged because of present views of public interest."[53]

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[49]After tracing the development of the commerce clause powers subsequent to Gibbons v. Ogden, 188 U.S. at 348-52, the Champion court affirmed congressional power to pass the 1895 antilottery statute, Id. at 347.

[50]Id.

[51]Id. at 348.

[52]Id. at 364-75, Fuller, C.J., along with Brewer, Shiras, and Peckham, J.J., in dissent.

[53]Id. at 372.

The companion case, Francis v. United States.[54] however, tightly construed this antilottery statute. Mr. Justice Holmes announced that a list of lottery subscribers and their bids was not a "paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery"[55] because it was not the purchaser's document.[56] This made it possible for the lottery's agents to sell tickets in many States, and then bring their lists of subscribers to one central location for the drawing. However, it was still illegal to transport advertisements across State lines, or to hire an express company to transport any of these materials between States.[57]

III. TEXT OF STATUTE

§ 1301. Importing or transporting lottery tickets

Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or any list of prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

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[54]188 U.S. 375 (1901).

[55]188 U.S. at 323.

[56]Id. at 378.

[57]The lists were transported by agents of the company. Their "movements were internal circulation within the sphere of the lottery company's possession." Id. at 377, Holmes indicated that the case would have been decided differently had the carriage been done by an independent carrier. Then, "it is commerce merely by reason of the business of the carriage." Id.

APPENDIX I

MAILING OF LOTTERY TICKETS OR RELATED MATTER

18 U.S.C. § 1302

M.E.B.

I. LEGISLATIVE HISTORY

The Federal lottery statutes have recently received nationwide attention. Since 1964, 13 States have retreated from a former policy of prohibition and now operate their own lotteries.[1] Concern over a possible conflict between these lotteries and Federal law[2] has precipitated a recent act of Congress,[3] which exempts State-run lotteries from the antilottery provisions of the United States Code.[4] The act represents a new direction in the Federal policy towards lotteries, which developed in the late 19th century. A major component of this policy has been 18 U.S.C. § 1302. Passed in 1890, it prohibits the mailing of lottery tickets or related materials, and newspapers containing lottery advertisements.[5]

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[1]New Hampshire, New York, New Jersey, Massachusetts, Connecticut, Pennsylvania, Michigan, Maryland, Illinois, Ohio, Delaware, Rhode Island and Maine.

[2]Attorney General William B. Saxbe sent the governors of each State currently permitting lotteries a telegram stating that "[s]erious questions have arisen concerning the lottery that is being conducted in your State," and that "[t]here is a distinct possibility that there are violations of the criminal provisions of the Federal code," N.Y. Times, Aug. 31, 1974, at 1, col. 1. "Attorney General William B. Saxbe promised representatives of 13 States at a meeting here [Washington] yesterday that he will not act to shut down their State-run lotteries for at least 90 days in order to give Congress time to amend Federal antilottery laws," Washington Post, Sept. 7, 1974, at 1, col. 8.

[3]Act of Jan. 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916.

[4]18 U.S.C. §§ 1301-04 (1970); 39 U.S.C. § 3005 (1970).

[5]See section III for text of statute.

Broadly, the 19th century saw Federal policy toward lotteries shift from encouragement at the outset[6] to regulation to the greatest extent possible consistent with Federal jurisdiction.[7] The movement toward Federal regulation of lotteries encompassed many crucial issues in constitutional law, and it was not accomplished without opposition. Motivation for congressional action was sometimes complex, but at major steps in the increased regulation of lotteries by the Federal Government the significance of the changing Federal role was raised and discussed.

Major issues that were argued during congressional debate and before the Supreme Court with regard to Federal regulation of lotteries included: the extent of the congressional power to regulate interstate commerce under Article 1, § 8;[8] the role of the post office within the internal affairs of the States under clause seven of Article 1, § 8;[9] whether the reach of Federal police power extends to proscribing new crimes in a manner with which all States do not agree;[10] the extent of

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[6]Congressional furtherance of lottery ventures is exemplified by the delegation of power to the corporation for the District of Columbia to operate lotteries, Act of May 4, 1812, ch. 75, 2 Stat. 726.

[7]Act of March 2, 1895, ch. 191, 28 Stat. 963.

[8]"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes. . . ." U.S. Const. art. I, § 8, cl. 3.

[9]"The Congress shall have Power . . . To Establish Post Offices and Post Roads. . . ." U.S. Const. art. I, § 8, cl. 7.

[10]By definition less explicit, such power could be found in the "necessary and proper" clause, U.S. Const. art. I, § 8, cl. 18: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

the protection afforded the States by the Tenth Amendment;[11] the nature of First Amendment freedom of the press protections from the congressional power to control advertisements appearing in newspapers;[12] and the extent of Fourth Amendment right of individuals to be secure in their persons[13] with regard to having their mail delivered unopened and unquestioned. Congress either openly or tacitly took a position on each of these issues in passing the antilottery measures. None of their efforts were overturned by the Supreme Court.[14]

The study of the constitutional issues of this problem cannot proceed in a vacuum. Congress was motivated by many important practical considerations. All but three States[15] had prohibited lotteries by 1884

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[11]"The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[12]"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. Const., amend. I.

[13]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV.

[14]Ex Parte Jackson, 96 U.S. 727 (1877), affirmed the constitutionality of Rev. Stat. § 3894 (1875 ed.), the first congressional limitation of lotteries; In re Rapier, 143 U.S. 110 (1893), affirmed extensions of congressional power made by the Act of Sept. 19, 1890, ch. 908, 26 Stat. 465; and Champion v. Ames, 188 U.S. 321 (1903), affirmed the constitutionality of the Act of March 2, 1895, ch. 191, 28 Stat. 963, which is substantially the same as 18 U.S.C. §§ 1301-03.

[15]The Senate Committee on Post Offices and Post-Roads surveyed the extant State lottery statutes and constitutional provisions in 1884, during consideration of S. 1017, 48th Cong., 1st Sess., concerning the prohibition of the mailing of lottery advertisements, 15 Cong. Rec. 4380-82 (1884). Of 38 States, only Delaware, Vermont and Louisiana did not completely prohibit lotteries as of 1884. Of those States, lotteries were limited to those specifically authorized by statute and in Louisiana were to be completely eliminated by 1895. After thorough exposition of this information, the synopsis concluded, "From the foregoing it clearly appears that the bill reported by the committee is not only within the power and duty of Congress, but is also in harmony with and in support of the policy of nearly every State in the Union." Id. at 4382.

and inaction by the Federal Government would have been a decisive position in favor of lotteries. The lotteries were thriving because of the United States mail. It provided an inexpensive means for soliciting customers throughout the country from their headquarters in the States which sanctioned them. Yet even more crucial, the mails were protected from State interference[16] and States which outlawed lotteries were powerless to prevent these circulars and advertisements from crossing their borders. Effective enforcement of the statutes was always a problem. The Fourth Amendment prohibited the inspection of the contents of sealed letters, so that it was usually impossible to know which letters violated the statute.[17]

Lotteries flourished in the United States from the colonial period through the 1830's and 1840's.[18] Usually sanctioned by law, they were not only popular but also respectable.

> For many years after lotteries began to prevail it was not regarded at all as a kind of gambling; the most reputable citizens were engaged in these lotteries, either as selected managers or as liberal subscribers.[19]

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[16] U.S. Const., art. 1, § 8, cl. 7.

[17] Ex Parte Jackson, 96 U.S. 727 (1877). See note 99, infra.

[18] See A. Spofford, "Lotteries in American History," S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 173 (1893) and J. Ezell, Fortune's Merry Wheel (1960).

[19] Spofford continues: "It was looked upon as a kind of voluntary tax for paving streets, erecting wharves, buildings, etc., with a contingent profitable return for such subscribers as held the lucky numbers. Spofford, supra, at 174-175.

During this period, most States had similar experiences with lotteries and a certain pattern evolved. Private lotteries were the first to be banned because of the competition they gave State lotteries and the fraud and corruption they engendered. To further stifle competition some States also banned the sale of tickets of lotteries of other States. However, the State sanctioned lotteries were not free of problems either, and one by one State constitutional amendments were passed prohibiting the legislatures from conducting any lotteries.[20]

Congressional experience in the District of Columbia was consistent with this pattern. The Corporation of the City of Washington, having been given the authority by Congress the preceding year, hired Samuel Blodgett to supervise a lottery for public improvements in 1793.[21] The Corporation soon regretted their choice when they were criticized because Blodgett delayed the drawing.[22] Problems did not end when the drawing was finally held because the grand prize--a hotel--was not completed as had been promised. The winner successfully recovered from Blodgett the difference between the value of the hotel and the amount stipulated as the prize.[23]

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[20] Id. at 193.

[21] Ezell, supra, at 102-3.

[22] Id.

[23] Id. at 103-4. Meanwhile, Blodgett was selling tickets for another lottery. Sales were low and criticism high, so Blodgett finally dropped the matter completely. Id. at 105. Between 1799 and 1812, the Corporation denied all petitions for a lottery.

In 1812, Congress forbade the sale of lottery tickets in the District of Columbia unless the lottery was expressly authorized by the law of some jurisdiction.[24] Again in need of money, less than three months later, Congress authorized the District of Columbia to conduct lotteries provided the President approved and the amount to be raised did not exceed $10,000.[25] Twelve lotteries were conducted under this act but this experience proved to be worse than the last.[26] In 1821, the lottery supervisor defaulted on the $100,000 grand prize and the District of Columbia was held liable to the winner[27] for although the District of Columbia never entered the lottery business again, Congress was slow to regulate this area.[28] It was not until 1842 that all lottery ticket sales in the District of Columbia were abolished.[29]

After the Civil War, congressional attention to lotteries shifted from the District of Columbia to the Post Office. The postal department

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[24]Act of Feb. 20, 1812, § 12, Code of laws for D.C. 286 (1819 ed.).

[25]Act of May 4, 1812, ch. 75, 2 Stat. 726.

[26]Spofford, note 18, supra, at 177.

[27]Clark v. Corporation of Washington, 25 U.S. (12 Wheat.) 40 (1827).

[28]In 1823, ticket vendors had to be licensed. Laws of Corp. of City of Washington to 1833, 247 (A. Rothwell, 1833 ed.). In 1827, the statute that would become 18 U.S.C. § 1303 was passed to prevent postmasters or their assistants from becoming lottery agents. Act of March 2, 1827, ch. 61, 4 Stat. 238.

[29]Act of August 31, 1842, ch. 282, 5 Stat. 578.

was successfully being "framed" by several fraudulent lotteries.[30] The States were powerless in this situation,[31] and some Federal action was necessary. The Post Office asked for statutory power to deal with the problem, but the bill did not pass.[32] The Post Office had been combatting the schemes under § 80 of their regulations, but this proved ineffective.[33]

The first limitation of lottery mail was passed in 1868. It was passed as part of an act directed at various aspects of the Post Office.[34] It provided that "it shall not be lawful to deposit in a post office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."[35] A further provision allowing the postmaster

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[30]The Department uncovered schemes such as the following: a firm in New York would obtain names of persons living in rural districts throughout the country, and send through the mail circulars of a "gift enterprise" scheme which was notoriously fraudulent. They were to receive, in answer to these circulars, a large amount of money every day. Whenever a complaint was made that the money was not received, the firm said that either it never received the money from the people or that it had mailed the promised package. Thus, the blame was always placed on the Post Department. H.R. Misc. Doc. No. 57, 39th Cong., 1st Sess. 2 (1866).

[31]The perpetrators would set up headquarters outside of the States into which they mailed their circulars. Even if a State could get jurisdiction, under the law of most States a conviction could not be had for obtaining money under false pretenses if the money was obtained by means of a promise which had not been fulfilled. An element of the crime is that the false representation must relate to a present or past fact. La Fave & Scott, Criminal Law 657 (1972).

[32]S. 148, 39th Cong., 1st Sess. (1866).

[33]Cong. Globe, 40th Cong., 2d Sess. 4175 (1868).

[34]Act of July 27, 1868, ch. 246, 15 Stat. 194.

[35]Id., § 13.

to open letters suspected of containing lottery materials prohibited by the statute was eliminated in conference.[36] There was no open debate over the substantive limitation on the mailing of lottery tickets and seemingly little dispute at that time.

The problems of enforcing the new law were soon perceived. The statute imposing penalties on postal employees for the unlawful detention or delay of mail was unaffected by the Act of 1868.[37]

> While it may be lawful . . . to detain . . . a letter . . . within the prohibition of the statute, it is unlawful for him to detain . . . any letter which is not. * * * The officer may have acted in perfect good faith . . . he may have had reasonable ground to believe that the letter detained was within the prohibition of the statute; and yet I cannot say . . . that such a plea would be a good defence to a public prosecution or to a private suit by the person aggrieved.[38]

Postal employees had few ways to ascertain with certainty the contents of suspected letters. In particular, letters are protected from search and seizure by the Fourth Amendment,[39] and could not be opened without a search warrant.[40]

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[36]Cong. Globe, 40th Cong., 2d Sess. 4412 (1868). Farnsworth, reporting for the House Committee on the Post Office and Post-Roads, argued that this would be a "dangerous power to confer upon postmasters."

[37]Rev. Stat. §§ 3890, 3891.

[38]12 Op. Atty. Gen. 538 (1868).

[39]It has always been held that one has a right to an expectation of privacy with regard to his letters while they are in the mail. Ex Parte Jackson, 96 U.S. 727 (1877). See note 99, infra.

[40]Search warrants were not a commonly used weapon against lottery circulars. This might have been an effective procedure if the postal authorities had worked in conjunction with the Justice Department.

When the postal laws were codified in 1872,[41] the 1868 limitation on the mailing of lottery tickets and circulars was reworded,[42] but only illegal lotteries were made subject to the statutory exclusion. There is no record of any debate or report concerning this important change.[43] It is unclear whether Congress had always intended to exclude matters dealing with illegal lotteries and was merely correcting the old statute or whether this in fact represented a change in congressional policy. The 1872 version was repeated in substantially the same form in the Revised Statutes.[44]

In the next few years, while the country was in the grips of a depression, criticism of the several State-sanctioned lotteries intensified. Between 1872 and 1876, seven States enacted constitutional amendments forbidding their legislatures from authorizing lotteries for any purpose.[45] Yet the populace was buying more tickets than ever. The Attorney General of New York reported that there were 33 lottery agencies in New York City alone receiving an average of 7661 ordinary and 1993 registered letters per week.[46]

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[41] Act of June 8, 1872, ch. 335, 17 Stat. 283.

[42] Id. at 149. The provision read as follows:

> Sec. 149. That it shall not be lawful to convey by mail, nor to deposit in a post office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, and a penalty of not more than $500 nor less than $100, with costs of prosecution, is hereby imposed upon conviction, in any Federal court, of the violation of this section.

[43] In introducing the bill, H.R. 1, 42d Cong., 2d Sess. (1872), Sen. Farnsworth, speaking for the House Committee on the Post Office and Post-Roads, said that there were no major changes. Cong. Globe, 42d Cong., 2d Sess. pt. 1, 15 (1872).

[44] Rev. Stat. § 3894.

[45] Stafford, supra, at 193.

[46] Ezell, supra, at 238.

> He estimated that millions of dollars annually were flowing into their tills, making them "financial vampires" sucking the life-blood of legitimate business and "inflicting upon society a species of distempered mental leprosy, which will require years to remove.

In 1876, Congress amended section 3894 by striking the word "illegal."[47] The change meant that Congress had determined that the exclusion of lottery materials from the mails was to extend to all lotteries, whether authorized by State governments or not. Because the statute was altered specifically to change Federal policy from limiting only illegal lottery materials to regulating lotteries regardless of legality according to State law, the change was significant. The change was debated fully on the floor of the Senate, giving the first clear indication of what was to come.[48] Despite the assertion of the chairman of the House Committee on the Post Office and Post-Roads that the bill contained no material changes,[49] and subsequent passage in the lower body with no debate,[50] Senate agreement was not obtained easily. Many of the major and recurring issues of constitutional import were perceived in the Senate, fervently argued on the floor, and decisively answered with the vote favoring the propriety of the proposed regulations. "Certainly the Senate does not mean to decide," argued Senator Whyte, "that the citizens of a State where lotteries are legal have no right to

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[47] Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90.

[48] 4 Cong. Rec. 4261-64 (1876).

[49] Id. at 695. Speaking as to modification of Rev. Stat. § 3893, relating to obscene books as well as to the lottery provision, Cannon responded, to a challenge that "the proposed bill in no wise changes the law as it now is except to provide a penalty for the circulation of obscene literature."

[50] 4 Cong. Rec. 3656 (1876).

send a lottery scheme from one portion of the State to another. That seems to me to be interfering with the rights of the people of the States where they choose to think that the sale of lottery tickets is not criminal or improper."[51]

The answer to the Senator's question was given by the chairman of the sponsoring committee:[52] it was "for the best interests of the country to strike out the word 'illegal' and to prohibit the transmission through the mails of any matter relating to lotteries."[53] The debate became

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[51]Senator Whyte continued at 4 Cong. Rec. 4262 (1876) by outlining briefly the changing perspective on lottery activity within the States and decrying congressional interference:

> In many States a great change has come over the minds of citizens of the States. In my own State for many years lotteries were authorized. We have built monuments, we have raised moneys for various public institutions--and so in Kentucky, in other States--by means of lotteries; but lotteries are not now tolerated in my State nor are lottery tickets permitted to be sold in the State. Therefore, as far as Maryland is concerned, this would have no application whatever; but in States like Louisiana, Kentucky, Alabama, or Georgia, and Virginia, where I think they are permitted to draw lotteries of some character, it would be highly improper, in my judgment, to allow the postmasters to prevent the circulation of lottery circulars while those States allow lotteries. The provision of the law as it now stands operates upon "illegal lotteries" only, upon lotteries that are unauthorized by the law, and I submit to the Senate that the law should stand as it now stands, so far as this second section is concerned.

[52]Mr. Hamlin, for the Senate Committee on Post Offices and Post-Roads and the Post Office Department, 4 Cong. Rec. 4262.

[53]4 Cong. Rec. 4262. "That is precisely what we mean," continued Hamlin, who then developed the rationale of the Committee position:

> The difficulty which the Department labors under is in determining what are and what are not legal lotteries. A great many schemes are gotten up, some in the Territories, some of them in operation today apparently with the forms of law, but yet of doubtful legal force, and they are transmitting their matter through the mails, and the whole thing proves to be a fraud upon the community; and the question arises whether it is not wiser and better to treat all lotteries, whether legal or illegal, as precisely the same, or as

emotional and extreme. Likely reflecting the fears of the majority of the populace, particularly with regard to the powerful Louisiana lottery, Congress followed these arguments and approved the bill.[54]

The famous Louisiana lottery was an important factor in this and future congressional action. In 1868, a New York gambling syndicate secured an exclusive lottery franchise from a bribed Louisiana legislature.[55] Declaring that the franchise would increase State revenues and stop the flow of Louisiana gambling dollars out of the State, the legislature gave the syndicate a lucrative monopoly by prohibiting the sale of other lottery tickets in the State.[56] In exchange for a payment of $40,000 per year, the company was exempted from all taxes.[57] The lottery was not without foes within the State, but its

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a system of gambling which a wise course in legislation will not only justify but demand at our hands shall be stopped.

Senator West's reply demonstrates the clarity with which the issue was seen:

. . . [I]t is not in the power of the Congress of the United States to resist carrying through the mails of any such papers. Where public morals are concerned, according to the first clause of the bill, (pertaining to obscene matter passing through the mails) it is a very different question, because no State legislates for the transmission of obscene publications or immoral publications; but if a State chooses to authorize and legalize a lottery, call it gambling, if you please, and gambling it is, that is a matter entirely for the consideration of that State, and it does not offend public morals to that extent that those things do to which other provisions of the bill apply.

[54] 4 Cong. Rec. 4264 (1876).

[55] Ezell, supra, at 243 "But as later revealed in testimony by the officers and incorporators in a fight over the profits, the issue was not left to stand or fall on its own merits, for the syndicate had liberally bribed carpetbagger and Negro legislators."

[56] Id. at 243-44

[57] Id. at 243

supporters were able to prevent attempts to revoke the franchise or authorize a second lottery in the State.[58]

The 1876 change did not have the desired result of extinguishing the State sanctioned lotteries. Again, the Postal Department was unable to effectively enforce the new law. Soon after enactment, the Postmaster General instructed postmasters to refuse to receive or deliver letters addressed to lottery companies or their agents, on the assumption that such mail concerned a lottery.[59] Again, the Attorney General advised that the Post Office did not have this authority and concluded that the statute did not confer any power of seizure nor any right of detention; the means of prevention contemplated by the statute was a fine.[60] The Attorney General also determined that newspapers, which are open to inspection, are not circulars and are not subject to the 1876 statute.[61]

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[58]"The ease with which these measures were passed seem to justify the repeated claim that the company controlled every Louisiana legislature from 1868 to k892." Id. at 245.

[59]Id. at 240. Compare with the opposite result in 12 Op. Att'y. Gen. 538 (1868) and 18 Op. Att'y. Gen. 306 (1885). In 1895, Congress explicitly gave the Postmaster General the power to refuse to deliver ordinary letters which violated the statute. Act of March 2, 1895, ch. 191, § 4, 28 Stat. 963.

[60]16 Op. Att'y. Gen. 5 (1878). Restated 18 Op. Att'y. Gen. 306 (1885). Ezell gives some background for this decision:

> The management decided to test the legality of the Federal law of 1876. Ben Butler, stormy petrel of the Civil War, postwar politician king-pin, and the brother-in-law of the Secretary of the Treasury, headed a corps of nine lawyers to press the fight. Howard reportedly hurried to Washington for personal interviews with President Rutherford B. Hayes and Secretary of the Treasury John Sherman, a move interpreted by northern newspapers as an attempt to inject the lottery into national politics. Despite numerous indications that the lottery was unpopular, the Attorney General handed down a decision which was berated by lottery foes as sustaining the law of 1876 but at the same time preventing its enforcement. Id. at 247-8.

[61]Op. Att'y. Gen. at 309.

The Louisiana lottery was able to continue its operations in flagrant violation of the statute and embarked on its most profitable decade.[62] Ninety-three percent of its revenue was coming from out of State sales.[63]

There were many smaller lottery schemes being perpetrated on the public at this time; although after 1878, none of them were legal in any State.[64] In reply to a resolution of the House of Representatives calling for information regarding the use of the mails for lottery purposes, the Postmaster General described many schemes that were being perpetrated on the public.[65] This report shows the great effort which the Postal Department put into investigations of lotteries. One-hundred and thirty-six names were listed as being those of persons conducting fraudulent lotteries.[66]

Pressure upon Congress to take further action against lotteries mounted. The 1880's saw scores of petitions begging for congressional eradication of the Louisiana lottery.[67] Countless bills were introduced

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[62] Ezell, supra, at 249.

[63] Id. at 251.

[64] Id. at 241. Two other States, Vermont and Delaware permitted lotteries authorized by their own legislature, but they had not authorized any during this period. H.R. Rep. No. 787 Part 2, 50th Cong., 1st Sess. 2 (1888). See note 15, supra.

[65] H.R. Exec. Doc. No. 22 46th Cong., 2d Sess. (1880).

[66] Rev. Stat. §§ 3929, 4041 gave the Post Office Department the authority to retain money orders and registered letters sent to fraudulent lotteries. The Postmaster General was to determine which lotteries were fraudulent.

[67] Ezell reports a concerted petitioning campaign undertaken by the clergy at 268. A large number of such petitions were printed in the Congressional Record from 1880 to 1895.

to accomplish this and related purposes. Most of them were never reported out of committee.[68] The atmosphere required decisive action.

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[68]There was much lottery-related congressional activity over the years 1876-90. Approximately ten bills a year were read and sent to committee from the 48th to the 51st Congresses concerning lotteries. One such bill was H.R. 5933, 50th Cong., 1st Sess. (1888), which concerned the prohibition of the advertising of lottery tickets in the District of Columbia. Debate concerning H.R. 5933 typifies the arguments and divisions of Congress at the period, 19 Cong. Rec. 1153-1161 (1888). Ex Parte Jackson was extensively relied upon at 19 Cong. Rec. 1155 to show the restrictions imposed upon Congress with regard to regulating lotteries by the First and Fourth Amendments. Proponents of the bill to eliminate lottery advertisements in the District of Columbia often argued emotionally, denying that they could be circumventing constitutional guarantees:

> I know it will be insisted that the provisions of the bill will be an abridgment of the "freedom of the press," but, Mr. Speaker, it will not abridge any "freedom of the press" to do right or to publish whatever may promote the good of mankind. It is not designed to take away any proper or legitimate right of the press, but only to restrain and prohibit all license to perpetrate a wrong by enticing the young and unsuspecting into habits that will lead them into ruin, as has heretofore been done in many instances. Some of the blackest deeds in the catalogue of crimes have been committed under the plea of liberty. On the way to the guillotine Madame Roland, [sic] exclaimed, "O, Liberty! Liberty! what crimes are committed in thy name." Remarks of Mr. Glass, id. at 1156.

Those opposed to further congressional action argued as follows:

> What is the Louisiana lottery? It is an institution authorized, organized, and created by the organic law of a sovereign State of this Union. It is a legal institution in so far as the State of Louisiana can make it so, as completely as any institution chartered by any State in this broad land. Now, my friend from Illinois [Mr. Cannon] knows that in so far as we can exercise this power in reference to the Louisiana lottery we can equally exercise it with reference to any banking institution chartered in the State of Louisiana or elsewhere. Now, I wish to ask my friend this question: If we can say to this lottery company, a chartered institution, bearing the stamp and impress of the authority of a State law--nay, of the constitution of one of the States of this Union--"Your advertisement shall not be published in any newspaper issued in the District of Columbia," why can we not say to some banking corporation authorized in the State of Louisiana, or, if you choose, in the District of Columbia, "You shall not receive the moneys of this lottery company as deposits in your vaults?" Remarks of Mr. Compton, id. at 1157.

H.R. 1159 was defeated 119-113 with 91 not voting, id. at 1161, showing the closeness of the issue. The excerpts given are representative of the nature of the arguments on the floor and the extent to which pertinent issues were raised and overcome.

The tenor of popular feeling eclipsed arguments about the propriety of congressional usurpation of State functions in a federalist system.[69] In a special message to Congress concerning lotteries,[70] President Benjamin Harrison urged that it was beyond the powers of the States to control the Louisiana lottery.

> If the baneful effects of the lotteries were confined to the States that give the companies corporate powers and a license to conduct the business, the citizens of other States, being powerless to apply remedies, might clear themselves of responsibility by the use of such moral agencies as were within their reach. But the case is not so. The people of all the

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[69] Congressional timidity was evoking severe criticism in the press.

> The Cincinnati Commercial Gazette, July 19, 1890, bluntly called Congress the protector of the lottery and denominated the Louisiana firm the "United States Lottery" since 97 percent of its revenue came from outside the State. Later it said the name should be the "Congressional Lottery" if the present session ended without action. The New York Herald pointed out that the lottery's robbery and demoralization was possible only through use of the mails and that the traffic was no less criminal than polygamy, against which Congress had taken stringent measures. The Philadelphia Press called the government's unwitting role a "national shame" and added that congressional action at this time would probably influence Louisiana to deny a new charter. Ezell, supra, at 260.

[70] A Compilation of the Messages and Papers of the Presidents 1789-1897 (J. Richardson ed.), 80-81, H.R. Misc. Doc. No. 210, Part 9, 53d Cong., 2d Sess. (1894). The same message was reprinted at 21 Cong. Rec. 7916 (1890). Harrison's message was based upon the increasing concern reported by the Postmaster General, John Wanamaker. In his 1889 annual report, Wanamaker had decried the ineffectiveness of existing Federal law in dealing with the Louisiana lottery, Report of the Postmaster General, 1889, H.R. Exec. Doc. No. 196, 51st Cong., 1st Sess. 39-41, (1889-90). This prompted Harrison to ask for new antilottery legislation in his first message to Congress, Richardson, 44:

> The unsatisfactory condition of the law relating to the transmission through the mails of lottery advertisements and remittances is clearly stated by the Postmaster General and his suggestion as to amendments should have your favorable consideration.

The President also complained of conditions in the District of Columbia in his message, Richardson, 81:

> The national capital has become a sub-headquarters of the Louisiana Lottery Company, and its numerous agents and attorneys are conducting here a business involving probably a larger use of

> States are debauched and defrauded. The vast sums of money offered to the States for charters are drawn from the people of the United States, and the General Government through its mail system is made the effective and profitable medium of intercourse between the lottery company and its victims. . . . The use of mails by these companies is a prostitution of an agency only intended to serve the purpose of a legitimate trade and a decent social intercourse.

Harrison was speaking on the recommendation of his Postmaster General, John Wanamaker, who had written in a special report that the "entire Post Office Department is in point of fact the principal agent of the Louisiana State Lottery Company."[71]

From 1884 to 1890, each Congress grappled with the question of banning from the mail newspapers containing lottery advertisements.[72] This mailing was a major source of lottery ticket sales. Since unsealed newspapers are not protected by the Fourth Amendment,[73] they may be inspected. Postal officials would be able, therefore, to enforce the law prohibiting this type of mailed lottery solicitation and cripple the Louisiana lottery.

> the mails than that of any legitimate business enterprise in the District of Columbia. There seems to be good reason to believe that the corrupting touch of these agents has been felt by the clerks in the postal service and by some of the police officers of the District.

[71] S. Exec. Doc. No. 196, 51st Cong., 1st Sess. 3-4 (1889-90). From Wanamaker's perspective this may have been merely demoralizing to the Post Office, but to the President and to Congress the political impact of the role of the Post Office in the propagation of the Louisiana State Lottery was disasterous. No State law could restrict the U.S. Post Office's authority to carry the mails and thus only Congress could eliminate the plague.

[72] See S. Rep. No. 233, 48th Cong., 1st Sess. (1884); H.R. Rep. No. 826, 48th Cong., 1st Sess. (1884); S. Rep. No. 11, 49th Cong., 1st Sess. (1886); H.R. Rep. No. 2678, 49th Cong., 1st Sess. (1886); H.R. Rep. No. 787, 50th Cong., 1st Sess. (1888); S. Rep. No. 1579, 51st Cong., 1st Sess. (1890).

[73] See discussion of Ex Parte Jackson, infra.

In 1890, such a statute was passed.[74] The debates which led up to passage[75] raised the following question. Is there any limitation on

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[74]Act of September 19, 1890, ch. 908, § 1, 26 Stat. 465.

> No letter, postal-card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money-order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or all of the drawing, be carried in the mail or delivered by any postmaster or letter carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it was carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

Not only does this enactment change the law with respect to newspapers, but also with respect to the public. For the first time, the citizens who bought lottery tickets would be liable for criminal penalties. It was hoped that this would decrease sales: "The citizen who respects the law, or is afraid of its majesty, will hesitate to take the chances of prosecution." H.R. Rep. No. 2844, 51st Cong., 1st Sess. 3 (1890).

[75]Substantially the same bill was reported out of committee and debated in each Congress from 1884 to 1890. The arguments that were presented during that period will be discussed topically here, rather than chronologically.

the congressional power to limit mail it finds injurious to public health and morals?[76] Proponents argued that Congress had a duty to "protect the general welfare and morality of the people against the pernicious effects of lotteries."[77] Opponents were skeptical of this "duty." Did it mean that Congress could regulate State-sanctioned institutions other than lotteries, or the contents of newspapers other than lottery advertisements?[78]

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[76]The bill's advocates repeatedly maintained that Ex Parte Jackson, 96 U.S. 727 (1877), conclusively determined that this statute was constitutional. The court had stated that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded." Id. at 732. However, as the opposition points out (Minority Report, S. Rep. No. 233, 48th Cong., 1st Sess. 15 (1884)) from the next sentence of the Jackson opinion:

> The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. Jackson at 732.

[77]Proponents found this duty in the decision of Phalen v. Virginia 49 U.S. (8 How.) 163, 168 (1850):

> The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests every class; it preys on the hard earnings of the poor; it plunders the ignorant and the simple. Quoted in the Majority Report, S. Rep. No. 233, 48th Cong., 1st Sess. 1 (1884).

As the Minority Report, id., points out, however, the court was here referring to the duties of State government.

[78]"If Congress may exclude from the mails a newspaper or periodical which contains an advertisement of a lottery, it may make nonmailable newspapers and periodicals in which are printed advertisements, reports or editorials which in its judgment the people should read." Majority Report, H.R. Rep. No. 787, 50th Cong., 1st Sess. 1 (1888). See also remarks of Mr. Compton, note 68 supra.

The bill's advocates contended that not only were Louisiana's rights at issue here, but more importantly, the rights of the other 37 States. These States were powerless to protect their citizens from the Louisiana lottery because the Federal Government had complete control of the mails.[79] The antagonists did not successfully counter this argument.[80] They did not explain how these States were to close their borders to mailed lottery solicitations. These adversaries were more concerned with the[81]

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[79]But in spite of this rigid legislation on the part of the several States they are still unable to protect their citizens against the demoralizing influence and the seductive schemes of the lottery company in the State of Louisiana, and will continue to be so long as every mail train of the United States may bring and scatter . . . within their territory newspapers containing flaming advertisements, depicting how money and fortunes may be made, without care and without labor, by investing only a portion of their hard-earned savings. Against this evil, condemned by public opinion and by their laws, the States are helpless. The power to regulate the mail--to say what shall be carried and what shall not be carried--is vested solely in Congress. We are therefore of the opinion that it has become the duty of Congress to aid the States in making their own laws effective, and to no longer permit the institutions of one State to daily violate the laws of the 37 other States by means of the mail service. This bill would effect this purpose. Its provisions are moderate. Every feature of it has been sanctioned in advance by the Supreme Court in the case of Ex Parte Jackson (96 U.S. 727). Minority Report, H.R. Rep. No. 787 Part 2, 50th Cong., 1st Sess. 2 (1888).

[80]"It is equally clear that the several States are invested with full and ample authority to deal with the whole subject. Most of them, as shown by the majority report, have already provided fully for the suppression of this evil. Their action, instead of furnishing a reason for the congressional legislation here proposed, is rather a conclusive argument against the General Government's interference. . . ." Minority Report, S. Rep. No. 233, 48th Cong., 1st Sess. 12-13 (1884).

[81]The report also declared:

Assuming that the States are competent to protect the morals of their people against the corrupting and injurious effects of lotteries and lottery advertisements, and that the duty to furnish such protection rests with them, this bill presents the grave question as to how far Congress may legitimately go in exercising unquestionable

> centralizing tendency of modern congressional legislation under which the General Government is rapidly assuming control of the domestic affairs of the States, and as rapidly subverting the whole theory and character of our national system as originally formed.

Supporters denied that the statute would violate the newspapers' First Amendment rights.[82]

> . . . it will not abridge any "freedom of the press" to do right or to publish whatever may promote the good of mankind. It is not designed to take away any proper or legitimate right of the press, but only to restrain and prohibit all license to perpetrate a wrong. . . .

It was also argued that this was not really the question, since many reputable newspapers had endorsed the bill.[83]

> Many of the ablest and most influential journals now advocate the denial of mail facilities to any publisher who will admit a lottery advertisement to his columns, and it is believed that an enactment by Congress to this effect will meet with the almost unanimous approval of papers of known and standing ability.

Opponents countered:[84]

> powers for the accomplishment of objects and purposes that do not come lawfully within its jurisdiction. In other words, can Congress properly regulate the mail service of this country, under its authority "to establish post offices and post roads," for the purpose of preventing the circulation of newspapers containing lottery advertisements and the suppression of lotteries? Minority Report, S. Rep. No. 233, 48th Cong. 1st Sess. 13-14 (1884).

[82] Remarks of Mr. Glass, 19 Cong. Rec. 1156 (1888).

[83] H.R. Rep. No. 2844, 51st Cong., 1st Sess. 1 (1890).

[84] Minority Report, S. Rep. No. 233, 48th Cong., 1st Sess. 15 (1884). The question of banning certain publications from the mail had been the subject of congressional debate before. In 1835, President Jackson recommended Federal legislation to prevent the circulation through the mail of incendiary publications designed to incite slave insurrections. Daniel Webster had argued: "It was the liberty of printing as well as the liberty of publishing in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication?" He further expressed the fear that Congress might under this example be called upon to pass laws to suppress the circulation of political, religious, or any other description of publication which might be demanded by the States or be deemed objectionable by Congress. Quoted at Id. p. 18.

> Liberty of circulating is as essential to [the freedom of the press] as liberty of publishing; indeed, without the circulation the publication would be of little value. . . . The freedom of circulation by the ordinary channels of communication is the very essence of the press's freedom. . . . Deny to the press the right to circulate through the mails and over post pikes and routes, which now include all public highways, railroads, and navigable streams (unless sent as merchandise), and the guarantee thrown around its freedom by the Constitution is worthless. "Without the circulation the publication would be of little value."

The 1890 act broke the back of the Louisiana lottery. Postmaster Wanamaker immediately appointed a "fearless man" to be the postmaster in New Orleans and "thousands of pieces of mail were seized and immense masses of evidence collected."[85] Business at the New Orleans Post Office was soon off by one-third.[86] The Supreme Court, reaffirming Ex Parte Jackson,[87] upheld the act's constitutionality in In Re Rapier.[88] Following that decision, some newspapers continued to print lottery advertisements by printing two editions or transporting their papers by express.[89] The final blow to the Louisiana lottery was to come in 1892 when the Louisiana legislature refused to renew the lottery's charter.[90]

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[85] Ezell, supra, at 263-4.

[86] Rep. of the Postmaster General, 1890, H.R. Exec. Doc. No. 1, Part 4, 51st Cong., 2d Sess. 14 (1890-91).

[87] 96 U.S. 727 (1877).

[88] 143 U.S. 110 (1891).

[89] Ezell, supra, at 266.

[90] Id. at 267.

The antilottery statutes were codified in 1909 as part of the Federal criminal code project of 1909[91] substantially as they existed in 1895. Rev. Stat. § 3894 as amended by 26 Stat. 465[92] became 18 U.S.C. § 213 of the code at 35 Stat. 1129. With the recodification of 1948,[93] it became 18 U.S.C. § 1302.

II. COURT INTERPRETATION

The first test of the constitutionality of congressional restrictions on the mailing of lottery material was Ex Parte Jackson.[94] The Supreme Court held that the 1876 act which imposed a fine on the mailing of circulars or letters concerning any lottery was constitutional because ". . . the power possessed by Congress embraces the regulation of the entire postal system of the country."[95] Although the court avoided the questions of interference with State prerogatives under the Tenth Amendment,[96] it did warn against infringing upon individual freedoms:[97]

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[91] Act of March 4, 1909, ch. 321, 35 Stat. 1129.

[92] The Act of September 19, 1890, was reiterated in another antilottery statute, the precursor of 18 U.S.C. § 1301, Act of March 2, 1895, ch. 191, 28 Stat. 963.

[93] Act of June 25, 1948, ch. 645, 62 Stat. 683.

[94] 96 U.S. 727 (1877).

[95] Id. at 732.

[96] This was in fact an issue in the case since the circular alleged in the indictment was deposited in the mail in New York and was sent to a New York address. Id.

[97] Id. at 728.

> The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with the rights reserved to the people, of far greater importance than the transportation of the mail.

The court reached First and Fourth Amendment issues after distinguishing between mail which is to be kept free from inspection (letters and sealed packages) and that which is open to inspection (newspapers, magazines, pamphlets and other printed matter). Letters and sealed packages are fully protected by the Fourth Amendment,[98] and Congress can not pass any law giving the postal service the authority, without court orders, to invade the secrecy of letters and such sealed packages.[99]

Mail which is open to inspection is not protected by the Fourth Amendment, but here the court saw First Amendment problems. A statute which denies the postal service to certain circulars and newspapers must not interfere with the freedom of the press. The court held that such material could be excluded from the mail only if its transportation in any other way was not forbidden by Congress.[100]

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[98] Whilst in the mail, [letters and sealed packages] can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. Id. at 733.

[99] The court realized that this would severely hinder enforcement of the law, since a postmaster is liable for heavy penalties if he wrongfully detains a letter. (Rev. Stat. §§ 3890, 3891). He has to be sure that the letter is illegal without opening it. The court suggested:

> [T]hey may be enforced upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters or packages, or from agents depositing them in the post office or others cognizant of the facts. 96 U.S. at 735.

[100] The Constitution gave the United States plenary power over the mail service. Pursuant to that power, Congress passed Rev. Stat. § 3982:

The 1890 amendment excluding newspapers containing lottery advertisements from the mail was upheld in In Re Rapier.[101] The court held that the Jackson decision was controlling[102] and that mail facilities were not required to be furnished for every purpose.[103]

> We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people.

Issues of construction that have been decided by lower courts are: What is a "lottery?" What is a "letter or circular?" May the proscribed mail be withheld by the Post Office? and Who is liable under the statute?

The cases have consistently held that the three necessary elements of a "lottery" are consideration, prize, and distribution by chance.[104]

> [N]o person may establish a private express for the conveyance of letters or packets by regular trips or at stated periods over any post route which is or may be established by law or from any city, town, or place to any other city, town or place between which the mail is regularly carried.

Petitioner unsuccessfully argued that this monopoly made it obligatory that the Postal Department carry all mail that was legitimate at the time of the adoption of the Constitution. 96 U.S. at 729.

[101] 143 U.S. 110 (1891). Unfortunately, the opinion does not elaborate on the court's views because the Justice to whom preparation of the opinion had been given, had died. Id. at 133.

[102] Id. at 133. [103] Id. at 134.

[104] Waite v. Press Publishing Association, 155 Fed. 58 (6th Cir. 1907); U.S. v. Wallis, 58 Fed. 942 (Id. S.D. 1893), Horner v. United States, 147 U.S. 449 (1893); Brooklyn Daily Eagle v. Voorhies, 181 Fed. Rep. 579 (E.D.N.Y. 1910); Wolf v. F.T.C., 135 F.2d 564 (7th Cir. 1943); J.C. Martin Corp. v. F.T.C., 242 F.2d 530 (7th Cir. 1957).

The question in Brooklyn Daily Eagle v. Voorhies[105] was whether a newspaper advertisement concerning a contest in which prizes were to be given for the "best composition" on the name of a certain breakfast food made the paper unmailable. The government on behalf of the postmaster who refused to accept the newspapers said that the advertisement did not say that the composition would be judged on the basis of merit and that even if it were, there was no way of telling what basis would be used. They felt that this meant that winning would be left to chance. The court held that as long as the contest was honestly carried out, it was not a lottery.

Because a person entering a scheme did not have to pay anything until he was informed of what he would win did not mean that the scheme was not a lottery.[106] The court held that "[t]his is no more than a recognition of the common law rule that a gambling transaction is unenforceable and 'only the loser has recourse to the courts.'"[107]

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[105] 181 Fed. Rep. 579 (E.D.N.Y. 1910).

[106] Wolf v. F.T.C., supra, n. 104. The scheme was part of a sales gimmick since the defendant obviously would make no money from this "lottery." The entrants ended up paying as much for the "prize" as if they had bought it directly from defendant. The Wolf court held that this was still a "prize" within the definition of "lottery" because the article drawn may or may not have been of any value to the purchaser who drew it. A later court in J.C. Martin Corp. v. F.T.C., supra, (this case involved an identical scheme) agreed with the Wolf court that the fact that the purchaser can back out does not remove it from the lottery laws, but disagreed on the issue of "prize." The Martin court held that since the purchaser pays the same price for the item as he would have otherwise, there is no prize. 242 F.2d at 533.

[107] 135 F.2d at 566.

In 1885, a circuit court announced that a lottery ticket was not a "letter or circular" and that a lottery dealer who mailed a plain ticket was not liable under the statute.[108] The ticket was not a "circular" because each one was individualized with a different number. It was not a letter since it was not in writing or addressed to the person whose address is on the envelope which enclosed it.[109] However, on the back of the tickets in this particular case, there was a printed schedule of the prizes and the court held that that was a circular since it was in no way individualized.[110]

The practice of detaining mail, illegal under the 1876 statute, was struck down in Cammerford v. Thompson.[111] The court declared that the Postmaster General could not order that mail be withheld from the address unless given specific authority by an Act of Congress.[112] Since the statute only imposes a fine or imprisonment, the court decided that that was the exclusive remedy.[113] It was also declared that the

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[108] United States v. Clark, 22 Fed. Rep. 708 (E.D.Va. 1885).

[109] Id. at 709.

[110] Id. at 110.

[111] 1 Fed. Rep. 412 (Ky. 1880).

[112] The court saw certain constitutional problems if Congress had declared lottery circulars unmailable.

> The act . . . provided no machinery for [the letters'] arrest and detention, probably because no such machinery is possible, except by resort to the courts, without a violation of the constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures. Id. at 421.

In 1895 such a statute was passed. See note 59, supra.

[113] 1 Fed. Rep. at 419.

statute only applies to mail sent out by the lottery dealers and not sent to them.[114]

The second Cammerford holding was also followed in United States v. Mason.[115] The court reasoned that the statute had to be restricted in some manner,[116] and since it was only the lottery dealers who were in the mind of Congress, they should be the only ones liable.[117]

Although the statute was strictly construed in the courts, the policy of section 1302 was not substantially frustrated. Lottery dealers remained indictable under the statute for mailing lottery-related materials.

III. TEXT OF STATUTE

§ 1302. Mailing lottery tickets or related matter

Whoever knowingly deposits in the mail, or sends or delivers by mail:

Any letter, package, postal card, or circular containing any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share,

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[114] "Circular" obviously refers to circulars sent out by lottery companies for the purpose of advertising their schemes, and the word "letter" . . . imports letters of a similar character and mailed for a like purpose * * * [T]he imposition of such penalty upon the writers of letters addressed to the promoters of the enterprises mentioned in this section might result in great injustice. Id. at 420.
The Act of September 19, 1890, ch. 908, 26 Stat. 465, reversed this holding and made citizens liable for their participation in lotteries. See note 74, supra.

[115] 22 Fed. Rep. 707 (E.D.Va. 1884).

[116] The statute had to be restricted, otherwise, "a father writing his son, warning him against spending money upon tickets in any specified lotteries, would be indictable for a criminal offense. Id. at 707.

[117] Id.

or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share of chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title --

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

APPENDIX J

POSTMASTER OR EMPLOYEE AS LOTTERY AGENT

18 U.S.C. § 1303:

D.F.D.

I. LEGISLATIVE HISTORY

In 1827, as part of a series of amendments to the laws regulating the United States Post Office, Congress passed the first of a series of the Federal anti-lottery statutes.[1] The law prohibited postmasters and their assistants from acting as agents for lotteries and from transporting lottery circulars and tickets without postage. Although the provision has scant legislative history, it seems likely that it was, at least in part, a reaction to the wave of anti-lottery sentiment which was being felt in the country at the time.[2] On its face, the statute reflected a fear that the United States Post Office, at that time one of the Federal Government's principal agencies, could become corrupt by association with some of the crime-ridden lottery operations of the day.

The section remained virtually untouched in the revision and consolidation of postal laws which took place in 1872; the only real

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[1]Act of March 2, 1827, ch. 61, § 6, 4 Stat. 238. The section, which is the precursor of the current 18 U.S.C. § 1303, read as follows:

> SEC. 6. And be it further enacted, That no postmaster, or assistant postmaster, shall act as an agent for lottery offices, or, under any colour of purchase, or otherwise, vend lottery tickets; nor shall any postmaster receive free of postage, or frank lottery schemes, circulars, or tickets. For a violation of this provision, the person offending shall suffer a penalty of fifty dollars.

The current Federal criminal statutes relating to lotteries are collected under 18 U.S.C. § 1301-07.

[2]See generally H. Chafetz, Play the Devil, 297-308; J. Ezell, Fortune's Merry Wheel, 177-203.

change was the removal of the provision regarding assistant postmasters.[3] With minor changes in punctuation and phraseology, the section was again carried over intact when the laws were codified in the Revised Statutes.[4]

The first real change in the section took place in 1909, when Congress amended and codified all of the nation's penal laws.[5] For the first time, the provision was taken from the postal laws and placed with other penal statutes in a criminal code and was changed to read as follows:

> SEC. 214. Whoever, being a postmaster or other person employed in the postal service, shall act as agent for any lottery office, or under color of purchase or otherwise, vend lottery tickets, or shall knowingly send by mail or deliver any letter, package, postal card, circular or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both.

The new section expanded coverage beyond postmasters to "all other persons in the postal service,"[6] an amendment apparently accepted without objection in committee and in the Congress. The part of the new section, which forbade the mailing of lottery advertisements, was entirely new, but it strangely did not receive mention in the committee report.[7] The fine for a violation, which had been at fifty dollars

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[3]Act of June 8, 1872, ch. 335, 17 Stat. 294. At that point the section was renumbered § 79 and included in the general collection of laws relating to the postal service.

[4]Rev. Stat. § 3851. The section was again renumbered.

[5]Act of March 4, 1909, ch. 321, 35 Stat. 1088.

[6]H.R. Rep. No. 2, pt. 1, 60th Cong., 1st Sess. 22 (1908).

[7]Id. at 22.

since the 1827 enactment, was doubled, and for the first time a possible prison term of one year was added.

With the exception of changes in phraseology made during the 1948 revision of Title 18 of the United States Code,[8] the provision as enacted in 1909 did not subsequently change, and it is today codified in 18 U.S.C. § 1303.

The recent addition of § 1307 to that Title,[9] however, exempts state-conducted lotteries from the prohibitions of § 1303, and may, therefore, have more of an impact on its effectiveness than any of the amendments heretofore described.

II. COURT INTERPRETATION

No case has arisen directly under 18 U.S.C. § 1303, and many of those which have mentioned the statute have done so only by way of reference. From these few instances of court interpretation, however, it is still possible to discern a pattern of court treatment of a few of the section's key words.

The earliest cases referring to the statute were decided in United States v. Dauphin,[10] and are known as the Louisiana Lottery Cases

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[8] Act of June 25, 1948, ch. 645, 62 Stat. 763.

[9] Pub. L. No. 93-583, § 1 (January 2, 1975) . Stat. . The new 18 U.S.C. § 1307 exempts from § 1303 and most other Federal anti-lottery statutes advertisements and lottery information concerning state-authorized lotteries which are published in a newspaper in that state. State lottery tickets and materials may be mailed within that state or from another state to a state conducting a lottery. For an analysis of § 1307, see Appendix L.

[10] 20 F. 625 (C.C.E.D.La. 1884).

because they arose in the context of the infamous and corrupt Louisiana lottery, which operated in the latter half of the nineteenth century. The defendants had been convicted under § 3894 of the Revised Statutes, the predecessor of 18 U.S.C. § 1302, for sending circulars through the mail advertising the lottery. Challenging the lower court's interpretation of the statute's conduct requirement on appeal, the defendants pointed out that they had not actually mailed the circulars themselves, but had only sent them to the post office with the expectation that they would be mailed. Since the statute would punish "[a]ny person who shall knowingly deposit or send anything to be conveyed by mail," the defendants argued, a person must actually have caused the circulars to be sent through the mail before a violation could be established. The court sustained this interpretation and dismissed the informations. The defendants, the court noted, had indeed sent the circulars to the post office, but

> . . . the meaning of this enactment is that the sending should follow the deposit, and should be "through" or "in" the mail. . . . Circulars concerning lotteries, so far as the federal law is concerned, may be lawfully sent anywhere, from any point to any point, with any intent, provided it be not in violation of this section. "In violation of this section" means in violation of the general and sole prohibition upon which it all rests, and in aid of which its penalties were established. That general prohibition is, "shall not be carried in the mail." No sending could conflict with this inhibition which was not effected in the mail.[11]

In support of this conclusion the court cited other statutes in the Postal Service title of the Revised Statutes, including § 3851, the precursor to 18 U.S.C. § 1303, and asserted that in each case the verbs

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[11] Id. at 627.

"send" or "sent" have an established meaning, and "uniformly signify forwarded in the mail through the officers of the government."[12]

Although the Louisiana Lottery Cases are the cases most directly in point, a more recent decision may cast a shadow over the Louisiana court's interpretation. In Creech v. Hudspeth,[13] a prisoner convicted of mail fraud brought a habeas corpus petition asserting, among other claims, that he had not actually mailed the letter but had done so through an assistant. The court rejected his argument, holding that the statutory phrase "use of the mails" means only that the violator cause the offending matter to be mailed.

> The fact that the clerk who actually mailed the letter, assignment, and other writing was innocent is not material, so long as the use of the mails was caused by the petitioner and his codefendants . . .[14]

Although the key word "send" was not involved in this case, the sort of reasoning it contains would probably supplant the Louisiana court's interpretation in a new case under the statute.

Another case left open a possible defense for a conviction under the statute. In Horwitz v. United States[15] several persons were convicted of conspiracy to mail circulars, letters, and other instruments containing lottery information. The postal authorities who had detected the scheme, however, had delivered the suspected letters to the

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[12] Id. at 628.

[13] 112 F.2d 603 (10th Cir. 1940).

[14] Id. at 606.

[15] 63 F.2d 706 (5th Cir. 1933).

addressees and had then required the addressees to sign waivers, open the letters in their presence, and return them immediately. The convicted defendants argued on appeal that this was not within the meaning of the word "delivery" in the statute, and offered as a supporting argument that the postal authorities could not have been convicted under § 337 of the criminal code, a predecessor of 18 U.S.C. § 1303, on these facts.[16] The court preferred not to decide the question, finding in the other facts of the case the essential elements of the crime of conspiracy. Although the court's opinion is certainly not conclusive, there is room for the possibility that the argument could be made again in a future case.

The last case citing the statute focused on a third key word in the statute: the meaning of "lottery."[17] In Garden City Chamber of Commerce v. Wagner,[18] the postmaster of Garden City refused to deliver post cards mailed to local residents by the city's Chamber of Commerce, since he contended that they were part of a lottery and that he would thereby expose himself to prosecution under 18 U.S.C. § 1303. The cards, each of which contained a number, were part of an advertising ploy. Each downtown merchant had numbers in his window, and any resident

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[16] Id. at 708.

[17] In addition to this case, of course, there are decisions under the other Federal statutes regarding lotteries which cast light on judicial interpretation of the word. A few postal regulations also bear on the question of what kinds of activities will be considered lotteries. See Haley, The Broadcasting and Postal Lottery Statutes, 4 Geo. Wash. L. Rev. 475, 491 n.48 (1936); Federal Communications Commission v. American Broadcasting Co., 347 U.S. 284, 294 n.15 (1953).

[18] 100 F.Supp. 769 (E.D.N.Y. 1951).

who could match his card with a window number would receive a prize. The Chamber of Commerce, incensed at the refusal to deliver, went to court asking for an injunction. After a careful consideration of the facts the District Court concluded that the plan in question was not a lottery and granted the injunction, since "the consideration requisite to a lottery is a contribution in kind to the fund or property to be distributed," and window-looking by the local residents would not constitute such consideration.[19] Citing the District Court opinion, the Court of Appeals affirmed, over a vigorous dissent.[20]

Fragmentary as these bits of statutory construction are, they do offer limited insight into court interpretation of some of the statute's important words. A broader interpretation awaits a case brought directly under the statute, a circumstance which has not happened in the first 148 years of its history and may well never occur.

III. TEXT OF THE STATUTE

§ 1303. Postmaster or employee as lottery agent

> Whoever, being a postmaster or other person employed in the Postal Service, as an agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme

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[19] Id. at 772.

[20] Garden City Chamber of Commerce v. Wagner, 192 F.2d 240 (2d Cir. 1951).

offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than $100 or imprisoned not more than one year, or both.

APPENDIX K

BROADCASTING LOTTERY INFORMATION

18 U.S.C. § 1304

D.F.D.

I. LEGISLATIVE HISTORY

The Federal prohibition against the broadcasting of lottery information and advertisements, presently contained in 18 U.S.C. § 1304, was enacted as part of the Federal Communications Act in 1934,[1] although its genesis was two years earlier. Throughout its long period of legislative birth, the justification for the statute remained essentially twofold: first, to preserve consistency with the antilottery postal statute which had been on the books for many years,[2] and second, to remove any competitive advantage the radio stations might have over the newspapers as a result of the postal prohibition.

A bill to eliminate the broadcasting of lottery advertising or information over federally licensed radio stations was first introduced in Congress as H.R. 7716 in 1932.[3] The provision was part of a longer act designed to amend the Radio Act of 1927, which was at that time the principal Federal statute regulating broadcasting. Obviously eying the postal lottery statute already in force, the House committee reporting the bill remarked:

> The committee does not think that the United States should permit any radio station, licensed and regulated by the Government, to engage in such unlawful practices.
> Furthermore, the broadcast of such information is unfair

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[1]Act of June 19, 1934, ch. 652, 48 Stat. 1064.

[2]18 U.S.C. § 214, at that time, which later became the current 18 U.S.C. § 1303. This provision was originally enacted in 1827.

[3]75 Cong. Rec. 1983 (1932).

> to the newspapers, which are forbidden the use of the mails, if they contain such information.[4]

Although differences of opinion regarding the procedural sections of the bill caused the proposal to be shifted from the committees to the floors of the House and the Senate several times, both houses consistently agreed with this rationale for the lottery section. The Senate Committee on Interstate Commerce, in its several reports on the bill, recommended the lottery section favorably in almost exactly the same words as the House.[5] As Representative Davis, the bill's sponsor, said during House debate,

> . . . this section simply provides that the Federal Government, which has assumed the responsibility and obligation to regulate radio, shall not permit these stations, licensed by the Federal Government, to violate the laws of the United States and of every State in the Union. I have heard of no opposition to this from any source. . . .[6]

The final conference report version of the bill,[7] which included both the House prohibition against the broadcasting of lottery information and the Senate ban on the broadcasting of lottery advertising, read as follows:

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[4]H.R. Rep. No. 221, 72d Cong., 1st Sess. 8 (1932). For a comparison of the broadcasting lottery statute and the postal lottery statute, see Haley, The Broadcasting and Postal Lottery Statutes, 4 Geo. Wash. L. Rev. 475 (1936).

[5]S. Rep. No. 546, 72d Cong., 1st Sess. 10 (1932); S. Rep. No. 1004, 72d Cong., 2d Sess. 11-12 (1932); S. Rep. No. 1045, 72d Cong., 2d Sess. 11 (1932).

[6]Cong. Rec. 3683 (1932).

[7]For the conference report on H.R. 7716 see H.R. Rep. No. 2106, 72d Cong., 2d Sess. (1933), also printed at 76 Cong. Rec. 5036-37 (1933) and 76 Cong. Rec. 5203-04 (1933). A useful summary of the report is found at 76 Cong. Rec. 5204 (1933) (remarks of Senator Dill).

> Sec. 13. No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person, firm, or corporation operating any such station shall knowingly permit the broadcasting of, any advertisement of, or information concerning any lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person, firm, or corporation violating any provision of this section shall upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs.[8]

The entire bill, passed by both houses, was presented to the President in 1933,[9] but was pocket vetoed several days later.

When Congress assumed the task of writing the massive Communications Act in 1934, it lifted the lost antilottery section from H.R. 7716 and inserted it, in almost precisely its original form, as § 316 of the new Act. The motivations that led to the original passage of the provision were still alive, and the worsening of the Depression had added, for at least one Representative, a new justification:

> I am in accord with this section of the bill because I believe that radio announcers should not be permitted to advertise the lotteries of other countries which already drain the United States of hundreds of millions of dollars, sent yearly by our citizens to other nations.[10]

For the committees reporting the new bill, however, it was enough merely to state the provision and then add that it "was included in H.R. 7716."[11]

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[8] H. R. Rep. No. 2106, 72d Cong., 2d Sess. 3 (1933).

[9] 76 Cong. Rec. 5397 (1933).

[10] 78 Cong. Rec. 10995 (1934) (remarks of Representative Kenney).

[11] S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934); 78 Cong. Rec. 10988 (1934) (the conference report).

The section received virtually no attention during the floor debates on the bill and had no outspoken opponents. Along with the rest of the bill it was approved by the Senate[12] and the House[13] and signed into law by the President on June 19, 1934.[14]

Section 316 of the new Act, in its final form, read almost exactly like the conference report version of H.R. 7716, supra.[15] With the exception of some minor changes in phraseology made in 1948, when the criminal statutes were revised and enacted into positive law,[16] the section reads the same today, in 18 U.S.C. § 1304, as it did when enacted.

II. COURT AND ADMINISTRATIVE INTERPRETATION

Since the enforcement of 18 U.S.C. § 1304 is within the province of the Federal Communications Commission as well as the Department of Justice, the provision has seen a fair amount of administrative and judicial interpretation, even though no prosecution has ever been brought under the statute.

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[12] 78 Cong. Rec. 10912 (1934). [13] 78 Cong. Rec. 10995 (1934).

[14] 78 Cong. Rec. 12452 (1934). Act of June 19, 1934, ch. 652, § 316, 48 Stat. 1088.

[15] The only differences were (1) the addition of the word "any" between the words "of" and "such lottery" in the latter part of the section's first sentence, and (2) the deletion of the words "firm, or corporation" from two places in the section.

[16] Act of June 25, 1948, ch. 645, § 1304, 62 Stat. 763. The only real change was the deletion of the words "upon conviction thereof" from the section's last sentence. The committee reporting the bill regarded this phrase as "surplusage since punishment can be imposed only after a conviction." H.R. Rep. No. 304, 80th Cong., 1st Sess. A99 (1947). For the text of the modern version, see section III.

In a number of instances the Federal Communications Commission has issued administrative decisions concerning § 1304, usually in situations where radio and television stations have sponsored or advertised various forms of product and cash giveaways. The first case to arise under the statute was In re WRBL Radio Station, Inc.,[17] where a station which had broadcast advertisements for a sponsor's lottery was faced with a challenge to its license renewal. Setting the pattern for many such cases to come, the Commission accepted the traditional view that "the essential elements of a lottery are chance, prize, and consideration,"[18] found the scheme in question to be a lottery, but renewed the license nonetheless since the station was not likely to broadcast such advertisements in the future.[19] In subsequent license renewal cases, the Commission adopted the view that the lottery

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[17] 2 F.C.C. 687 (1936).

[18] Id. at 690. This view was reasserted in many subsequent cases, particularly after it received the blessing of the Supreme Court in Federal Communications Commission v. American Broadcasting Co., Inc., 347 U.S. 284 (1953). See, e.g., In re City of Jacksonville, 21 F.C.C. 334, 410 (1956); In re Noble Broadcasting Corp., 1 F.C.C.2d 154, 157 (1965); In re Keith L. Resing, et al., 3 F.C.C.2d 904 (1966).

One recent F.C.C. case, however, may have signalled a departure from the three-fold definitional view. In In re Greater Indianapolis Broadcasting Co., 44 F.C.C.2d 37 (1973), the Commission observed that

> we know of no case interpreting the federal lottery statutes where a lottery was found to exist without a receipt of the consideration by the promoter. We believe that the evils sought to be prevented by the prohibition of lotteries include not only the appeal to the gambling spirit and the risk of loss by the participants, but also the unjust enrichment of the manipulator of the scheme.

Id. at 39.

[19] 2 F.C.C. 693. In this case the station had come under new management since the infraction.

infraction would not cause a license forfeiture if the station was operating in the "public interest" and appeared as if it was going to continue to do so.[20]

The denial of a license renewal, however, is not the only sanction available to the Commission in case of a § 1304 violation. The Commission can also revoke licenses or construction permits,[21] issue a cease and desist order,[22] and impose forfeitures of up to $1,000 for each day in which the infraction occurs.[23] It is these measures which have been in frequent use in recent years, and in a number of reported cases the Commission has imposed heavy fines upon stations which have been found guilty.[24]

In addition to the above, of course, the Commission can issue rulings[25] and regulations[26] which it feels necessary to enforce the provisions of the law. Pursuant to this authority, it adopted a

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[20] See, e.g., In re KXL Broadcasters, 4 F.C.C. 186 (1937), in which the Commission renewed the license since

> this station for many years has supplied a public need, and for the most part its programs have met with general approval . . . .

Id. at 190.

[21] 47 U.S.C. § 312 (a)(6).

[22] 47 U.S.C. § 312 (b).

[23] 47 U.S.C. § 503 (b)(1)(E).

[24] See, e.g., In re KTOK Radio, Inc., 3 F.C.C.2d 653 (1966) ($500); In re Ohio Quests, Inc., 8 F.C.C.2d 859 (1967) ($500); In re Call of Houston, Inc., 12 F.C.C.2d 733 (1968) ($2,000); In re Lawrence Broadcasters, Inc., 14 F.C.C.2d 384 (1968) ($10,000); In re Taft Broadcasting Co., 18 F.C.C.2d 186 (1969) ($2,000).

[25] 5 U.S.C. § 554 (e).

[26] 47 U.S.C. § 303 (f) and (r).

consideration to create a lottery, but the District of Columbia Court of Appeals reversed the ruling in Caples Company v. United States.[32] There was not sufficient consideration flowing to the promoter to justify such a finding, the court observed, and added:

> The undesirability of this type of programming is not enough to brand those responsible for it as criminals. Protection of the public interest will have to be sought by means not pegged so tightly to the criminal statute or in additional legislative authority.[33]

Despite such adverse rulings, the Commission has continued to focus on the requirement of consideration for a lottery and has developed a body of law on the subject more sophisticated than that found in the earlier Federal cases. In a series of cases and rulings in 1969,[34] the Commission examined a number of schemes in which cash and gifts were given away both to those who had purchased tickets and those who were given free chances. If free chances were made generally available, the Commission held, the consideration element was not present and the scheme did not constitute a lottery.

> However, thereby to eliminate the element of consideration necessary to support a lottery finding, the free chances must be reasonably equally available to all participants in the contest. . .[35]

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[32] 243 F.2d 232 (D.C.Cir. 1957).

[33] Id. at 234.

[34] In re Bob Jones University, 18 F.C.C.2d 8 (1969); In re Public Notice Concerning Applicability of Lottery Statute to Contests and Sales Promotions, 18 F.C.C.2d 52 (1969); In re WBRE-TV, Inc., 18 F.C.C.2d 96 (1969); In re Taft Broadcasting Co., 18 F.C.C.2d 186 (1969).

Perhaps the most fascinating of all the 1969 cases is In re United Television Co., Inc., 20 F.C.C.2d 278 (1969), where a station was carrying spurious religious programs which in reality tipped off local residents to winning lottery numbers by means of carefully selected citations to the Scriptures.

[35] In re Bob Jones University, 18 F.C.C.2d 8, 10 (1969).

Further, a station manager can not merely accept the word of the promoter that the free chances are being made available equally:

> In order to assure himself that his facilities are not being used for unlawful purposes, he should take all reasonable steps to learn whether the promotion in its actual operation is being conducted as a lottery.[36]

Moving beyond the concept of consideration, the Commission in a number of cases has had to interpret other elements of the statute as well. The statute, for example, imposes liability on anyone who "broadcasts" lottery information or advertising, without regard to that person's state of mind,[37] but makes a station operator liable only if the operator "knowingly permits" such broadcasts. In several cases station managers or owners have attempted to avoid liability by denying knowledge. Although the Commission has recognized that this is technically a sufficient defense to the statute,[38] it may still impose de facto liability by liberal application of principles of respondeat superior[39] or by finding that the incident "reflects a lack of responsible supervision over program content on the part of the licensee."[40] A subsequent revision of operations to prevent the recurrence of lottery broadcasts will not suffice to negate liability,

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[36] In re Public Notice Concerning Applicability of Lottery Statute to Contests and Sales Promotions, 18 F.C.C.2d 52 (1969).

[37] Although it seems safe to assume that the intention inheres in the doing of the act.

[38] In re Meredith Colon Johnston, et al., 1 F.C.C.2d 720, 724 (1965).

[39] In re Ohio Quests, Inc., 8 F.C.C.2d 859, 860 (1967).

[40] In re City of Jacksonville, 21 F.C.C. 334, 410 (1956).

the Commission has held,[41] but where the intention to broadcast lottery information was not present and the lottery element of the announcement was insignificant, liability may not be imposed.[42] Radio giveaway programs have been affirmatively held, by analogy to the American Broadcasting Co. decision, not to be lotteries.[43]

By far the most interesting series of cases to have arisen under 18 U.S.C. § 1304, however, has come up just recently in the context of the State-operated lotteries which began flourishing in the late 1960's and early 1970's. Soon after the beginning of the New York State Lottery in 1967 the FCC issued a declaratory judgment regarding the lottery, ruling that the statute applies to State-operated lotteries as well as private ones and therefore bars all announcements other than ordinary news reports and station editorials.[44] The broadcasters involved appealed the ruling[45] and challenged the statute on first amendment grounds, but the Second Circuit in New York State Broadcasters Association v. United States[46] rejected their constitutional argument.

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[41] In re Call of Houston, Inc., 12 F.C.C.2d 733, 735 (1968). But see In re WRBL Radio Station, Inc., supra note 19.

[42] In re Noble Broadcasting Corporation, 1 F.C.C.2d 154 (1965).

[43] In re KFPW Broadcasting Co., et al., 26 F.C.C.2d 735 (1970).

[44] In re Broadcasting of Information Concerning Lotteries, 14 F.C.C. 2d 707 (1968). The Commission observed:

> In the category of news, any material broadcast in normal good faith coverage, which is reasonably related to the audience's right and desire to know and be informed of the day-to-day happenings within the community is permissible.

Id. at 710.

[45] Authorized by 47 U.S.C. § 402(a).

[46] 414 F.2d 990 (2d Cir. 1969), cert. denied 396 U.S. 1061 (1970).

Noting as an example that "the first amendment does not protect freedom to swindle even though words may be used to accomplish that result,"[47] the court noted that

> [t]he real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct.[48]

Although the statute, which prohibits the broadcasting of "any . . . information concerning a lottery," would appear to be invalid on its face, the court upheld its constitutionality through a narrow interpretation of the phrase, holding that the statute bars only the broadcasting of information that "directly promotes" a particular lottery. "[W]e think that the section must be directly construed to go no further."[49]

Such an interpretation allowed the court to discuss in detail precisely what could and could not be broadcast. A news item which has "the incidental effect of promoting a lottery" is not banned, but if a lottery announcement happens to contain incidental "news" such as the amount realized for education, it is prohibited by the statute.[50] An interview by a television reporter of an excited winner would be a

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[47] Id. at 996.

[48] Id. at 997. In a later case in another context the court put it more succinctly: "[T]he First Amendment deals with the free exchange of ideas and not with commercial 'factual' speech." Securities and Exchange Commission v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306 (2d Cir. 1971). See also United States v. Hunter, 454 F.2d 205 (4th Cir. 1972).

[49] 414 F.2d at 997.

[50] Id. at 998. "We are aware," the court said, "that at times the line drawn may be thin . . . "

legitimate feature story and is "legitimate news and an indirect promotion at best." Editorial comment cannot be reached by § 1304 at all, unless "the editorial format is used as a sham to avoid the prohibition on direct promotion of a lottery."[51]

Because the FCC ruling lacked specificity, the court set it aside to allow the Commission to reconsider its judgment in light of the opinion. In response, the Commission issued a second declaratory ruling in 1970[52] answering in detail the broadcasters' questions.

The New York State Broadcasters Association case, however, was not the last word on the issue. In 1972 the Jersey Cape Broadcasting Corporation in Wildwood, New Jersey, requested a declaratory ruling on whether a one-sentence statement during Thursday evening news broadcasts advising New Jersey residents of the winning lottery number in the weekly drawing of that State's lottery would constitute a § 1304 violation. In a series of three rulings, the Commission held that broadcast of such a news item was prohibited and rejected a plea for reconsideration.[53] On appeal, the Third Circuit, sitting en banc,

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[51] Id. at 999. The court did take notice of the rule of New York Times Co. v. Sullivan that advertisements "on behalf of a movement whose existence and objectives are matters of highest public interest and concern" are entitled to full constitutional protection. 376 U.S. 254, 266 (1964). The argument could conceivably be used under § 1304, the court observed, but the public concern must be more than "wholly incidental and subordinate to the promotion . . ." 414 F.2d at 999.

[52] In re Broadcasting of Information Concerning Lotteries, Supplemental Declaratory Ruling, 21 F.C.C.2d 846 (1970).

[53] In re Jersey Cape Broadcasting Corp., 30 F.C.C.2d 794 (1972), 36 Fed. Reg. 14347 (1972), FCC 72-702, filed July 27, 1972.

unanimously held in New Jersey State Lottery Commission v. United States[54] that such a news broadcast was protected by both the first amendment and another provision of the Communications Act. The court focused on 47 U.S.C. § 326, which reads as follows:

> § 326. Censorship
> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

This provision, the court said, was to guarantee that nothing in the Act's other provisions would be construed so as to be inconsistent with the first amendment. The FCC is not permitted to "exercise . . . control over editorial decisions of broadcast journalists,"[55] the court observed, and in any event the Commission's contention that such information is not "news" is "simply frivolous."

> The first amendment makes clear that it is beyond the competency of any governmental agency to determine, a priori, that any item of information is, for any news medium, not news.[56]

Though the court declined to pursue the issue any further and preferred to decide the case on these broad grounds, there is some question as to whether the guidelines established for the statute in New York State Broadcasters Association could survive the strict limitations placed on § 1304 by the New Jersey State Lottery Commission court. Perhaps to resolve this issue, the Supreme Court granted certiorari in the New Jersey case.[57]

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[54] 491 F.2d 219 (3d Cir. 1974).

[55] Id. at 222. [56] Id. at 223.

[57] 417 U.S. at 907-08 (1974).

In any event, it appears that the question of broadcasting in reference to State-authorized lotteries is now moot in light of the recent addition of 18 U.S.C. § 1307 to the Code, which exempts State lotteries from the prohibitions of § 1304.[58] Lotteries not conducted under State auspices, however, are still subject to all the provisions of § 1304 as interpreted by the FCC and the courts, and the State lottery cases may well be valuable precedent in that context.

III. TEXT OF THE STATUTE

§ 1304. Broadcasting lottery information

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

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[58] Pub. L. No. 93-583, § 1 (January 2, 1975 88 Stat. 1916. The new section provides that § 1304 and most other Federal antilottery statutes do not apply to advertisements, lists of prizes, or information concerning a State-conducted lottery where the material in question is broadcast by a radio or television station licensed in the lottery State or an adjacent State which conducts a lottery. 18 U.S.C. § 1307(a). See Appendix L.

APPENDIX L

STATE-CONDUCTED LOTTERIES

18 U.S.C. § 1307

H.A.K.

I. LEGISLATIVE HISTORY

The growth of State-operated lotteries in recent years has been hampered by the existence of Federal statutes prohibiting lotteries within areas of Federal jurisdiction. 18 U.S.C. § 1301 (relating to the importation and transportation of lottery tickets), § 1302 (relating to the mailing of lottery tickets and related matter including advertising), § 1303 (prohibiting postal employees from participating in lottery schemes), and § 1304 (relating to the broadcasting of lottery information) together constituted a significant limitation upon the operations of State lotteries. Remedial legislation, however, was passed in the last days of the 93d Congress because of a threat of prosecution of the lottery States by the Department of Justice for violation of the Federal antilottery statutes.[1] Congress enacted 18 U.S.C. § 1307 to exempt from 18 U.S.C. §§ 1301-04 lotteries conducted by a State acting under authority of State law.

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[1]On August 30, 1974, Attorney General Saxbe sent the governors of each State currently permitting lotteries (New Hampshire, New York, New Jersey, Massachusetts, Connecticut, Pennsylvania, Michigan, Maryland, Illinois, Ohio, Delaware, Rhode Island, and Maine) a telegram warning them that "Serious questions have arisen concerning the lottery that is being conducted in your State," and that "There is a distinct possibility that there are violations of the criminal provisions of the Federal code." N.Y. Times, Aug. 31, 1974, at 1, col. 1. Saxbe then announced a ninety-day moratorium on Federal prosecution under the statutes: "Attorney General William B. Saxbe promised representatives of 13 States at a meeting here [Washington] yesterday that he will not act to shut down their State-run lotteries for at least 90 days in order to give Congress time to amend Federal antilottery laws." Wash. Post, Sept. 7, 1974, at 1, col. 8. But cf. "A Fair Bet: Official Gambling Will Grow." N.Y. Times, Oct. 13, 1974, § 4 (The Week in Review), at 10, col. 3.

On December 20, 1974, Congress passed section 1307 as part of Pub. L. No. 93-583, signed into law by President Ford on January 2, 1975.[2] Although the bill received much attention in the final weeks of the 93d Congress, it had been introduced in the Senate as S. 544 in January of 1973[3] and as H.R. 6668 in the House the following April.[4] Passage did not seem likely until November, 1974, when the Senate Committee on the Judiciary held hearing on S. 544 and related bills.[5] S. 544 was reported out on December 18,[6] and was passed by the Senate the following day.[7] The House passed its H.R. 6668 on December 20, incorporating one additional provision,[8] with which the Senate agreed the same day.[9]

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[2]120 Cong. Rec. S22542-43; H12599-609 (daily ed. Dec. 20, 1974).

[3]S. 544, 93d Cong., 1st Sess. (1973), by Senator Hart.

[4]H.R. 6668, 93d Cong., 1st Sess. (1973), by Congressman Rodino of New Jersey, chairman of the Judiciary Committee. Rodino had also introduced a similar bill in the 92d Congress, H.R. 2374, and had held hearings on that bill on October 13, 1971. Neither that attempt, nor the subsequent hearings held on April 24, 1974 on H.R. 6668 produced immediate action on the floor. [Copies of these hearings unavailable as of this writing.]

[5]S. Rep. No. 93-1404, 93d Cong., 2d Sess. 2 (1974). The hearings were held on November 20, 1974 before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary. [Copy unavailable as of this writing.]

[6]S. Rep. No. 93-1404 supra.

[7]120 Cong. Rec. S22145 (daily ed. Dec. 19, 1974).

[8]120 Cong. Rec. H12599-609 (daily ed. Dec. 20, 1974). For discussion of the amendment, respecting adjacent States, see note 22 infra.

[9]120 Cong. Rec. S22543 (daily ed. Dec. 20, 1974).

Reasons for the passage of an exemption from the antilottery statutes for State-conducted lotteries were summarized by the Senate Judiciary Committee as follows:[10]

> The purpose of S. 544, as amended, is to amend present Federal provisions relating to lotteries (18 U.S.C. 1301-1304, 1953; 39 U.S.C. 3005) to accomodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of nonlottery States. The bill accomplishes this purpose by exempting such State-run lotteries from existing prohibitions to the extent of permitting use of radio and television stations licensed to a location within that State; use of newspapers published within that State without imposing mailing restriction on such papers; transportation and use of the mails to distribute materials to addresses within that State; and use of interstate facilities and channels to obtain equipment, tickets, etc., designed for use in the operation of such lottery within that State (e.g., purchased from an out-of-State business).

The Committee repeatedly emphasized the limited nature of the proposed exemption and the historical context for previous absolute Federal prohibition of lottery activity.[11] The direction that the exemption provided by section 1307 should take was precisely confined by the Committee to the following:[12]

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[10] S. Rep. No. 93-1404 at 2, supra.

[11] Id. at 2-3. Prior Federal action against lotteries had been taken in the 19th century in response to unprecedented corruption, particularly in connection with the infamous Louisiana lottery. See generally J. Ezell, Fortune's Merry Wheel 177-203. See also 19 Cong. Rec. 1153-61 (1888), in which the bill that would establish the most pervasive Federal lottery prohibition was debated, the message of President Harrison to Congress concerning the Louisiana lottery at 9 A Compilation of the Messages and Papers of the Presidents 1789-97 (J. Richardson ed.), H.R. Misc. Doc. No. 210, Part 9, 53d Cong., 2d Sess. (1894) 80-81, and the resulting statute, Act of September 19, 1890, ch. 908, 26 Stat. 465.

[12] S. Rep. No. 93-1404, supra note 5, at 3.

1. Permitting transportation and mailing to addresses within the particular State conducting the lottery;

2. Permitting the mailing of newspapers published within the State, notwithstanding lottery promotional or other information contained therein concerning a State-run lottery in that State;

3. Permitting the broadcasting of promotional or other information concerning a lottery within that State from stations licensed to a location within that State; and

4. Permitting a State-run lottery to obtain material necessary to conduct its operation from out-of-State sources.

The Committee further noted the failure of the States to obtain full relief in the courts.[13]

Upon resolving itself into the Committee of the Whole House,[14] the House debated the identical H.R. 6668 on the floor on December 20.[15] The Chairman of the Committee on the Judiciary, Mr. Rodino, who was the sponsor of the bill,[16] urged passage, quoting a letter from the Attorney General citing the need for prompt congressional action.[17] Two official letters from the Department of Justice were inserted into the

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[13] Id. at 3n.2. The Supreme Court has heard arguments in New Jersey State Lottery Commission v. United States, 491 F.2d 219 (3d Cir. 1974), docket no. 73-1471, in which the Third Circuit held en banc that lottery information broadcast as news is constitutionally protected under the first amendment. This exemption would not apply to anything other than legitimate news under the reasoning of the case, but would extend to other media regardless of location provided that the categorization as "news" was within the sound editorial discretion of the source of the otherwise prohibited information.

[14] 120 Cong. Rec. H12519 (daily ed. Dec. 19, 1974); H. Res. 1492.

[15] 120 Cong. Rec. H12599-609 (daily ed. Dec. 20, 1974).

[16] Rodino had also sponsored previous bills to accomplish the same purpose. See note 4 supra.

[17] 120 Cong. Rec. at H12599.

Congressional Record[18] to demonstrate the imminence of Federal prosecution of the lottery States.[19] Further technical difficulties were raised in which members sought to achieve parallel treatment of broadcasting and newspapers under section 1307, but exact accord was found to be unworkable consistent with the limited nature of the exemption.[20] Rodino then reiterated the prior history of the proposed

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[18] 120 Cong. Rec. at H12601. Pertinent excerpts are the following:

> U.S. Department of Justice
> New Haven, Conn., October 25, 1974
>
> Commission on Special Revenue,
> State of Connecticut,
> Wethersfield, Conn.
>
> Gentlemen: The apparent and potential conflicts between Federal statutes and State Special Revenue Projects flags to this office the obligation to enforce the Federal law . . .
>
> . . . . . .
>
> . . . Congress will presumably avail itself of the opportunity to determine whether the Federal laws should be enforced against the State. Unfortunately inaction on the part of Congress when the issue has clearly been presented to it in the form of proposed remedial legislation suggests that the laws as they are or may be applicable in their present form do in fact state the will of Congress. This inference becomes stronger with the passage of time, particularly when threats of prosecution have been made publicly. . . .

[19] Id. See also note 1 supra.

[20] This distinction turns on the different technologies involved. The destination of broadcasts cannot be limited in the same way that the destination of newspapers can be, since restricting where newspapers may be sold or sent is a relatively easy matter. Materials to be broadcast may be restricted as to content but not as to expected audience, within broad limits, in a populated area crossing State lines. Thus, if the general rule is to limit infringement on neighboring States, restricting the subject matter of a broadcast would mean that in many cases a radio station would not be able to broadcast with respect to the lotteries of a large part of its listening audience. Although the same can be said logically for newspapers, Congress chose not to extend the exemption for newspapers, feeling that the fact situation rarely arises in which a newspaper in a lottery State has as its prime audience another lottery State. See 120 Cong. Rec. at H12603-07, and examples given herein at text following fn. 29.

bill and its current need,[21] and offered an additional amendment extending the exemption to encompass broadcasting of information from adjacent States in which lotteries are also authorized.[22] This amendment was designed to accomodate situations in which metropolitan areas are served by communication facilities in neighboring States that also allow lotteries but otherwise would not be able to broadcast with respect to both lotteries.[23] Over some objection to this addition to the exclusion,[24] the House passed H.R. 6668 as amended 185-126.[25]

Congressional exemption of State-conducted lotteries from prior Federal restrictions required amendment of two other sections of United States Code in addition to the enactment of section 1307. A new paragraph was added to 18 U.S.C. § 1953 (concerning the interstate transportation of wagering paraphernalia) to exclude "equipment, tickets, or materials used or designed for use within a State in a

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[21] 120 Cong. Rec. at H12606.

[22] Section 1307(a)(2) originally read "broadcast by a radio or television station located in a State conducting such a lottery." The Rodino replacement, which was agreed to, read "broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery." This is actually a limiting amendment, although it adds adjacent States. Under the former provision, a radio or television station located in any lottery State could broadcast about any other lottery. Thus a Michigan station could broadcast concerning New York, despite not normally serving the New York audience. The key word is "that," which relates the subject of the broadcast back to the location to which the source is licensed. (See text of statute in section III infra.)

[23] See the examples given at text following fn. 29.

[24] 120 Cong. Rec. at H12606-07.

[25] Id. at H12608.

lottery conducted by that State acting under authority of State law."[26] A new section was also added to 39 U.S.C. § 3005 (relating to the postal service) to permit the mailing of certain materials related to a lottery conducted by a State under the authority of the law of that State.[27]

II. SCOPE

Although there is as yet no litigation concerning Pub. L. No. 93-583, the scope of section 1307 merits discussion. The four conditions set out by the Senate Judiciary Committee[28] are reflected in the statute.

Section 1307(a) exempts from the operation of 18 U.S.C. §§ 1301-04 lottery-related information "concerning a lottery conducted by a State acting under authority of State law" that is contained in a newspaper or radio or television broadcast originating in the same State. The radio or television station of a neighboring State that conducts a lottery according to its law could broadcast with respect to the lottery of the State of origin as well as that of the neighboring State, but a newspaper could never publish lottery-related information not concerning the lottery of the State in which it was published. This limitation is,

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[26] This paragraph as an addition to the list of exclusions in 18 U.S.C. § 1953(b) that constitute specific exemptions to the general rule of the statute, which is to prohibit the interstate transportation of wagering paraphernalia.

[27] 39 U.S.C. § 3005 authorizes the postal service to refuse to deliver mail under certain circumstances relating to "false representation." The new paragraph 39 U.S.C. § 3005(d) would clarify that lotteries conducted by a State under authority of State law are not meant to be included in the rule of the statute.

[28] See text accompanying note 12 supra.

of course, itself subject to the constitutional role which protects information having legitimate news value, whether or not pertaining to lotteries.[29]

Section 1307(b) permits the mailing or transportation to a lottery State from outside sources of materials relating to the lottery of the destination State.

Under 39 U.S.C. § 3005(d) the mailing of lottery materials relating to a given State may be mailed from addresses in that State to addresses within that State.

Finally, no information or materials relating to lotteries may originate from a non lottery State that does not fall within the category of news or material destined to be used by the State-authorized lottery in the State to which it is sent.

A series of examples may be useful to demonstrate possible applications of Pub. L. No. 93-583:

1) A lottery may be discussed by any letters, newspapers, radio or television stations to the extent of its legitimate news value without respect to the statute because of the First Amendment.

2) The Boston Globe, published in Massachusetts but serving much of New England, may advertise and fully discuss the Massachusetts State lottery but not that of New Hampshire, Rhode Island, Connecticut, or New York. Readers of the Globe in those States, as well as readers in nonlottery Vermont, may read of the Massachusetts lottery only.

3) WBZ radio, licensed to a location in Boston, Massachusetts, may broadcast with respect to the lotteries of Massachusetts, Rhode Island, Connecticut, New York, and New Hampshire, but not with respect to that of New Jersey, of Pennsylvania, or of Maine. Portland, Maine listeners regularly served by WBZ may listen to advertisements concerning all of these other lotteries but not that of Maine. Rutland, Vermont listeners will have to suffer through all the lottery information broadcast by WBZ if they wish to listen at all, despite having no lottery of their own.

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[29] See note 13 supra.

4) A Portsmouth, N.H., television station licensed to feed cable television programs from Boston and New York City would seemingly be in violation of the law if it did not filter out all lottery-related information except that pertaining to Massachusetts or New Hampshire.

5) The same cable television station located in Methuen, Mass. would only have to eliminate the lottery information coming from New York City that referred to New Jersey or Pennsylvania, but would be able to carry broadcasts relating to Rhode Island that could not be used by its competitor in Portsmouth.

6) A Rutland radio or television station, or the Rutland Herald, could not advertise or discuss any lotteries at all, even though Rutland residents could read about (or listen to or watch information about) the other lotteries as discussed above with no difficulty.

7) A Rutland printshop could print New Jersey State lottery tickets or advertisements which it could then send to Newark or Camden but not Albany or Hartford or Montpelier, so long as the materials were sent via United Parcel Service. The materials could not be sent via U.S. Mail. The same tickets printed in Newark could be sent to Camden or Atlantic City by either UPS or U.S. Mail.

8) Disregarding Fourth Amendment issues, one living in Rutland could not mail a letter containing anything having to do with any lottery.

9) One living in Massachusetts could mail anything having to do with the Massachusetts lottery anywhere in Massachusetts, but could neither mail information having to do with the Rhode Island lottery in Massachusetts to a location in Massachusetts nor mail anything having to do with any lottery anywhere except Massachusetts.

10) A seeming contradiction in the statute would have the sender in example 9 able to mail information about the Rhode Island lottery to Providence or Newport (although not to Cambridge) without violating 18 U.S.C. §§ 1301-04, but in doing so 39 U.S.C. § 3005 would still have been contravened.

Pub. L. No. 93-538 does not immunize State-operated lotteries from the impact of all Federal statutes relating to lotteries. Only lotteries conducted "by a State acting under authority of State law" are protected and only with respect to possible violations of 18 U.S.C. §§ 1301-04, 1953, and 39 U.S.C. § 3005. Thus, for example, potential violation of 18 U.S.C. § 1306 (relating to the distribution of lottery

materials by federally-insured banks) by a bank dealing in State lottery materials at the request of the State would still be possible, although the bank, not the State, would be directly subject to prosecution.

III. TEXT OF STATUTE

§ 1307. State-conducted lotteries

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law --

(1) contained in a newspaper published in that State, or

(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by a State acting under authority of State law.

(c) For the purposes of this section "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(d) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chance and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests

Sec. 2. The sectional analysis for chapter 61 is amended by adding the following item:

1307. State-conducted lotteries.

Sec. 3. Section 1953(b) of title 18 of the United States Code is amended by changing the period to a comma and adding: "or (4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law."

Sec. 4. Section 3005 of title 39 of the United States Code is amended by adding at the end thereof the following subsection:

(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation published in a State containing advertisements, lists of prizes, or information concerning a lottery conducted by that State acting under authority of State law, or (2) tickets or other materials concerning such a lottery within that State to addresses within that State. For the purposes of this

subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

APPENDIX M

OBSTRUCTION OF STATE OR LOCAL LAW ENFORCEMENT

18 U.S.C. § 1511

H.A.K.

I. LEGISLATIVE HISTORY

One of the major provisions of the Organized Crime Control Act of 1970 was the syndicated gambling prohibition, Title VIII of S. 30, which added sections 1511 and 1955 to 18 United States Code.[1] Section 1955 directly prohibited all syndicated gambling of a given size as a matter of Federal substantive law provided that such a gambling enterprise was also a violation of existing State law.[2] Section 1511 sought to reach obstruction of justice brought about by collusion of organized crime figures and local officialdom for the purposes of shielding gambling businesses.

The need for section 1511 was abundantly clear to its proponents. Senator Hruska first introduced the statute as part of S. 2022,[3] the bill that would later be incorporated into the Organized Crime Control Act as Title VIII. In his remarks on the Senate floor,[4] Hruska said:

> Equally important is the second part of the proposed statutory measure. No drive against illegal gambling can even begin to succeed in those instances where it is to be undermined and betrayed by venal law-enforcement officers--police, prosecutors, or even judges.
>
> It is not pleasant to contemplate, but we cannot blind ourselves to the distasteful fact that some bribery and

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[1] Pub. L. No. 91-452, 84 Stat. 922, October 15, 1970.

[2] See Appendix P for a discussion of 18 U.S.C. § 1955 and the text of that statute.

[3] 91st Cong., 1st Sess., 115 Cong. Rec. S4332 (daily ed. April 29, 1969).

[4] 115 Cong. Rec. S4332 (daily ed. April 29, 1970).

> bribery attempts of law-enforcement officials at all levels have been characteristic of the presence of organized crime.
>
> Hence, the necessity to the Congress to enact a law which makes obstruction of State and local law enforcement in such areas a Federal offense. The citizens of every State are entitled to have their laws enforced in an equal-handed manner, and that right is one protected by the 14th amendment to the U.S. Constitution.

In order to accomplish the congressionally-defined end of curtailing the cooperation between public officials and elements of organized crime that often accompanies syndicated gambling activity, 18 U.S.C. § 1511 was drawn to reach only that type of obstruction of justice that had to do with the sheltering of gambling activities.[5] Such conduct would be a specific Federal offense while related conduct affecting other areas of illegality would be handled through other State and Federal statutes. Thus, prosecution under 18 U.S.C. § 1511 would likely come only along with prosecution for violations of the gambling prohibition statute, 18 U.S.C. § 1955, and indeed that is how it has worked.[6]

Authority for the Congress to enact 18 U.S.C. § 1511 came from the same source as that for section 1955, the Commerce Clause of the U.S. Constitution.[7] Both statutes are prefaced in Title VIII of the Organized Crime Control Act of 1970 by the "Special Finding" that "The

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[5] The statute as enacted appears in section III. On the question of the breadth of the statute's reach, see note 19, infra, and related textual matter.

[6] Of the 19 reported appellate cases examined in the preparation of this appendix arising under 18 U.S.C. § 1511, 15 involved questions related to § 1955 as well, and the other four may have done so at trial. See "Court Interpretation," section II.

[7] See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); Caminetti v. United States, 242 U.S. 470 (1917);

Congress finds that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof."[8] Although other theories exist upon which to base Federal power to prohibit the obstruction of local law enforcement, such as the equal protection of the laws argument advanced by Senator Hruska above, the Commerce Clause is the primary basis for the statute.[9]

United States v. Darby, 312 U.S. 100 (1941); and Maryland v. Wirtz, 392 U.S. 183 (1968). Also see note 2, supra.

[8] Pub. L. No. 91-452, 84 Stat. 922, Title VIII, pt. A, Sec. 801.

[9] To make an equal protection argument under the 14th Amendment, one would have to argue that bribery leading to the obstruction of law enforcement results in unequal prosecution of the laws and thus that different categories of law violators are being created and receiving unequal treatment. Traditionally, this argument has been used in the area of racial discrimination, Yick Wo v. Hopkins, 118 U.S. 356 (1886). A broad interpretation of sec. 5 of the 14th Amendment giving Congress authority to positively legislate to overcome racial discrimination has rested behind civil rights cases such as United States v. Price, 383 U.S. 787 (1966), and United States v. Guest, 383 U.S. 745 (1966), brought under 18 U.S.C. § 241. Although such congressional power is no longer contested in the "pure" equal protection area of racial discrimination, other types of equal protection arguments not related to race have a far more tenuous link to the 14th Amendment. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Legislative File, Criminal Division, Department of Justice. A third possible theory arises under the Guaranty Clause, Article IV, Sec. 4, but is equally uncertain and would necessitate dividing the various provisions of Title VIII for jurisdictional purposes. See Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on S. 30 and related proposals, 91st Cong., 2d Sess., May 20, 21, 27; June 10, 11, 17; July 23, and Aug. 5, 1970 [hereinafter cited as House Hearings.], at 676 for Department of Justice comments on use of the Guaranty Clause.

Title VIII was the Nixon Administration contribution to the Organized Crime Control Act of 1970, prepared in the Department of Justice in cooperation with members of Congress and their staffs.[10] Unlike what was to become 18 U.S.C. § 1955, however, which was a general syndicated gambling prohibition that had been circulating for some years, section 1511 was drafted and researched in early 1969.[11] It was added to the dormant gambling prohibition statute proposed by the Johnson Administration, and reintroduced in the 91st Congress, 1st Session as S. 2022 on April 29, 1969, after which it was referred to the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, chaired by Senator McClellan.[12] The operative part of 18 U.S.C. § 1511 as proposed originally in S. 2022 was as follows:[13]

> § 1511. Obstruction of State or local law enforcement
> (a) It shall be unlawful for two or more persons to devise or participate in a scheme to obstruct, hinder, or impede the execution or enforcement of the criminal laws of a State or political subdivision thereof, with the intent to establish,

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[10] Legislative File, Criminal Division, Department of Justice.

[11] Id.

[12] See letter of transmittal from the Attorney General, 115 Cong. Rec. S4362 (daily ed. May 1, 1969). For the Senate hearings on S. 2022, see Measures Related to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292, 91st Cong., 1st Sess., March 18, 19, 25, 26, and June 3, 4, 1969 [hereinafter cited as Senate Hearings].

[13] S. 2022, 91st Cong., 1st Sess., April 29, 1969. Those aspects of § 1511 relating to definitions and jurisdiction are not included as they are discussed fully elsewhere, see note 2, supra.

promote, carry on, facilitate, or conceal an illegal gambling business if:

(1) one or more of such persons does any act to effect the object of such a scheme; and

(2) one of the persons is an official or employee responsible for the execution or enforcement of criminal laws of such State or political subdivision; and

(3) one of the persons operates, works in, participates in, or derives revenue from an illegal gambling business.

(b) As used in this section, the term "illegal gambling business" means betting, lottery, or numbers activity . . .

In his testimony before the Senate Subcommittee on Criminal Laws and Procedures, Will Wilson, Assistant Attorney General of the Criminal Division, described the symbiotic relationship between syndicated gambling and the bribery of public officials.[14] In response to questioning by Senator McClellan, Wilson outlined the import of § 1511 and the types of prosecutions he expected under the statute:[15]

Senator McClellan . . . One, would a local police officer who accepted a bribe to refuse to enforce State law be a coconspirator in the violation of . . . [the syndicated gambling provision]?

Mr. Wilson. No; he probably could not be. General conspiracy law today probably would not include the one-bribe situation.

What this statute envisioned, however, is a blockage of the law, where the law is not enforced either in an area or against individuals by reason of bribery. Our experience has been that rackets like policy games that are in daily operation require systematic bribery. So it would envision generally the cases involving either most of the enforcement officers in an area or some blockage fairly high up in the police department.

Senator McClellan. What is the difference under your proposed section 1511, title I, between "devising or participating in a scheme," and "conspiring"?

Mr. Wilson. Well, the purpose of that language is to broaden the word "conspire" to include a situation, for instance, where you could trace some of the profits of a scheme of a gambling enterprise into a given individual, but couldn't ever put him in the room where conversations or other acts of conspiracy occurred.

Senator McClellan. What you are doing is saying that if you accept the fruits or benefits of that conspiracy you would be guilty?

Mr. Wilson. Yes, sir.

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[14] Senate Hearings, 394-402. [15] Id., 397.

18 U.S.C. § 1511 was reported out of the Subcommittee with only minor changes in language.[16] The report relied upon the President's message on organized crime of April 23, 1969 for evidence of the menace posed by official pay-offs.[17] No areas of disagreement about the purposes or wording of the statute are reflected by the Committee report or its hearings. Once Federal jurisdiction was established for purposes of the prohibition of gambling enterprises by means of the special findings as to effect upon interstate commerce, there were no further questions concerning the regulation of an aspect of that prohibition rationally related to the overall congressional purpose.[18] All the definitional and jurisdictional elements of section 1511 were repeated word for word from section 1955 and questions pertaining to those standards were resolved in connection with the general prohibition of syndicated gambling provision.

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[16] The changes did not go to the substance of the legislation: § 1511(a) "devise or" was removed to leave just "participate"; "hinder, or impede the execution of" was excised, leaving the wording as "scheme to obstruct the enforcement of"; "establish, promote, carry on, facilitate, or conceal" was simplified to read "the intent to facilitate an illegal"; § 1511(a)(2) was changed to read "employee, elected, appointed, or otherwise, who is responsible for the enforcement of"; and § 1511(a)(3) "operates, works in, participates in, or derives revenue from" was replaced by "participates in".

[17] "'For most large-scale illegal gambling enterprises to continue operations over any extended period of time, the cooperation of corrupt police or local officials is necessary. This bribery and corruption of Government closest to the people is a deprival of one of a citizen's most basic rights.'" S. Rep. No. 91-617, 91st Cong., 1st Sess., December 18, 1969, 71.

[18] "Once it is determined that gambling operations of a certain size may be subject to general regulation under the Commerce Clause, Congress clearly has constitutional power to regulate a particular aspect of gambling operations." Id., 74.

The only remaining ambiguity as to the operation of 18 U.S.C. § 1511 concerned its scope. The Subcommittee intended the statute to have broad latitude within the context of the obstruction of law enforcement related to gambling. As suggested by Assistant Attorney General Wilson in answer to Senator McClellan's question, use of the term "conspiracy" was avoided and "scheme" put in its place to provide for prosecutions in which the proof might not be adequate for a conviction under a standard conspiracy statute, but a showing of profiteering by public officials relating to inadequate enforcement of the laws could be shown beyond a reasonable doubt. This issue was not sufficiently clarified at this point in the hearing, since all of the situations to which the statute could apply were not completely developed.[19]

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[19]The differing implications of the words "scheme" and "conspiracy" were fully discussed in the House, however. See the report by the Committee on Federal Legislation of the Association of the Bar of the City of New York on "The Proposed Organized Crime Control Act of 1969 (S. 30)," reprinted in full in House Hearings at 291 et seq. Citing the Senate Report on S. 30, S. Rep. No. 91-617, 91st Cong., 1st Sess., December 18, 1969, at 155, stating that "The scope of section 1511 is intended to be wide," the Committee on Federal Legislation argued that the resulting language was so vague that it was of doubtful constitutionality at House Hearings, 324. Senator McClellan, in a law review article written during the time the House Judiciary Committee was considering the Senate-passed version of S. 30, met that criticism not unambiguously; McClellan, "The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?" 46 Notre Dame Lawyer 55, 137 (1970). McClellan argued that conspiracy in fact requires a lesser degree of proof than proof of a "scheme" under Title VIII: "Title VIII, on the other hand, requires that a defendant 'participate in a scheme,' and thus requires that each individual defendant take an active part, whether by financing, supervising, operating, or profiting from the scheme. The additional element of 'participation,' not required in conspiracy cases, makes the prohibition in title VIII more specific in one respect than the laws prohibiting conspiracy, which, although they have been criticized by Mr. Justice Jackson and some others, are today of unquestioned validity and great utility." Then McClellan cited the same dialogue from Senate subcommittee testimony quoted supra, note 15 and related text, in which Mr. Wilson testified that a lesser degree of proof would be required.

Nevertheless, the bill was passed by the Senate as Title VIII of S. 30 on January 23, 1970.[20]

Careful attention to the proposed 18 U.S.C. § 1511 was furthered in the House Judiciary Committee by the detailed analysis presented by the Committee on Federal Legislation of the Associated Bar of the City of New York.[21] Consideration of the scope of § 1511 by the Committee on Federal Legislation ultimately lead to a change in wording and a narrowing of focus with respect to those not sufficiently connected with a plan to obstruct law enforcement.[22] State of mind requirements under the Senate version of § 1511 were criticized. It was suggested that the provision required a showing of too high a degree of knowledge of a given gambling operation by an official directly involved in the administration of criminal justice. Consequently, it restricted rather than extended the range of influential public officials, who in reality might be tempted by the reputedly difficult-to-refuse offers often made in furtherance of illicit syndicated gambling.[23] Third, the Committee recommended that § 1511 be clarified to make clear that only those bribery attempts made by organized crime gambling ventures were culpable under the statute.[24] Many of these comments were echoed by the American Civil Liberties Union in its statement before the House committee.[25]

The confusion was ended by the House Judiciary Committee in reporting out S. 30 with "conspiracy" in the place of "scheme", constricting the scope of § 1511 somewhat and placating the Committee on Federal Legislation. See note 26, infra, for the full extent of changes made by the House in S. 30.

[20] 116 Cong. Rec. S481 (daily ed. Jan. 23, 1970), by a vote of 73 to 1.

[21] See note 19, supra. [22] Id.

[23] House Hearings, 324. [24] Id., 325.

[25] House Hearings, 490, 498-99.

The Judiciary Committee reported out S. 30 on September 30, 1970 with changes made in response to the criticism of the Committee on Federal Legislation and others.[26] The report noted that:[27]

> The officials covered by the provision are not limited to officials responsible for the enforcement of the criminal laws of a State or political subdivision--since officials acting in a wide variety of capacities may participate in conspiracies to obstruct State and local gambling laws. The section applies generally to persons who participate in the ownership, management, or conduct of an illegal gambling business. The term "conducts" refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet.

S. 30 was passed on the second day of floor debate, October 7, 1970, with no further changes in Title VIII.[28] The Senate accepted all the changes made by the House at the recommendation of Senator McClellan.[29] S. 30 became law with the President's signature on October 15, 1970.[30]

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[26]The following changes were made in the House from the version of § 1511 passed by the Senate and discussed supra, note 16: 1) "participate in a scheme to" was excised and "conspire to" was put in its place in § 1511(a); 2) "conspiracy" was put in the place of "scheme" in § 1511(a)(1); 3) "who is responsible for the enforcement of criminal laws" was stricken from the description of public officials in § 1511(a)(2); "conducts, finances, manages, supervises, directs, or owns all or part of" was added to clarify "participates in" an illegal gambling business in § 1511(a)(3). The other changes are not germane to this study or are discussed in connection with § 1955, note 2, supra. See the final wording of § 1511 as enacted in section III.

[27]H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., September 30, 1970, 52-53.

[28]116 Cong. Rec. HR 9779 (daily ed. Oct. 7, 1970), by a vote of 341-26.

[29]McClellan felt that no detrimental changes of substance had been made and that S. 30 had already been in Congress too long, 116 Cong. Rec. S17760 (daily ed. Oct. 12, 1970).

[30]116 Cong. Rec. S18188 (daily ed. Oct. 16, 1970).

II. COURT INTERPRETATION

Section 1511 of 18 United States Code has seldom been construed by itself. Virtually all reported cases arising under 18 U.S.C. § 1511 have also involved prosecutions for violating the syndicated gambling statute, 18 U.S.C. § 1955.[31] As the two statutes were enacted together and are utilized together, all courts considering the constitutionality of § 1511 save one[32] have done so through analysis of § 1955 and in reference to other cases construing § 1955.[33] Since the major questions that have been raised concerning the constitutionality and statutory construction of Title VIII of the Organized Crime Control Act of 1970, incorporating these two statues, have been discussed adequately elsewhere,[34] what follows will be merely a summary of the questions that have been posed with references to those cases specifically considering § 1511 and such updating as is necessary.

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[31] See note 6, supra.

[32] United States v. Garrison, 348 F. Supp. 1112 (E.D. La. 1972).

[33] "Since §§ 1511 and 1955 were enacted together as parts B and C (§§ 802-803) of Title VIII of the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 936-37 (1970), they should be construed in pari materia," United States v. Becker, 461 F.2d 230, 232 (2d Cir. 1972).

[34] See note 2, supra.

The finding by Congress of an effect upon interstate commerce as grounds for Federal jurisdiction for Title VIII has been overwhelmingly approved by the courts.[35] Only once has a serious judicial attack been made concerning the constitutionality of Title VIII at the circuit court level, even that made in dissent to a decision reached by the full court of the Ninth Circuit.[36] Commerce Clause authority was specifically

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[35]For authority upon which the congressional finding is based, see note 7, supra. To date seven judicial circuits have upheld the constitutionality of the congressional finding underlying §§ 1511 and 1955: United States v. Becker, supra; United States v. Riehl, 460 F.2d 454 (3d Cir. 1972), specifically construing § 1511; United States v. Harris, 460 F.2d 1041 (5th Cir. 1972), cert. denied, 409 U.S. 877 (1972); United States v. Thaggard, 477 F.2d 626 (5th Cir. 1973), cert. denied, 94 S. Ct. 570 (Dec. 3, 1973); United States v. Hunter, 478 F.2d 1019 (7th Cir. 1973), cert. denied, 414 U.S. 857 (1973); Schneider v. United States, 459 F.2d 540 (8th Cir. 1972), cert. denied, 409 U.S. 877 (1972); United States v. Sacco, 491 F.2d 995 (9th Cir. 1974); and United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973).

[36]United States v. Sacco, supra. This case is an interesting resolution of a controversy over the constitutionality of Title VIII in the ninth circuit. Originally decided in conjunction with United States v. Oberpriller, docket nos. 72-1663, 72-1723, 72-1436, 72-1659, and 72-1461, by separate three-judge panels, Sacco and Oberpriller were tentatively in direct opposition to each other. Sacco was reheard by the court's own motion to have the resolution of the conflict made by the entire circuit. The case was heard before twelve circuit judges, ten of whom concurring in the opinion of Choy, C.J., in which Title VIII was upheld as constitutional. With that opinion, the ninth circuit joined six others that had approved Title VIII, note 35, supra, and reiterated generally unquestioned recent authority with regard to Commerce Clause, Vaguenes, and Uniformity questions at 491 F.2d 999-1003. In dissent, however, Ely, C.J., relying heavily on the prior and tentative opinion of Talbot Smith, J., in Oberpriller, contested the power of Congress to make such findings under the authority of the Commerce Clause. In the only serious reported judicial attack upon such congressional authority with regard to Title VIII, and the only such attack in recent years anywhere under the Commerce Clause, Ely, J. argues at 491 F.2d 1017: "Surely we have arrived at a point when the Federal courts should have the courage to say to the Congress: 'This far, and no farther!'"

approved with regard to § 1511 in a leading district court opinion,[37] a case in which the arguments were not tied to § 1955 at all.

Related constitutional questions with regard to infringements upon States' rights under the 10th Amendment and potential violations of the equal protection of the laws under the 5th and 14th Amendments have been discussed and summarily dismissed upon the resolution of the Commerce Clause question in connection with Title VIII as a whole.[38] The contention that Title VIII might be unconstitutionally vague has also been disallowed.[39]

There have been no significant difficulties with regard to construction of § 1511 as yet. The definition of an 'illegal gambling business' under § 1511 is identical to that contained in § 1955, so questions of the intent of Congress as to that definition have also been

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[37] United States v. Garrison, supra, at 348 F. Supp. 1119: "There can be no doubt that such widespread and profitable activities involve the use of, the instrumentalities of, and have a profound effect upon, interstate commerce. Nor can there be any doubt that these immense illegal gambling operations could not survive without the cooperation of some officials on the State and local level. Section 1511 does not purport to reach all illegal gambling operations in which local officials may be involved, but only those of a substantial size that operate on a regular basis. And, considering the size of illegal gambling in the United States and its conexity [sic.] with some State and local officials, this court cannot say that Congress had no rational basis for finding that the class of activities proscribed by 18 U.S.C. § 1511 affects interstate commerce."

[38] 10th Amendment, United States v. Harris, supra, 1049; Equal Protection, United States v. Bally Manufacturing Corp., 345 F. Supp. 410, 427 (E.D. La. 1972); United States v. Smaldone, supra, 1343; United States v. Thaggard, supra, 630-31.

[39] United States v. Sacco, supra, 1001, citing Conally v. General Construction Co., 269 U.S. 385, 391 (1926); United States v. Riehl, supra, 459; United States v. Garrison, supra, 1119-1120.

brought under Title VIII as a whole.[40] As to the conspiracy aspect of § 1511(a), there have been negligible difficulties in the reported cases to date. There has not been any reported litigation involving the state of mind requirements necessary for conviction under the statute.

III. TEXT OF STATUTE

§ 1511. Obstruction of State or local law enforcement

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if --

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

(b) As used in this section --

(1) "illegal gambling business" means a gambling business which --

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to poolselling, bookmaking, maintaining slot machines, roulette wheels, or

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[40] See note 2, supra. The excerpt in the text of fn. 27, supra, concerning the meaning of 'conducts' in connection with § 1511, has frequently been cited in connection with both statutes for the intent of Congress as to embracing all but the wagerers within the definition of those culpable under Title VIII for participation in an illegal gambling business. See, e.g., United States v. Becker, supra, 232; United States v. Sacco, supra, at 491 F.2d 1002: "The word 'participate' is the key to resolving the controversy. The original bill introduced by Senator Hruska contained the word 'participate' instead of the six words which presently mark the violation. Other circuits which have construed 'conduct' have revived this initial meaning,' citing inter alia, Becker and Riehl, supra.

dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization, except as compensation for actual expenses incurred by him in the conduct of such activity.

(d) Whoever violates this section shall be punished by a fine of not more than $20,000 or imprisonment for not more than five years, or both.

APPENDIX N

TRAVEL IN AID OF RACKETEERING

as it relates to

GAMBLING

18 U.S.C. § 1952

T.J.D.

I. LEGISLATIVE HISTORY

What is now 18 U.S.C. § 1952[1] was enacted by Congress in 1961 as part of Attorney General Robert F. Kennedy's "program to curb organized crime and racketeering." It was one of a series of bills submitted by the Justice Department aimed at those persons who were involved in racketeering on a multistate or national level.[2]

As originally proposed, § 1952 made it a felony to travel in interstate or foreign commerce with intent to: (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, carrying on, of any unlawful activity. An "unlawful activity" was defined as any business enterprise involving gambling, liquor, narcotics, or prostitution which violated Federal law or the law of the State in which the enterprise was operated, and extortion and bribery.[3]

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[1]Section 1952 was added to Title 18 of the United States Code by the Act of September 13, 1961, Pub. L. 87-228, § 1(a), 75 Stat. 498, amended, Act of July 7, 1965, Pub. L. 89-68, 79 Stat. 212; Act of October 27, 1970, Title II, § 701(i)(2), 84 Stat. 1282.

[2]See Hearings Before the Senate Comm. on the Judiciary on S. 1653-1658, 1665, 87th Cong., 1st Sess. (1961) [hereinafter cited as 1961 Senate Hearings]; Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, and H.R. 7039, 87th Cong., 1st Sess. (1961) [hereinafter cited as 1961 House Hearings].

[3]The bill was introduced in the Senate as S. 1653, 87th Cong., 1st Sess. (1961), in the House as H.R. 6572, 87th Cong., 1st Sess. (1961) and is set out below in its original form:

§ 1952. Interstate and foreign travel in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce with intent to --

The Attorney General sent his draft legislation to prohibit travel in aid of racketeering enterprises to Congress on April 6, 1961. In his cover letter to the Speaker of the House and the Vice President, the Attorney General stated:

> Over the years an ever-increasing portion of our national resources has been diverted into illicit channels. Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity. . . .
>
> The effect of this legislation would be to impede the clandestine flow of profits from criminal ventures and to bring about a serious disruption in the far-flung organization and management of coordinated criminal enterprises. It would thus be of material assistance to the States in combatting pernicious undertakings which cross State lines.[4]

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(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity

shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

and (b) by adding the following item to the analysis of the chapter:

Sec. 1952. Interstate and foreign travel in aid of racketeering enterprises.

[4]Letter from Robert F. Kennedy, Attorney General, to the Vice President, S. Rep. No. 644, 87th Cong., 1st Sess. (1961); Letter from Robert F. Kennedy, Attorney General, to the Speaker of the House, H.R. Rep. No. 966, 87th Cong., 1st Sess. (1961) (reproduced in 1961 U.S. Code Cong. & Adm. News 2664, 2666).

Thus, the principal aim of the bill was directed against "syndicate" members who reap rich profits from various forms of racketeering, especially gambling,[5] but remain immune from local prosecution by living outside the State of actual operation of their illegal "business enterprises."[6] This concern for the dilemma of local law enforcement officials existed at least as early as 1950 when the Attorney General convened a conference to discuss the problems presented by organized crime.[7] However, it was Attorney General Kennedy's personal interest in the subject that explains the active Federal role undertaken in 1961 to fight organized crime generally and gambling in particular.[8]

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[5]"The main target of our bill is interstate travel to promote gambling. It is also aimed at the huge profits in the traffic in liquor, narcotics, prostitution, as well as the use of these funds for corrupting local officials and for their use in racketeering in labor and management." Statement of Attorney General Kennedy, 1961 House Hearings at 20.

[6]". . . only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials." Statement of Attorney General Kennedy, 1961 Senate Hearings at 16.

[7]The Conference was convened at the request of local law enforcement officials. The motive for the Conference was revealed in testimony to Congress:

> . . . while practically all of the States have laws prohibiting gambling and gaming, and the use of gambling machines, such as the notorious slot machine, is prohibited, the efforts of the local enforcement officials are usually and often frustrated not only by the hostility and opposition of those who stand to benefit by these operations, but also by the ease with which the paraphernalia, which is essential to gambling operations, can be distributed in interstate commerce.

Statement of H. Plaine, Department of Justice, Hearings Before the House Committee on Interstate and Foreign Commerce, on S. 3357 and H.R. 6736, 81st Cong., 2d Sess. at 35 (1950).

[8]Pollner, Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime, 28 Brooklyn L. Rev. 37 (1962).

The statute was drafted to proscribe only travel in interstate or foreign commerce for certain enumerated purposes. General travel of innocent persons would not be affected[9] and neither would the "social gambler" have anything to fear, since the law was designed to attack only those unlawful activities engaged in as a "business enterprise."[10] The legislation was limited to a "business" activity in order to differentiate between an isolated criminal act and a continuous course of criminal conduct; it was thus focused on the illicit operations of organized crime.[11] The Attorney General described how the statute would operate to realize its objectives:

> If our bill is enacted we will be able to prosecute the courier who carries the funds across State lines and in conjunction with the aiding and abetting statute [18 U.S.C. § 2], we will be able to prosecute the person who caused the courier to travel--namely the kingpin.[12]

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[9]". . . we have carefully delineated an area of law enforcement which will disrupt the organized criminal syndicates without interfering with general travel." Statement of Attorney General Kennedy, 1961 Senate Hearings at 16. See also Statement of Herbert J. Miller, Department of Justice, 1961 House Hearings at 336.

[10]Statement of Attorney General Kennedy, 1961 House Hearings at 24. See also Dialogue between Senator Ervin and Herbert J. Miller, Department of Justice, 1961 Senate Hearings at 255.

[11]Statement of Herbert J. Miller, Department of Justice, 1961 House Hearings at 336; H.R. Rep. No. 966, 87th Cong., 1st Sess. (reproduced at 1961 U.S. Code Cong. & Adm. News, 2664, 2666).

[12]1961 House Hearings at 22.

The Travel Act was introduced in the Senate on April 18, 1961 by Senator Eastland,[13] designated S. 1653, and hearings commenced on June 6, 1961, before the Senate Committee on the Judiciary.[14] The principal witness during the Senate hearings was Herbert J. Miller from the Criminal Division of the Justice Department. It was to him that Senator Keating proposed that the bill be expanded to "apply to the use of the mails or to the telephone or to transportation facilities, as well as travel."[15] Mr. Miller maintained that by limiting the bill to travel, it

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[13] 107 Cong. Rec. 6040 (1961).

[14] Hearings were also held on June 19, 20, 21 and 26. 1961 Senate Hearings.

[15] 1961 Senate Hearings at 111. The basis of Senator Keating's remarks was his own bill S. 710 (set out below) which was similar to, but more comprehensive than S. 1653:

§ 373. Conspiracy to commit organized crime offense against any of the several States

If two or more persons conspire to commit any organized crime offense against any of the several States, and one or more of such persons, to effect the object of the conspiracy, delivers for shipment or transports in interstate commerce any article, or deposits in the mail or sends or delivers by mail any letter, package, postal card, or circular, or transmits or causes to be transmitted in interstate commerce any message or communication by wire or radio, or receives any article, letter, package, postal card, circular, message, or communication after such shipment, transportation, sending, delivery, or transmission, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is punishable by a lesser maximum fine or imprisonment than provided in this section, the maximum punishments for such conspiracy shall not exceed such lesser maximums.

As used in this section, the term "organized crime offense" means any offense proscribed by the laws of or the common law as recognized in any State relating to gambling, narcotics, extortion, intoxicating liquor, prostitution, criminal fraud, or false pretenses, or murder, maiming, or assault with intent to inflict great bodily harm, and punishable by imprisonment in a penitentiary or by death.

§ 374. Conspiracies resulting in murder, maiming, or great bodily harm

If as a result of any conspiracy violating section 371, 372, or 373 of this chapter, any person is murdered, maimed, or subjected to great

would be more likely to pass. Nevertheless, the Senate added a new section to the bill which included within its scope the use of any facility for transportation in interstate or foreign commerce (including the mail) with intent to do any of the acts prohibited in the first section of the bill.[16]

Senator Keating also suggested that the bill encompass other crimes such as murder.[17] But Mr. Miller's fears about adverse congressional reaction to such an expansive law[18] were well-founded. No such far-reaching amendment was made. Although the breadth of the bill had been broadened, the number of proscribed offenses remained the same. Mr. Miller had argued that Federal investigative and prosecutive resources would be "overcommitted" if Senator Keating's broad version was adopted.[19]

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bodily harm, each conspirator shall, in lieu of any other penalty or limitation, be punished as herein prescribed: (1) by death if any person is murdered and if the verdict of the jury shall so recommend; (2) by imprisonment for any term of years or for life if any person is murdered and if the death penalty is not imposed; or (3) by imprisonment for not more than ten years if any person is maimed or subjected to great bodily harm.

[16] S. Rep. No. 644, 87th Cong., 1st Sess. at 5, 6 (1961). See also Remarks by Senator Eastland, 107 Cong. Rec. 13943 (1961).

[17] 1961 Senate Hearings at 107, 112.

[18] 1961 Senate Hearings at 107.

[19] 1961 Senate Hearings at 113.

The Senate Judiciary Committee also narrowed the bill in certain respects. The definition of "unlawful activity" was restricted to include a "business enterprise involving . . . liquor on which the Federal excise tax has not been paid. . . ."[20] Another narrowing amendment was inserted in response to Senator Ervin's objection that the bill could be used to punish "evil intent" only.[21] He was concerned that a "crime would be committed whenever a man stepped across the line between two States with the requisite mental intent, regardless of whether he ever committed any overt act to carry that intent into effect."[22] Mr. Miller argued that the bill met Senator Ervin's overt act requirement, since prosecutors would have to show a business enterprise existed and travel in aid of it.[23] The Committee, however, amended the bill, so that the gravamen of the offense would be travel and a further act to aid the enterprise:[24]

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[20]"The purpose of [this] amendment is to clarify the prohibiting of travel in aid of a business enterprise involving liquor so as not to involve the Federal Government in petty offenses at the State or local level which may involve the sale of liquor." S. Rep. No. 644, 87th Cong., 1st Sess. at 2 (1961).

[21]1961 Senate Hearings at 251-54, 257-58.

[22]1961 Senate Hearings at 251. [23]Id.

[24]Section 1, as changed, read:

(a) . . .

(3) otherwise promote . . . any unlawful activity and performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) after such travel . . . .

Section 2, as changed, read:

(a) Whoever uses any facility for transportation in interstate or foreign commerce . . . with intent to --

. . . .

(3) otherwise promote . . . any unlawful activity and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) . . . .

> The committee has tightened the bill to require that the individual doing the traveling for the illegal purpose must, after his travel, perform or attempt to perform one of the acts forbidden in the bill.[25]

The Senate's version of the bill was reported with amendments on July 27, 1961[26] and passed the Senate as amended the following day.[27]

H.R. 6572 was introduced in the House on April 24, 1961 by Representative Celler.[28] Hearings began on May 17 before a Subcommittee of the House Committee on the Judiciary.[29] The Subcommittee, chaired by Representative Celler, was particularly concerned with the arguably ambiguous language of the statute.[30] However, no action was taken in this regard.

The final House version combined the two sections proposed by the Senate substituting the present language extending the coverage of the Act to "whoever travels in interstate commerce or uses any facility in interstate commerce, including the mail . . . ." The House Committee was apparently unaware of the significant change it had made. They retained the Senate's more restrictive title[31] and reported that the

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[25]107 Cong. Rec. 13943 (1961).

[26]S. Rep. No. 644, 87th Cong., 1st Sess. (1961); 107 Cong. Rec. 13846 (1961).

[27]107 Cong Rec. 13942 (1961).

[28]107 Cong. Rec. 6631 (1961).

[29]Hearings were also held on May 18, 19, 24-26, 31. 1961 House Hearings.

[30]1961 House Hearings at 33-37, 337-46.

[31]"Interstate and foreign travel or transportation in aid of racketeering enterprises." S. Rep. No. 644, 87th Cong., 1st Sess. at 5 (1961).

amendment made "no substantive change in the provisions of the bill."[32] But the courts have uniformly applied the Travel Act to interstate facilities other than those used for travel or transportation. One further consequence of the House consolidation was the deletion of the language in the Senate bill, "after such travel" and insertion of the word "thereafter" immediately preceding "performs or attempts to perform." This was an adoption, essentially, of the same language used in section one of the Senate version and conformed with the requirement that an act be performed subsequent to travel or use of an interstate facility.

There were two other significant House amendments that were major departures from the Senate version. The first was a deletion of the Senate's limiting language with respect to the type of unlawful liquor activity proscribed.[33] The second, and more controversial, made extortion and bribery an "unlawful activity" only if undertaken in the course of a business enterprise involving gambling, liquor, narcotics or prostitution offenses.[34] The Senate bill contained no such limitation; it prohibited travel or the use of any facility for transporation in interstate commerce, including the mail, in furtherance of "extortion and bribery in violation of the laws of the State in which committed or of the United States."

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[32]H. Rep. No. 966, 87th Cong., 1st Sess. (1961); 1961 U.S. Code Cong. & Adm. News 2664.

[33]See note 20 and accompanying text supra.

[34]The Justice Department vehemently opposed the change. See Pollner, supra note 8, at 41.

The Subcommittee referred the bill to the full Committee on the Judiciary,[35] which reported the bill with amendments on August 17, 1961.[36] Four days later, the House version passed.[37] In view of the significant differences between the two versions, the Senate asked for a conference[38] to which the House agreed.[39]

The conferees agreed to accept the Senate version with respect to the inclusion of any acts of extortion or bribery "in violation of the laws of the State in which committed or of the United States." They also adopted the language of the Senate version to limit "unlawful activity" to liquor on which the Federal excise tax had not been paid.

However, the conference committee apparently failed to catch the significance of the House version which combined the Senate's two separate sections into a single section. The House version was agreed to for its "cosmetic value"[40] "so that the amendment to . . . title 18 . . . merely adds a new section at the end thereof designated as section 1952."[41] Also, the requirement that an overt act be committed after having traveled or after having used the facilities of interstate or foreign commerce, with which both the Senate and House agreed, was incorporated in the bill using the House language.

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[35] 107 Cong. Rec. 14095 (1961).

[36] H. Rep. No. 966, 87th Cong., 1st Sess. (1961); 107 Cong. Rec. 16262 (1961).

[37] 107 Cong. Rec. 16540 (1961). [38] 107 Cong. Rec. 16809 (1961).

[39] 107 Cong. Rec. 17382 (1961).

[40] United States v. Archer, 486 F.2d 670, 679-80 n.10 (2d Cir. 1973).

[41] H.R. Rep. No. 1161, 87th Cong., 1st Sess. (1961) (Conference Report). This report was reproduced at 107 Cong. Rec. 18814-15.

The conference report[42] was submitted to the House and Senate on September 11, 1961 and agreed to on the same day.[43] The bill was signed by the Speaker of the House[44] and the Vice President[45] and presented to the President on September 12, 1961.[46] The following day, the President signed the Travel Act.[47]

Since that time, § 1952 has been amended twice. The first, in 1965, added the crime of arson to the definition of unlawful activity in subsection (b)(2). This was the result of a Department of Justice suggestion that arson was often used by organized crime to collect under insurance policies and had thus become another source of revenue.[48] The second amendment was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[49] It inserted "or controlled substances (as defined in section 102(6) of the Controlled Substances Act)," after "narcotics" in subsection (b)(1) and deleted "or narcotics" from subsection (c).

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[42] Id.

[43] 107 Cong. Rec. 18814 (1961) (House); 107 Cong. Rec. 18950 (1961) (Senate).

[44] 107 Cong. Rec. 18984 (1961).

[45] 107 Cong. Rec. 19192 (1961).

[46] 107 Cong. Rec. 18990 (1961).

[47] 107 Cong. Rec. 19294 (1961).

[48] See H.R. Rep. No. 264, 89th Cong., 1st Sess (1965); S. Rep. No. 351, 89th Cong., 1st Sess. (1965).

[49] Pub. L. No. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282. For legislative purpose and history, see H.R. Rep. No. 91-1444, 91st Cong., 2d Sess. 1970 U.S. Code Cong. & Adm. News 4566.

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II. COURT INTERPRETATION

Although the Supreme Court has not definitively passed on the constitutionality of the Travel Act,[50] all Federal courts that have considered the matter agree that its enactment was a valid exercise of congressional power under the Commerce Clause.[51] The statute has also been upheld against attacks based on the First, Fifth and Tenth Amendments.

In United States v. Cerone,[52] the defendant, charged with violating § 1952, argued that since newspapers and other media frequently reported predictions as to the outcome of various athletic events and such reports were protected under the First Amendment, his telephonic communication of such information was similarly protected. But the

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[50]The cases that have reached the Supreme Court involving § 1952 prosecutions have not raised the constitutionality of the statute. Erlenbaugh v. United States, 409 U.S. 239, 243 n.9 (1972); Rewis v. United States, 401 U.S. 808, 811 n.5 (1971); United States v. Nardello, 393 U.S. 286 (1969). These three cases only presented questions of statutory construction. Two other cases involved the suppression of wiretap evidence: United States v. Kahn, 415 U.S. 143 (1974); Spinelli v. United States, 393 U.S. 411 (1969).

[51]United States v. Nichols, 421 F.2d 570 (8th Cir. 1970); Gilstrap v. United States, 389 F.2d 6 (5th Cir. 1968), cert. denied, 391 U.S. 913 (1969); Marshall v. United States, 355 F.2d 999 (9th Cir. 1966), cert. denied, 385 U.S. 815 (1967); United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965). See also United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962); United States v. Ryan, 213 F. Supp. 763 (D. Colo. 1963); United States v. Corallo, 281 F. Supp. 24 (S.D.N.Y. 1964).

[52]452 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972).

court rejected his reasoning, denying First Amendment protection to criminal conduct[53] and other courts have held likewise.[54]

The argument that § 1952 usurps the powers reserved to the States under the Tenth Amendment by attempting to enforce State criminal laws has not been considered a significant threat to § 1952 and has always been dealt with summarily.[55] Moreover, no court seems willing to impose a limitation upon Congress' power under the Commerce Clause.[56]

The most often raised argument under the Fifth Amendment[57] has been that § 1952 is so vague and ambiguous as to constitute a denial of due process.[58] The courts have uniformly held that the statute as a

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[53]The court cited Ginzburg v. United States, 383 U.S. 463 (1966) for the proposition that speech or conduct ordinarily protected may lose its protection due to the speaker's (or actor's) intent or the context within which the speech or conduct occurs. United States v. Cerone, supra note 52, at 286.

[54]Spinelli v. United States, 382 F.2d 871, 890 (8th Cir. 1967), reversed on other grounds, 393 U.S. 410 (1968); United States v. Borgese, 235 F. Supp. 286, 296 (S.D. N.Y. 1964); United States v. Corallo, supra note 51, at 28; United States v. Smith, supra note 51, at 918.

[55]United States v. Nichols, supra note 51; Gilstrap v. United States, supra note 51; Marshall v. United States, supra note 51; United States v. Barrow, supra note 51; United States v. Kelley, 254 F. Supp. 9 (S.D. N.Y. 1966); United States v. Corallo, supra note 51.

[56]United States v. Barrow, supra note 51.

[57]There have been several other miscellaneous arguments based on the Fifth Amendment: (1) United States v. Smith, supra note 51 (defendant held not to have been placed in jeopardy twice when charged with violating 18 U.S.C. §§ 1952 and 1084). Also, with regard to the duplicity issue, see United States v. McLeod, 493 F.2d 1186 (7th Cir. 1974); (2) United States v. Gebhart, 441 F.2d 1261 (6th Cir. 1971), cert. denied, 404 U.S. 855 (1972) (exercise of prosecutorial discretion sustained).

[58]United States v. Cozetti, 441 F.2d 344 (9th Cir. 1971); Gilstrap v. United States, supra note 51, United States v. Zizzo, supra note 51; Bass v. United States, 324 F.2d 168 (8th Cir. 1963); Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir. 1963). See also United States v. Gerhart, 275 F. Supp. 443 (S.D. W.Va. 1967); United States v. Teemer, 214 F. Supp. 952 (N.D. W.Va. 1963).

Courts also reject a similar contention that § 1952 fails to

whole is sufficiently clear to withstand such attacks. Several cases have also been reported in which defendants unsuccessfully attacked specific words or phrases.[59] Defendants also have argued that § 1952 is potentially applicable only to those traveling to States where gambling is illegal, but not to those traveling to States where gambling is legal.[60] All courts that have considered the argument have held that the mere fact that variation in State laws produces differences in application, does not make § 1952 repugnant to the due process clause of the Fifth Amendment.[61]

The courts have also consistently held that prosecutions brought under § 1952 do not involve an abridgement of the right to travel.[62] In United States v. Gerhart,[63] the district court for the southern district of West Virginia stated:

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apprise a person of common intelligence of the conduct which he must avoid in order to be certain not to violate its provisions, as required by the Sixth Amendment. United States v. Cerone, 452 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972); Turf Center, Inc. v. United States, supra; United States v. Teemer, supra.

[59] Turf Center, Inc. v. United States, supra note 58 ("facilitate," "any facility," "involving," "gambling"); United States v. Cozzetti, supra note 58 ("business enterprise").

[60] United States v. Ryan, 213 F. Supp. 763 (D. Colo. 1963).

[61] United States v. Schwartz, 398 F.2d 464, 467 (7th Cir. 1968); Spinelli v. United States, supra note 54; Turf Center, Inc. v. United States, supra note 58; United States v. Gerhart, supra note 58; United States v. Ryan, supra note 60.

[62] Gilstrap v. United States, supra note 51, at 8; United States v. Corallo, supra note 51, at 28.

[63] 275 F. Supp. 443 (S.D. W.Va. 1967). This analysis resembles the approach taken by the courts with respect to First Amendment arguments. See note 53 and accompanying text supra.

> . . . the citizen's right to travel immediately becomes subordinate to the right of Congress to regulate interstate commerce when the travel involves the use of an interstate facility for illicit purposes. Travel, once tainted by illegality, loses any constitutional significance.

The courts, for the most part, have been consistent in their interpretation of the statute. It is clear that anyone who travels in interstate commerce, or uses any interstate facility, in order to assist or further any "unlawful activity" (as defined in the statute) is subject to prosecution under § 1952. The person who directs the illegal interstate activity is subject to prosecution under the aiding and abetting statute.[64]

Section 1952 does not, however, make it a crime per se, for one who operates a gambling establishment to travel interstate.[65] For example, the defendant in United States v. Hawthorne[66] had made preparations to move from Indiana to West Virginia, where he planned to open a supper club which would provide gambling facilities in violation of West Virginia law. He traveled to West Virginia to connect two tanks of bottled gas to his recently purchased trailer. This trip, the immediate purpose of which was to move the defendant's family, was held to be insufficiently related to his gambling enterprise to bring it within the interdiction of the statute.[67] On the other hand, an

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[64] 18 U.S.C. § 2(a): Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

[65] United States v. Hawthorne, 356 F.2d 740 (4th Cir.) cert. denied, 384 U.S. 908 (1966).

[66] Id.

[67] United States v. Hawthorne, supra note 65, at 741-42.

interstate trip to see one's son was held to violate the statute where the "dominant motive" of the return trip was for the purpose of promoting gambling activity.[68] Thus, that travel is motivated by two or more purposes, will not preclude conviction under the Act if the requisite § 1952(a) intent is also present.[69]

While the Travel Act does not proscribe all interstate travel which may incidentally lead to a furthering of unlawful activity, neither does it require the interstate travel be essential to the unlawful activity.[70] It is sufficient that the person travel for the purpose of merely assisting the unlawful enterprise. Travel by employees, for instance, from their homes in New Jersey to a gambling casino in Pennsylvania where they worked, satisfied the travel requirement of the statute.[71]

During the Senate Hearings on the Travel Act, Senator Ervin voiced his concern that patrons of a gambling establishment who traveled interstate to, for instance, place a bet, were potentially liable under the proposed legislation if used in conjunction with the aiding and abetting statute.[72] However, the courts have developed a clear distinction between travel by employees and travel by customers of an illegal "business enterprise."[73] Not only are patrons not subject to

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[68] United States v. Carpenter, 392 F.2d 205 (6th Cir. 1968).

[69] United States v. Gooding, 473 F.2d 425, 428 (5th Cir. 1973).

[70] United States v. Barrow, 363 F.2d 62, 65 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

[71] Id.

[72] Hearings on S. 1653-1658, 1665 Before the Senate Committee on the Judiciary, 87th Cong., 1st Sess., at 256 (1961).

[73] United States v. Lee, 448 F.2d 604, 606 (7th Cir. 1971).

liability,[74] but those persons who conduct a gambling operation frequented by out-of-State bettors do not, without more, violate the Travel Act.[75] Further, even though the owner of a gambling establishment is liable for the foreseeable interstate travel of an employee,[76] he cannot be held liable for the foreseeable interstate travel of patrons, unless he actively solicits their patronage.[77]

In addition to covering interstate travel, § 1952 also prohibits the use of "any facility in interstate or foreign commerce" for certain specified unlawful activities. The term "facility" has not been confined

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[74] Rewis v. United States, 401 U.S. 808 (1970); United States v. Lee, supra note 73.

[75] Rewis v. United States, 401 U.S. 808, 811 (1970): " . . . the traveler's purpose must involve more than the desire to patronize the illegal activity."

[76] United States v. Lee, supra note 73; United States v. Chambers, 382 F.2d 910, 913-14 (6th Cir. 1967); United States v. Barrow, 363 F.2d 62, 64-65 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967); United States v. Zizzo, 338 F.2d 577, 580 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965).

[77] There is only dictum to this effect in Rewis v. United States, supra note 74, at 814.

by the courts to travel or transportation facilities, but has been held to include the telephone,[78] the telegraph,[79] and newspapers.[80]

The decisions involving the use of an interstate facility contain analysis similar to that found in the travel cases. Thus, the use of an interstate facility need not be essential to the operation of the illegal enterprise.[81] Also, most courts, especially the Seventh Circuit, have reversed convictions where the use of the interstate facility was only incidental to the illegal activity.[82]

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[78] Menendez v. United States, 393 F.2d 312, 314 n. 2 (5th Cir.), cert. denied, 393 U.S. 1029 (1968); United States v. Winston, 267 F. Supp. 555, 561 n.8 (S.D. N.Y. 1967); United States v. Borgese, 235 F. Supp. 286, 297 (S.D. N.Y. 1964). But see: United States v. DeSapio. 299 F. Supp. 436 (S.D. N.Y. 1969): One count of indictment alleging use of telephone in intrastate commerce was dismissed as not stating a § 1952 violation. Cf. United States v. Gebhart, 441 F.2d 1261 (6th Cir.), cert. denied, 404 U.S. 855 (1971) (absent interstate mailing, § 1952 not violated).

[79] United States v. McMenama, 403 F.2d 969 (6th Cir. 1968); United States v. Hawthorne, supra note 65.

[80] Erlenbaugh v. United States, 409 U.S. 239 (1972) (causing a publication to be carried by a facility of interstate commerce with an intent to facilitate the operation of an illegal gambling business violated 18 U.S.C. § 1952). The Fourth Circuit, in United States v. Arnold, 380 F.2d 366, 388 (1967) had reversed a conviction under § 1952 because "the use of the telephone to order . . . transmittal through the mail [of a sports publication intended to be used to facilitate the operation of a football betting pool] is not the use of a 'facility . . . . to . . . promote . . . any unlawful activity,' as contemplated by . . . § 1952." However, the Seventh Circuit's contrary view (452 F.2d 967) was accepted in Erlenbaugh by the Supreme Court.

[81] United States v. Miller, 379 F.2d 483, 486 (7th Cir.), cert. denied, 389 U.S. 930 (1967); United States v. Vitich, 357 F. Supp. 102, 105 (W.D. Wisc. 1973).

[82] Rewis v. United States, 401 U.S. 808 (1971); United States v. Altobella, 442 F.2d 310 (7th Cir. 1971); United States v. McCormick, 442 F.2d 316 (7th Cir. 1971); United States v. Judkins, 428 F.2d 333 (6th Cir. 1970) (calls from Arkansas to appellant's house of prostitution in Tennessee not shown to have a business purpose). [Compare: United States v. Hawthorne, supra note 65].

It is not clear, however, whether depositing an out-of-state check in a bank is a use of interstate commerce sufficient to justify convictions under § 1952 based on such an act. In United States v. Altobella,[83] the defendants were convicted of using interstate commerce to facilitate extortion activities illegal under Illinois law. The Seventh Circuit reversed, holding that the use of the mails by an Illinois bank through which the extortion victim's check, drawn on a Pennsylvania bank, was cleared after it had been cashed in Illinois, did not afford the basis for Federal jurisdiction under § 1952. The Fourth Circuit, on the other hand, takes a contrary view. United States v. Salsbury[84] involved a defendant who financed an illegal gambling operation in Maryland. Bettors paid bookmakers by check or money order which were often drawn on out-of-state banks. Bookmakers would settle their accounts with the defendant using these out-of-state checks. The defendant would turn these instruments over to a druggist who provided a check-cashing service. The court held that the transmission of these instruments in the mail to the drawee banks in the clearing process was sufficient to invoke § 1952.[85] Also, in United States v. Wechsler,[86]

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[83] 442 F.2d 310 (7th Cir. 1971).

[84] 430 F.2d 1045 (4th Cir. 1970).

[85] "It is of no significance that the druggist rather than Salsbury actually cashed the checks at a bank and started the clearing process that used the mails, because Salsbury initiated the transactions and guaranteed payment in the event of dishonor." Salsbury, supra note 84, at 1048. The Fourth Circuit further disagrees with the Seventh Circuit; in Salsbury they believed it did not matter whether the use of interstate facilities was tangential to the major part of an operation illegal under § 1952. See note 82 and accompanying text supra.

[86] 392 F.2d 344 (4th Cir.), cert. denied, 392 U.S. 932 (1968).

the Fourth Circuit held that the deposit in a bank of a check allegedly received by a member of a zoning board in payment for his vote on an application for re-zoning was held to have been a use of a facility in interstate commerce.[87] This apparent conflict between the Circuits is best illuminated by the Seventh Circuit's own words:

> As in Rewis and Altobella, the interstate activities relied upon by the Government were the acts of others and were not actively sought or made a part of the illegal activity of the accused.[88]

It appears that the conflict can be resolved in accordance with the following line of reasoning: If the check is written by a victim (Altobella) or customer (analogy to Rewis), and drawn on an out-of-state bank, the depositing of the check in the defendant's bank account will not constitute use of an interstate facility. However, where it is the defendant who initiates the transaction or where the use of an interstate facility results from the act of a participant in the unlawful enterprise, the courts will find a violation of § 1952.[89]

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[87] "When one deposits a check, there would seem to be little doubt that he is using a facility in interstate commerce." Id. at 347 n.3.

[88] United States v. McCormick, supra note 82, at 318.

[89] Where Federal officers supplied the interstate element of a § 1952 offense, and acted to insure that the use of an interstate facility occurred by provoking interstate and foreign telephone calls, the conviction based on such acts was reversed. United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

The breadth given the term "facility" has created another problem. The courts have uniformly interpreted the phrase "use of any interstate facility" to include wire communications facilities, which are explicitly covered in 18 U.S.C. § 1084.[90] Despite this overlap, the cases reflect the view that there is no merit to the argument that the above interpretation constitutes a denial of defendant's Fifth Amendment right not to be placed in jeopardy twice.[91] That conduct generally proscribed in § 1952 and specifically prohibited in § 1084, on the other hand, allowed the Fifth Circuit in Nolan v. United States[92] to convict under § 1084 and yet acquit under § 1952.[93]

Another type of overlap was noted by the Supreme Court in Erlenbaugh v. United States.[94] The defendant, charged with violating § 1952, argued that since he was immune from prosecution under § 1953(b)(3), the same exemption should be read into § 1952. The Supreme Court held that the exception for "any newspaper or similar publication" contained in § 1953, which prohibits the interstate shipment of certain gambling paraphernalia, was not intended to be read into § 1952.[95]

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[90] § 1084 forbids the use of wire communication facilities for interstate transmission of wagering information. See Appendix G, supra.

[91] United States v. McLeod, 493 F.2d 1186 (7th Cir. 1974); United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962). The basis for such a holding has been that the two statutes require different elements of proof.

[92] 395 F.2d 283 (1968).

[93] For other problems involving the overlap of §§ 1084 and 1952, see: United States v. Winston, 267 F. Supp. 555 (S.D. N.Y. 1967); United States v. Ruthstein, 414 F.2d 1079 (7th Cir. 1969) (§ 1084 did not so preempt State statute prohibiting transmittal by telephone of wagering information as to make impossible defendant's conviction under § 1952).

[94] 409 U.S. 239 (1972).

[95] Id. at 246-47.

Section 1952 also overlaps with 18 U.S.C. § 1082 which pertains to gambling ships. Section 1082 is restricted to gambling ships "on the high seas" or "not within the jurisdiction of any State," but § 1952 would seem to apply to the same activity covered by § 1082 while the ships remain within the three mile limit of the coast. United States v. Brennan[96] involved "a real floating craps game" aboard a ship which went from New Jersey to New York. The prosecution was brought under § 1952. Any possible overlap in application of the two statutes, however, is probably not important since § 1082 is so rarely used.[97] Nevertheless, § 1952 could, in fact, supersede § 1082 completely, since § 1952 applies to foreign, as well as interstate, commerce.

There are two crucial aspects to the application of § 1952, which the courts have dealt with in a uniform manner. The first is whether the prosecution must show an intent to engage in conduct in violation of § 1952 (i.e., knowing use of an interstate facility) or merely an intent to engage in conduct in violation of the laws of the State in question. The intent to promote or facilitate "unlawful activity" has been held to be an essential element of the offense under § 1952.[98] Any act of

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[96] 394 F.2d 151 (2d Cir. 1968).

[97] There has been only one reported case involving a § 1082 prosecution: United States v. Black, 291 F. Supp. 262 (S.D. N.Y. 1968).

[98] United States v. Lee, 448 F.2d 604 (7th Cir.), cert. denied, 404 U.S. 858 (1971); United States v. Erlenbaugh, 452 F.2d 967 (7th Cir.), aff'd. Erlenbaugh v. United States, 409 U.S. 239 (1971); United States v. Bash, 258 F. Supp. 807 (N.D. Ind. 1966), aff'd. sub nom. United States v. Miller, 379 F.2d 483 (7th Cir. 1967), cert. denied, 389 U.S. 930 (1968); United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971); United States v. Colacurcio, 499 F.2d 1401 (9th Cir. 1974); United States v. Isaacs, 347 F. Supp. 743, 753 (N.D. Ill. 1972).

interstate travel or any use of interstate facilities must be undertaken with that specific intent. Nevertheless, there is no requirement of an intent to violate the statute itself.[99]

The second aspect is whether the defendant must personally participate in the interstate transaction which the prosecution utilizes to invoke § 1952. The answer has consistently been in the negative; it is sufficient if the defendant knowingly caused the use of a facility in interstate commerce.[100]

One final interpretive problem should be mentioned. In United States v. Nardello,[101] the Supreme Court held that the extortionate acts for which appellees were indicted, which were prohibited by Pennsylvania's "blackmail" laws, fell within the generic term "extortion" as used in § 1952.[102] The Court noted that extortion need not be connected with a business enterprise involving the other enumerated

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[99] Id. A corollary to this notion is that ignorance of the provisions of § 1952 is not a defense. United States v. Bash, supra note 98, at 810. The issue has also arisen whether a good faith mistake of local law would be a defense. The Sixth Circuit has held it is. United States v. Stasman, 446 F.2d 489 (6th Cir. 1971); cf. United States v. Gelhart, 441 F.2d 1261 (6th Cir. 1971).

[100] United States v. Ruthstein, 414 F.2d 1079, 1082 (7th Cir. 1969); United States v. Miller, 379 F.2d 483 (7th Cir. 1967), cert. denied, 389 U.S. 930 (1968); United States v. Hawthorne, supra note 65, at 742; United States v. Zizzo, supra note 51, at 580.

[101] 393 U.S. 286 (1969).

[102] See also: United States v. Karigiannis, 430 F.2d 148, 150 (7th Cir. 1970), cert. denied, 400 U.S. 904 (1971), (Illinois statute making it "theft" to obtain by threat control over property of owner created an offense which could be generically classified as "extortion" for purposes of § 1952). Cf. United States v. Niedelman, 356 F. Supp. 979 (S.D. N.Y. 1973) (New York crime of "Commercial Bribery" was not within meaning of "bribery" as used in § 1952).

offenses to be violative of § 1952.[103] Further, other courts have held that, although the statute was aimed at organized crime, the term "business enterprise" does not require proof that defendant was associated with an organized crime syndicate[104] or that the offense charged is one commonly undertaken by organized crime.[105]

III. ENFORCEMENT EXPERIENCE

In his testimony before the Subcommittee on State Justice and Commerce Appropriations in 1960, then Attorney General William P. Rogers expressed concern over the significant increase in organized crime.[106] He was particularly troubled by the problem of how to cope with it:

> The Federal Government only has jurisdiction in about 10 percent of the crimes that are committed in this country and yet people . . . feel that the Federal Government is responsible when there is a serious crime wave. We are seeking constantly new ways to attack that problem. We do not have the jurisdiction that would enable us to do a completely effective job . . . ."[107]

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[103] Presumably, this includes bribery and arson as well. United States v. Gooding, 473 F.2d 425, 427 (5th Cir. 1973); United States v. Isaacs, supra note 98; United States v. Archer, 355 F. Supp. 981 (S.D. N.Y. 1972), rev'd. on other grounds, 486 F.2d 670 (2d Cir. 1973).

[104] United States v. Roselli, supra note 98, at 885-86; United States v. Phillips, 433 F.2d 1364 (8th Cir. 1970); United States v. Isaacs, supra note 98, at 753; United States v. Archer, supra note 103.

[105] United States v. Roselli, supra note 98 at 885-86; Dillon v. United States, 391 F.2d 433 (10th Cir. 1968) (bingo); South v. United States, 368 F.2d 202 (5th Cir. 1966) (poker).

[106] Hearings Before A Subcommittee of the House Committee on Appropriations, 86th Cong., 2d Sess., pt. 2, 32 (1961).

[107] Id.

Relief was not long in coming. In September of 1961, three statutes were enacted that were specifically designed to attack organized crime. One of them was § 1952:

> This act, which is intended to strike at the direction and control of unlawful business activities, promises to present a complexity of legal and enforcement problems . . . . [I]t is necessary to compile the liquor, narcotic, gambling, prostitution, extortion, and bribery statutes of each State . . . it is [also] necessary to examine each case presented for prosecution to insure that the case, both in form and substance, meets the tests of legal sufficiency and will serve to implement the statute along the lines stressed by Congress.[108]

The Criminal Division of the Justice Department requested $540,000 for 30 additional attorneys and 17 clerks and stenographers for fiscal 1962 to meet the increased workload.[109] In the first four months after 18 U.S.C. §§ 1084, 1952, and 1953 were enacted, 2,100 F.B.I. investigations were initiated under those statutes.[110] This figure had increased to 12,500 by December, 1963.[111] Increased activity, of course, was not restricted to the F.B.I. The Criminal Division requested an additional $629,000 for fiscal 1963, in part to employ 18 more attorneys in the Organized Crime and Racketeering Section.[112] Racketeering

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[108] Hearings Before A Subcommittee of the House Committee on Appropriations, 87th Cong., 2d Sess., pt. 2, 107 (1963).

[109] Hearings Before A Subcommittee of the House Committee on Appropriations, 87th Cong., 1st Sess., pt. 2, 6 (1962). The F.B.I. also warned that its workload would "greatly expand." See id., at 495.

[110] Hearings, supra note 108, at 122.

[111] Hearings Before A Subcommittee of the House Committee on Appropriations, 88th Cong., 2d Sess., pt. 2, 80 (1965).

[112] Hearings, supra note 108, at 5, 126. "This is where all the emphasis is going in the Attorney General's drive on organized crime." Statement of Administrative Ass't. Attorney General Andretta, Hearings, supra note 108, at 146.

convictions in calendar 1960 totaled 45 but had jumped to a high of 546 in calendar 1964.[113]

Various other side-effects of the enactment in 1961 of the antiorganized crime statutes were also reported to the Subcommittee. For example, the increased convictions of racketeers were cited as the stimulus for new law enforcement vigor at State and local levels.[114] Also, in 1965 it was reported that:

> The utility of the 1961 antigambling laws is being demonstrated not only by increased prosecutive action, but also by numerous intelligence reports of gambling operations shutting down or becoming intrastate and relatively minor in scope and profit.[115]

Again, in 1966, the Subcommittee heard:

> There is no doubt that vigilant enforcement of the new antigambling laws and wagering tax laws has resulted in a sharp decline in gambling activity and has inflicted serious financial dislocation on the syndicate during the past fiscal year.[116]

The activity of the Organized Crime and Racketeering Section continued to be documented[117] for the review of the Appropriations Committee in the succeeding years.

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[113] Hearings Before A Subcommittee of the House Committee on Appropriations, 89th Cong., 1st Sess., pt. 3, 7 (1966).

[114] Hearings, supra note 111, at 4.

[115] Hearings, supra note 113, at 88.

[116] Hearings Before A Subcommittee of the House Committee on Appropriations, 89th Cong., 2d Sess., pt. 3, 75 (1967).

[117] Hearings Before A Subcommittee of the House Committee on Appropriations, 93d Cong., 1st Sess., pt. 1, 504, 516-17 (1974). For a description of major cases brought under § 1952, see: Hearings, 92d Cong., 1st Sess., pt. 1 (1972) and Hearings, 91st Cong., 1st Sess., pt. 1 (1970).

IV. TEXT OF STATUTE

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

APPENDIX O

TRANSPORTATION OF WAGERING PARAPHERNALIA

18 U.S.C. § 1953

R.S.P.

I. LEGISLATIVE HISTORY

Section 1953 of U.S.C. Title 18[1] was sponsored by Attorney General Robert Kennedy as part of his legislative program in 1961 to combat organized crime and racketeering[2] and was a modification of a bill which was recommended by Attorney General Rogers shortly before the Kennedy Administration took office.[3] The legislation was supported by Attorney General Kennedy because the States did not have the jurisdiction to control the widespread use of interstate facilities by bookmakers and lottery and policy operators effectively.[4] He explained that although there were Federal antilottery statutes which prohibit the interstate transportation of paper "representing a ticket, chance, share or interest in a lottery,"[5] they did not cover, as a result of narrow judicial construction, much of the wagering paraphernalia used in organized gambling enterprises.[6]

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[1]See text of Pub. L. No. 87-218 in section IV.

[2]H.R. Rep. No. 968, 87th Cong., 1st Sess. (1961); U.S. Code Cong. & Ad. News, 87th Cong., 1st Sess., 2636-37 (1961).

[3]Introduced as S. 527, 87th Cong., 1st Sess. (1961) by Sen. Wiley, and as H.R. 3246, 87th Cong., 1st Sess. (1961) by Rep. Cramer. (107 Cong. Rec. 1066, 1244 (1961)).

[4]Letter from Attorney General Kennedy to the Speaker of the House, April 6, 1961, as reproduced in H.R. Rep. 968, 87th Cong., 1st Sess. (1961).

[5]18 U.S.C. §§ 1301-05.

[6]France v. United States, 164 U.S. 676 (1897), for instance, held that the statutes applied only to papers representing chances on an existing lottery and not lotteries which had already been completed. Francis v. United States, 188 U.S. 375 (1903), held that a duplicate slip retained by a lottery operator did not represent a chance in the lottery

As Senator Eastland, who introduced the bill in the Senate, pointed out:

> . . . the lottery statutes in their present form (do not)cover the many thousands of sports betting pool slips which are transported daily across State lines, for they do not meet the traditional definition of a lottery--the payment of a consideration must be for a prize to be awarded by chance. Even out-and-out lottery tickets may be shipped across State lines with impunity if they are printed in blank, shipped, and then locally overprinted with the paying numbers.[7]

Section 1953 was, therefore, drafted with broad, comprehensive language to close the loopholes in the lottery statutes and to provide the Federal Government with the necessary authority to control the interstate transportation of wagering paraphernalia.[8]

The bill recommended by Kennedy differed from Rogers' bill in that it included a clear state of mind requirement and made the scope of the prohibitions more specific. The element of knowledge was added because it was believed that since the bill imposed criminal sanctions, there might be constitutional questions if it did not require some

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and therefore was not prohibited by the statutes. In United States v. Rich, 90 F. Supp. 624 (E.D. Ill. 1950), the court held that the use of mails in advertising and conducting a bookmaking business did not violate the statutes because bookmaking did not fit the traditional definition of a lottery. Hearings Before the Senate Judiciary Committee on the Attorney General's Program to Curb Organized Crime and Racketeering, 87th Cong., 1st Sess. (June 6,19,20,21 and 26, 1961) (Hereafter referred to as Senate Hearings) at 14.

[7]107 Cong. Rec. 13902 (1961) (Remarks of Senator Eastland).

[8]Senate Hearings at 9, Kennedy testifying; 107 Cong. Rec. 13902 (1961) (Remarks of Senator Eastland); H.R. Rep. No. 968, 87th Cong., 1st Sess. (1961).

element of mens rea.[9] Also, it was necessary to make the bill more specific in order to more effectively assure that the loopholes left open by the lottery statutes would be closed.[10]

The bill for § 1953 was introduced in the Senate by Senator Eastland, Chairman of the Judiciary Committee, on April 18, 1961.[11] Hearings on the bill were held before the Judiciary Committee between June 6th and 26th,[12] and before the Executive Session of the Judiciary Committee on July 10th, 11th, and 26th.[13] As a result of these hearings, certain changes were made by the Senate in the original bill.

At the request of the Post Office, for instance, the Senate amended the bill by prohibiting the mailing of wagering paraphernalia.[14] This amendment gives the Post Office jurisdiction over such violations; since the Congress has plenary power over the mails, this amendment also prohibits intrastate as well as interstate mailing.[15]

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[9]The element of mens rea, requiring a criminal state of mind, has traditionally been considered necessary in any criminal statute. Hearings Before Subcommittee No. 5 of the House Judiciary Committee on Legislation Relating to Organized Crime, 87th Cong., 1st Sess. (May 17, 18,19,24,25,26, and 31, 1961) (Hereafter referred to as House Hearings) at 283, 326 and 378.

[10]See note 8 supra.

[11]S. 1657, 87th Cong., 1st Sess. (1961); 107 Cong. Rec. 6040 (1961).

[12]See note 6 supra.

[13]Hearings Before the Executive Session of the Senate Committee on the Judiciary on S. 1657, 87th Cong., 1st Sess. (July 10, 11, and 26, 1961) (Hereafter referred to as Executive Session).

[14]This was done by adding section 2 to the bill which amends 18 U.S.C. 1302 to include "any article described in section 1953". S. Rep. No. 589, 87th Cong., 1st Sess. (1961); Letter from Acting Postmaster General Brawley to Rep. Celler, May 16, 1961, as reproduced in H.R. Rep. No. 968, 87th Cong., 1st Sess. (1961). (The amendment was endorsed by the Justice Department. (H.R. Rep. No. 968, 87th Cong., 1st Sess. (1961))).

[15]Ex parte United States, 242 U.S. [illegible]

In addition to broadening the bill, the Senate added the first three exemptions found in subsection (b).[16] The first exemption was added by the Judiciary Committee in order to protect legalized parimutuel betting.[17] It was suggested by a representative of the American Totalisator Company (which supplies equipment used in parimutuel wagering pools) [18] and it would allow such companies to ship parimutuel betting equipment to States which have legalized parimutuel betting. It would also allow an individual to redeem a legally acquired parimutuel ticket from anywhere out-of-state.[19]

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[16]The need for exemptions was apparent because the scope of the prohibitions was broad enough to cover certain lawful activity. The only exemption that was part of the original bill as introduced was that for common carriers. That exemption was considered necessary because it was apparent that common carriers would not be able to tell whether boxes they received contained wagering paraphernalia unless they were marked. Even though common carriers would not be prosecuted under § 1953, it was noted that if a common carrier did transport wagering paraphernalia knowingly, the Interstate Commerce Commission would have the authority to revoke its license. (Senate Hearings at 297, 303).

[17]S. Rep. No. 589, 87th Cong., 1st Sess. (1961). The Justice Department had not taken legalized parimutuel betting into account when drafting the legislation, but it agreed that it should be exempt. (House Hearings at 352; Senate Hearings at 294-95).

[18]House Hearings at 262.

[19]Senate Hearings at 293-95.

After the exemption for parimutuel betting was added, Senator Cannon of Nevada recommended that § 1953 be further amended to include a similar exemption for legalized gambling.[20] In a prepared statement to the Senate Judiciary Committee on June 21st, he requested such an amendment, but no action was taken at that time.[21] During the hearings before the Executive Session of the Senate Judiciary Committee, Cannon again raised the issue,[22] and two days later, Senator Eastland offered the amendment on the floor of the Senate where it was approved and passed as part of the bill.[23]

The last exemption the Senate added was for the interstate transportation of newspapers or similar publications. It was spurred by testimony from the A.C.L.U., which indicated that without such an exemption an individual, in certain situations, could be prosecuted under § 1953 for carrying a New York Times across State lines.[24] The Justice Department claimed that the exemption was unnecessary because newspapers are not "designed" for gambling and, therefore, would not be covered by § 1953; but it added that it had no objection to their exclusion.[25]

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[20]Senator Cannon did not want the States which had legalized parimutuel betting to get preferential treatment over Nevada, whose policy towards legalized gambling is, of course, the most liberal.

[21]Senate Hearings at 302-03. [22]Executive Session at 117.

[23]107 Cong. Rec. 13902-03 (1961).

[24]Senate Hearings at 48; House Hearings at 383. The reason why the A.C.L.U. was concerned was that most papers carry sports information which could be used in bookmaking. The exemption would protect people who carried a newspaper across State lines, and it would also protect the owners and publishers of newspapers who might otherwise be prosecuted under 18 U.S.C. § 2(a) for aiding and abetting. In light of Erlenbaugh v. United States, 409 U.S. 239 (1973), this fear was unjustified. See text accompanying note 50 infra.

[25]Senate Hearings at 289.

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[25]Senate Hearings at 289.

During the Executive Session of the Senate Judiciary Committee it was decided not to use the term "press" (which was suggested by the A.C.L.U.) due to the fear that some future Postmaster General might construe the term too narrowly.[26]

After these amendments were added, the bill passed the Senate on July 28th and was referred to the House for consideration.[27]

Representative Celler introduced the bill for § 1953 in the House on April 24, 1961.[28] Hearings were held on the bill before Subcommittee No. 5 of the House Judiciary Committee.[29]

The subcommittee sought to amend the bill by exempting "any games sold for use in legally organized clubs, churches or other nonprofit organizations." The Department of Justice, however, strongly opposed this exemption, and it was subsequently struck by the committee.[30]

Aside from some technical amendments, the House Judiciary Committee amended the bill by adding subsection (c) making it clear that § 1953 is not intended to preempt any State law.[31]

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[26] Executive Session at 17.

[27] 107 Cong. Rec. 13902-03 (1961).

[28] H.R. 6571, 87th Cong., 1st Sess. (1961); 107 Cong. Rec. 6631 (1961). See copy of the bill, as introduced, in section IV.

[29] See note 9 supra. Although the bill passed the Senate first, the hearings in the House were held earlier than those in the Senate. Consequently, most of the issues raised by the House were resolved by the Senate.

[30] Pollner, Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering, 28 Bklyn L. Rev. 37, 44 (1961).

[31] H.R. Rep. No. 968, 87th Cong., 1st Sess. (1961).

With these few changes, the bill passed the House on August 21st.[32] At the recommendation of Senator Eastland, the Senate concurred with the House's amendments[33] and the bill became law on September 13, 1961.[34]

On January 2, 1975, Pub. L. No. 93-583 was enacted.[35] The purpose of the Act was to exclude State-operated lotteries from the scope of Federal criminal restrictions. It added § 1307 to U.S.C. Title 18 and amended § 1953 by adding a fourth exemption to subsection (b).[36] Those who supported the Act feared possible prosecution of State-operated lotteries under certain Federal statutes, including § 1953.[37]

II. COURT INTERPRETATION

There has been little litigation concerning § 1953, and what little there has been has centered around two major areas. The first involves the question of whether the statute prohibits activity connected with legalized gambling. In United States v. Fabrizio,[38] the Supreme Court held that § 1953 comprehensively prohibits the interstate transportation of all wagering paraphernalia which is not specifically exempt. In that case, the defendant was prosecuted for buying tickets for the New Hampshire Sweepstakes on behalf of out-of-state residents.

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[32] 107 Cong. Rec. 16537-40 (1961).

[33] Id. at 17694.

[34] Act of Sept. 13, 1961, Pub. L. No. 87-218, 75 Stat. 492.

[35] 120 Cong. Rec. S22542-43; H12599-609 (daily ed. Dec. 20, 1974).

[36] See text of statute in section IV, infra.

[37] 120 Cong. Rec. 12601 (1974).

[38] 385 U.S. 263 (1966).

The Court held that the act of sending the acknowledgments of purchase across State lines violated § 1953. The exemption for legalized gambling in subsection (b)(2) was not applicable, since it only excluded betting materials coming into (not leaving) a State which has legalized gambling. The recent exemption for State-operated lotteries[39] would, however, apply in this case today, but since the exemption is relatively narrow, the problem of to what degree § 1953 might further restrict legalized gambling remains unresolved.[40]

The second area involves the interpretation by a series of cases of the exemption in (b)(3) for newspapers and similar publications. The first case, Kelly v. Illinois Bell Telephone Co.,[41] held that receiving or transmitting gambling information for the purposes of news reporting did not violate 18 U.S.C. §§ 1084, 1952 or 1953.[42] The defendants in that case owned and published the "Louisville Daily Sports News," a "tout sheet" primarily devoted to horse racing information and admittedly

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[39] See note 36 supra. This exemption, of course, was not in effect at the time the case was decided.

[40] When Senator Cannon proposed the exemption for legalized gambling, he requested that it be modeled after the very broad exemption for parimutuel betting. (See notes 21 & 22 supra). If it had been, it would, of course, resolve the problem of the tourist who crosses a State line with the adknowledgment of purchase; but, on the other hand, it would perhaps preclude the prosecution of an individual, like the defendant in the Fabrizio case, who by conducting an interstate scheme to purchase sweepstakes tickets undermines the antigambling policies of other States.

[41] 325 F.2d 148 (7th Cir. 1963).

[42] § 1084, which has an exemption for news reporting, prohibits the use of wire communication facilities in interstate commerce for the transmission of bets or information assisting in the placing of bets on sporting events; § 1952 prohibits the use of any interstate facility for the purpose of facilitating an unlawful gambling enterprise.

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very useful to bookmakers. In a related case, United States v. Kelly,[43] the same defendants were prosecuted under § 1953 for distributing the "Louisville Daily Sports News" across State lines. In holding that the publication was exempt under (b)(3) as a matter of law, the Court referred to the earlier case and commented that it would be incongruous to allow the defendants to receive information for the purpose of publishing the paper and then prohibit them from distributing the finished publication.

The Court in United States v. Azar[44] followed United States v. Kelly and held that tout sheets were exempt under § 1953; but it went on to hold that the exemption did not apply to § 1952. The Court found that the defendant had intended "to facilitate the carrying on of the numbers racket in the State of Michigan" by distributing a tout sheet and, consequently, had violated § 1952.[45] The Court refused to hypothesize about other services which might facilitate a numbers racket, but simply stated that the tout sheet was a "unique product, created for and devoted to, the service of a racket" and, therefore, was encompassed by § 1952.[46]

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[43] 328 F.2d 227 (6th Cir. 1964).

[44] 243 F. Supp. 345 (E.D. Mich. 1964).

[45] Id. at 349.

[46] Id. at 350.

The next case, United States v. Arnold,[47] held that using an interstate wire communication facility to order a newspaper did not violate § 1084. The Court in that case reasoned that since the newspaper was exempt under § 1953, it should not be unlawful to have it delivered--even though it is being used for the purpose of aiding an unlawful gambling enterprise. The subsequent cases[48] have rejected Arnold and have distinguished Kelly v. Illinois Bell Telephone Co. on the grounds that in that case none of the defendants were involved in receiving wagers or bets.

As a result of these inconsistent decisions, the Supreme Court attempted to resolve the matter in Erlenbaugh v. United States.[49] It rejected the reasoning in Arnold and held that the newspaper exemption in § 1953 did not apply to § 1952. In justifying its decision, the Court explained that since § 1952, unlike § 1953, is restricted to unlawful businesses it is unnecessary for it to include an exemption for newspapers which is merely designed to protect innocent people. In addition, the Court said that since "knowledge and intent to transmit gambling paraphernalia in interstate commerce are elements of the crime created by . . . § 1953,"[50] the exemption is not really necessary for that statute either.

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[47] 380 F.2d 366 (4th Cir. 1967).

[48] United States v. Kish, 303 F. Supp. 1212 (N.D. Ind. 1969); United States v. Ross, 374 F.2d 227 (6th Cir.), vacated on other grounds, 390 U.S. 204 (1967).

[49] 409 U.S. 239 (1972).

[50] The Court cited United States v. Chase, 372 F.2d 453, 460 (4th Cir.), cert. denied 387 U.S. 907 (1967).

In Erlenbaugh, the defendant was in the business of receiving bets (as were the defendants in Kish and Ross[51]), but, unfortunately, the Court did not limit its holding by this fact.[52] In Azar[53] it was not clear whether the defendants were involved in receiving bets, but the language in that case was broad enough to include their activity of distributing a tout sheet regardless of whether they were or not. Therefore, as a result of those two cases, it appears that Kelly v. Illinois Bell Telephone Co.[54] may no longer be good law.

In other areas, the courts have held that § 1953 applies to flash paper which is intended to be used in gambling.[55] There was testimony in the House Hearing that the term "similar game" was too open-ended and might include virtually any form of gambling.[56] The Justice Department, however, claimed that since the enumerated games had very well defined meanings, the courts should have no difficulty in deciding what games are in fact "similar."[57] In United States v. Baker[58] the one case which addressed the problem, the Court did not have any difficulty in resolving it. The exemption in (b)(2) for legalized gambling has been held to apply only to the States, and it does not

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[51] See note 48 supra.

[52] As did the courts in Kish and Ross in order to distinguish Kelly v. Illinois Bell Telephone Co.

[53] See note 44 supra.

[54] See note 41 supra.

[55] United States v. Scaglione, 446 F.2d 182 (5th Cir.), cert. denied, 404 U.S. 941 (1971).

[56] House Hearings at 161.

[57] Id. at 351.

[58] 364 F.2d 107 (3d Cir.), cert. denied, 385 U.S. 986 (1966).

include betting materials sent to a foreign country.[59] The courts have also held that § 1953 can be used to prosecute a principal who directs his agent to send or carry wagering paraphernalia in interstate commerce.[60]

In general, § 1953 has been well received by the courts. Unlike their treatment of the lottery statutes, they have interpreted the prohibitions of § 1953 broadly.[61] A remaining problem, however, is whether and to what extent § 1952 supersedes § 1953. Because the exemption for newspapers in § 1953 does not apply to § 1952, in certain cases the prosecution can proceed under § 1952 even though it could not proceed under § 1953.[62] The extent to which this will detract from the usefulness of the exemption for newspapers remains unanswered by the courts.

III. ENFORCEMENT EXPERIENCE

Although there have been no specific appropriations for the enforcement of § 1953, there is a certain amount of information which is useful for an understanding of how this section and the others which were passed at the same time affected the budget for the Department of Justice.

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[59] United States v. Baker, 364 F.2d 107 (3d Cir.) cert. denied, 385 U.S. 986 (1966).

[60] United States v. Zambito, 315 F.2d 266 (4th Cir.), cert. denied, 373 U.S. 924 (1963).

[61] Arguably, the courts may have interpreted the scope of the prohibitions too broadly and at the expense of the exemptions. See the discussion of United States v. Fabrizio, notes 38-40 and accompanying text supra.

[62] United States v. Azar, supra, note 44.

During the appropriations hearings before the House in February, 1961, Attorney General Kennedy referred to the proposed legislation on gambling which Attorney General Rogers sent to the Congress; and later that year, before the Senate, he referred to the bills which he had recently introduced on the same subject, and said that if the bills were passed, the Justice Department would need supplemental appropriations.[63]

After the legislation passed, the Justice Department continued to refer to these new Acts from year to year as one of the reasons why the Department's requests for appropriations were increasing. The caseload for the Organized Crime Section of the Criminal Division of the Justice Department more than doubled from 1962 to 1965,[64] apparently as a result of this new legislation. Also, the number of cases that were investigated by the F.B.I. under these Acts alone went from 5,361 in 1962 to 15,600 at the end of fiscal 1964.[65]

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[63] Hearings Before the Subcommittee of the House Committee on Appropriations for the Department of State and the Department of Justice, (Hereafter referred to as House Appropriations) 87th Cong., 1st Sess. (Feb. 28, 1961) at 11. Hearings Before the Subcommittee of the Senate Committee on Appropriations for the Department of State and the Department of Justice, (Hereafter referred to as Senate Appropriations) 87th Cong., 1st Sess. (June 19, 1961) at 262.

[64] The number of cases received went from 526 in 1962 to 1,023 in 1965. House Appropriations, 88th Cong., 1st Sess. (Jan. 29, 1963) at 95; 89th Cong., 1st Sess. (Feb. 9, 1966) at 77.

[65] House Appropriations, 88th Cong., 1st Sess. (Jan. 29, 1963) at 8; 89th Cong., 1st Sess. (Mar. 1, 1965) at 88.

This increased work load in the Organized Crime Section and the increase in the requested and actual appropriations for the Criminal Division, as shown in the charts below, indicate to some extent the impact of § 1953 and the other statutes which were passed at the same time, on the appropriations and the budget for the Department of Justice in the years immediately after 1961, during the Kennedy program.

The Caseload for the Organized Crime Section of the Criminal Division.[66]

Year	'57	'58	'59	'60	'61	'62	'63	'64	'65	'66
Actual No. of Cases Received	84	810	685	493	403	526	755	968	1,023	911
Original Estimate			850	875	580	375	375	725	800	900
Revised Estimate				530			725	790	900	

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[66] House Appropriations, 86th Cong. 1st Sess. (Feb. 4, 1959) at 180; 86th Cong. 2d Sess. (Feb. 3, 1960) at 101; 87th Cong., 2d Sess. (Jan. 23, 1962) at 108; 88th Cong., 1st Sess. (Jan. 29, 1963) at 95; 88th Cong., 2d Sess. (Jan. 30, 1964) at 84; 89th Cong., 1st Sess. (Mar. 1, 1965) at 94; 89th Cong., 2d Sess. (Feb. 9, 1966) at 79.

Appropriations for the Criminal Division of the Justice Department.[67]

Year	Original Request	Actual Appropriation
1957		$1,200,00
1958	$1,274,000	1,286,000
1959	1,579,000	1,579,000
1960	1,618,000	1,618,000
1961	1,604,000	1,890,000
1962	1,815,000*	2,471,000
1963	3,100,000**	3,011,000
1964	3,232,000	3,186,000
1965	3,352,000	3,325,000
1966	3,491,000	3,468,000

*This request was later raised to $2,355,000.[68]

**This large increase in appropriations was requested in January, 1962, just a few months after the gambling legislation was enacted and it was in anticipation of the increased workload.

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[67] House Appropriations, 85th Cong., 2d Sess. (Jan. 14, 1958) at 59; 86th Cong., 1st Sess. (Feb. 4, 1959) at 186; 86th Cong., 2d Sess. (Feb. 3, 1960) at 97; 87th Cong., 1st Sess. (Feb. 28, 1961) at 92; 87th Cong., 2d Sess. (Jan. 23, 1962) at 103; 88th Cong., 1st Sess. (Jan. 29, 1963) at 2; 88th Cong., 2d Sess. (Jan. 30, 1964) at 45; 89th Cong., 1st Sess. (Mar. 1, 1965) at 85; 89th Cong. 2d Sess. (Feb. 9, 1966) at 72.

[68] Senate Appropriations, 87th Cong., 1st Sess. (June 19, 1961) at 240.

IV. TEXT OF STATUTE

§ 1953. Interstate transportation of wagering paraphernalia.

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication, or (4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

and by adding the following term to the analysis of the chapter:

Section 1953. Interstate transportation of wagering paraphernalia.

APPENDIX P

PROHIBITION OF ILLEGAL GAMBLING BUSINESSES

18 U.S.C. § 1955

P.S.F.
H.A.K.

I. LEGISLATIVE HISTORY

On October 15, 1970, President Nixon signed into law the Organized Crime Control Act of 1970, a comprehensive series of measures designed to bring organized crime under more effective Federal control.[1] The Act included changes in several areas of criminal procedure and substantive law, including the establishment of special grand juries, immunity grants, extended sentencing for recidivists, and new provisions related to racketeering. Title VIII of S. 30, which was to become Sections 1511 and 1955 of 18 United States Code, dealt with syndicated gambling.

Title VIII was included in the 1970 Act because it was felt that restricting syndicated gambling was directly related to the larger issue of organized crime control. The consensus among law enforcement officials was that gambling was the single most lucrative source of revenue for the underworld.[2] Constricting the inflow of capital from gambling would thus affect the operations of organized crime throughout the range of its activities.

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[1]Pub. L. No. 91-452, 84 Stat. 922, October 15, 1970.

[2]See generally Task Force Report: Organized Crime, Report by the President's Commission on Law Enforcement and Administration of Justice (1967); Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, Gambling and Organized Crime, S. Rep. No. 1310, 87th Cong., 2d Sess. (1962).

Prior to the 1970 Act, there was no direct Federal prohibition of gambling. Instead, Congress had exercised its regulatory powers narrowly and dealt only with interstate aspects. Interstate travel for purposes of gambling in violation of State law, interstate communication of illegal gambling information, and interstate transportation of certain gambling devices were prohibited by 18 U.S.C. §§ 1952, 1084, and 1953. Wagering tax statutes had been used to prosecute syndicated gambling enterprises through the Internal Revenue Service for nonpayment of Federal excise taxes, but these statutes were dramatically curtailed, when they were held to violate the self-incrimination clause of the Fifth Amendment by the Marchetti-Grosso decisions of the Supreme Court.[3]

The immediate precursor of Title VIII was recommended to the Congress by the Department of Justice under the Johnson Administration soon after the Marchetti-Grosso decisions eliminated further gambling prosecutions through the Internal Revenue Service.[4] Transmitted to the Speaker of the House and the Vice-President with recommendations on April 10, 1968, the bill was introduced in the 90th Congress, 2d Session as H.R. 16666 on April 22, 1968 and as S. 3564 on May 29, 1968.

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[3]Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968). The thrust of the Court's holding was that by being penalized for failure to comply with Federal tax provisions on wagering prohibited by local law, defendants were being coerced into admitting culpability.

[4]Legislative File, Criminal Division, Department of Justice.

S. 3564 was introduced by Senator McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures of the Judiciary Committee. McClellan said on the Senate floor upon introduction of the bill that "[g]ambling is the principal source of income for the elements of organized crime and it is the purpose of this bill to seek to shut off this flow of revenue by making it a crime to engage in a substantial business enterprise of gambling."[5] The Senator incorporated into the Congressional Record at that point the letter of transmittal of the bill from the Justice Department setting fotth the purposes of the proposed legislation, the rationale for Federal intervention, and the scope of the proposed statute as it would interact with existing State and Federal laws.[6]

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[5]114 Cong. Rec. S6673 (daily ed. May 29, 1968).

[6]The letter came from the Office of the Attorney General on April 10, 1968. Its most important provisions, echoed by all future discussions of S. 3564 and related bills up until final passage as Title VIII of S. 30 more than two years later, are as follows:

> Dear Mr. Vice President: Enclosed for your consideration and appropriate reference is a legislative proposal "to prohibit business enterprises of gambling."
>
> The purpose of the bill is to make it a Federal crime to engage in a substantial business enterprise of gambling. Four considerations call for the enactment of this legislation.
>
> First, gambling is largely the creature of organized crime and is its principal source of revenue. If we can diminish this revenue materially, we will strike a significant blow at the nation-wide underworld empire which preys upon the American people.
>
> Second, gambling both involves and affects interstate commerce. People, information, funds and paraphernalia, without which gambling could not function, move regularly across State lines. These interstate aspects of gambling make it an apprpriate subject of concern to the Federal government.
>
> Third, an inevitable companion of flourishing gambling activity is bribery and corruption of local law enforcement officials, often on an aggravated scale which stultifies local law enforcement as an effective weapon against illegal gambling and organized crime. The criminal activity which flourishes under such conditions affects not only the local community in which it occurs but also other parts of the country, thus becoming a matter of Federal concern.
>
> Fourth, existing Federal statutes dealing with the interstate aspects of gambling (Sections 1084, 1952 and 1953 of Title 18 of

Little seems to have been done in either House during the rest of the Session concerning the proposed statutes.[7] The following year a revised proposal was submitted by the Justice Department that included what would later become 18 U.S.C. § 1511 as well as § 1955, known as the "Illegal Gambling Business Control Act of 1969."[8] The new draft was introduced by Senator Hruska in the 91st Congress, 1st Session on April 29, 1969 as S. 2022.[9] The resurgence of interest in gambling prohibition

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> the United States Code) are not broad enough to reach all gambling activity which is of legitimate concern to the United States. Despite these statutes and despite efforts made to date by both the Federal and the several State governments, gambling continues to exist on a large scale to the benefit of organized crime and the detriment of the American people. A more effective effort must be mounted to eliminate illegal gambling. In that effort the Federal Government must be able not only to deny the use and facilities of interstate commerce to the day-to-day operations of illegal gamblers--as it can do under existing statutes--but also to prohibit directly substantial business enterprises of gambling.
>
> The proposed statute would not bring all illegal gambling activity under Federal cognizance. It deals only with those who are engaged in a substantial business enterprise of gambling, as distinguished from those whose operations are relatively small . . .
>
> The Federal Government will not preempt the field of gambling regulation if this statute is enacted. Rather, it will play its traditional role of cooperating with local law enforcement authorities who will continue to have major responsibility in this area. The purpose of the statute is simply to make the Federal Government a more effective member of the established State-Federal law enforcement partnership which has long been waging a common war on organized crime and illegal gambling . . .

[7]The House Judiciary Committee, Subcommittee No. 5, did hear Fred M. Vinson, Jr., the Assistant Attorney General of the Criminal Division, on H.R. 16666 on May 15, 1968. Although nothing seems to have come of this presentation in that session, the substance of his remarks were reported to the Congress again the following year under the Nixon Administration. Legislative File, Criminal Division, Department of Justice.

[8]April 29, 1969, Legislative File, Criminal Division, Department of Justice.

[9]115 Cong. Rec. S4332 (daily ed. April 29, 1969).

was based in part upon the goals of the newly-elected Nixon Administration.[10] S. 2022 was one of a series of proposals that would be proposed that year related to organized crime, following a Presidential message on April 23, 1969.

Senator Hruska's remarks upon the introduction of S. 2022 summed up the Administration's perspective on syndicated gambling. Professional gambling, according to the Senator, was "a separate, professional, and insidious conspiracy that by its size and power seeks to constitute a government unto itself."[11] In addition to attacking syndicated gamblers, the Senator lashed out at the public apathy that often seemed to condone such practices. He explained how such gambling profits are used to further other activities of organized crime and lead to corrupt local law enforcement, estimating the annual revenue derived from syndicated gambling to be in the tens of billions of dollars. Federal jurisdiction in the area would be based on a less restrictive notion of Commerce clause powers[12] than had been used in the past. Later in the week, on May 1, 1969, Senator Mundt reiterated Hruska's remarks and added to the Record an additional statement from the Justice Department.[13]

Detailed consideration of S. 2022 was left to the Subcommittee on Criminal Laws and Procedures chaired by Senator McClellan, which discussed the bill along with S. 30 and other organized crime control measures in

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[10] Id. (remarks of Senator Hruska).

[11] Id. [12] Id.

[13] 115 Cong. Rec. S4362 (daily ed. May 1, 1969, remarks of Senator Mundt).

March and June of 1969.[14] S. 2022, as it was to become 18 U.S.C. § 1955, was presented to the Subcommittee in the following form:[15]

§1953A. Prohibition of illegal gambling business

(a) Whoever participates in an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section, the term "illegal gambling business" means betting, lottery, or numbers activity which --

(1) is a violation of the laws of a State or political subdivision thereof; and

(2) involves five or more persons who operate, work in, participate in, or derive revenue from said betting, lottery, or numbers activity; and

(3) has been or remains in operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(c) As used in this section "State" means . . .

(d) This section does not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax . . .

The Federal jurisdictional aspects of S. 2022 were thoroughly discussed at this stage of the processing of the bill.[16] The statute

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[14] Measures Related to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292, 91st Cong., 1st Sess., March 18, 19, 25, 26, and June 3, 4, 1969 [hereinafter cited as Senate Hearings].

[15] S. 2022, 91st Cong., 1st Sess., April 29, 1969.

[16] Senate Hearings at 396. The colloquy between Senator McClellan and Assistant Attorney General Wilson at that point is illustrative:

Senator McClellan . . . I am concerned that the effect of this bill would be to extend Federal jurisdiction so far that it would be virtually the same as local criminal jurisdiction in this area. Now, you have mentioned this problem in your remarks already.

Mr. Wilson. We have tried to head that off, and if we haven't done it, it needs to be done, because it is not our purpose to move all this into Federal Courts.

Senator McClellan. Our experience in the past has been that in such situations the expansion of Federal power has tended to supplant, not merely supplement, State criminal jurisdiction. Again I take it that is what you want to avoid?

Mr. Wilson. Yes, sir.

proposed to deal with illegal gambling business directly, since no proof of a relationship with interstate commerce and to the Commerce Clause of the U.S. Constituion, Article I, Sec. 8 was required as an element of the new offense defined by the statute. Instead, by special findings, S. 2022 declared that gambling activity of the size set out in the statute (involving five or more persons and staying in operation at least 30 days or having a gross revenue exceeding $2000 in any single day) had a sufficient effect upon interstate commerce to be federally prosecuted.[17] Even apparently intrastate gambling activity of that proportion would have an impact on the free flow of commerce among the States, definitely a matter of Federal jurisdiction.[18] Using a congressional finding to trigger the statute was an idea based upon two recent decisions in the Supreme Court involving violations of the Civil Rights Act of 1964, inter alia,[19] and by a series of Federal cases involving the effect of gambling generally upon interstate commerce.[20] Justice Department testimony before the Subcommittee provided ample additional documentation for the proposed means of directly dealing with syndicated gambling.

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[17]S. 2022, supra, "Findings" at 1, 2.

[18]Virtually unquestioned since Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1 (1824).

[19]Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). See also Wickard v. Filburn, 317 U.S. 111 (1942); Maryland v. Wirtz, 392 U.S. 183 (1968).

[20]United States v. Hawthorne, 356 F.2d 740 (4th Cir.), cert. denied, 384 U.S. 908 (1966); United States v. Barrow 363 F.2d 62 (3d Cir.), cert. denied, 385 U.S. 1001 (1967); United States v. Miller, 379 F.2d 483 (7th Cir.), cert. denied, 389 U.S. 930 (1967); United States v. Spino, 345 F.2d 372 (7th Cir.), cert. denied, 382 U.S. 825 (1965); In Re Ruby Lazarus, 276 F. Supp. 434 (S.D. Cal. 1967); United States v. Zambito, 315 F.2d 266 (4th Cir.), cert. denied, 373 U.S. 924 (1963).

A related matter of concern was the preemption of local law enforcement efforts by this new extension of Federal jurisdiction. In the prepared statement of the Assistant Attorney General, Will Wilson,[21] the discussion with him and others in the hearings of the subcommittee,[22] and the report of the subcommittee that was to follow,[23] however, it was clearly stated that the intent of Congress was to cooperate with existing law enforcement agencies on the local level and add Federal power only where it was required. Throughout the debates, emphasis was placed on the basic principles of federalism and the need to respect them in this combined effort of State and Federal governments against syndicated gambling.

Other provisions added to the statute in the Senate committee were a finding with respect to probable cause for purposes of search and arrest warrants,[24] a forfeiture provision,[25] and minor changes in language. S. 2022 also included by this stage a provision amending 18 U.S.C. § 2516 to include violations of the proposed new gambling statutes among the statutes for which wiretapping could be invoked.

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[21] Senate Hearings, 381.

[22] Id., 394-402.

[23] S. Rep. No. 91-617, 91st Cong., 1st Sess., December 18, 1969, 70-75.

[24] See discussion in Senate Hearings, 399-401, between Mr. Peterson, of the Criminal Division, and Mr. Blakey, Chief Counsel to the Senate Subcommittee.

[25] Senate Hearings, 397, 412.

Reported out of committee on December 18, 1969, S. 2022 became first Title IX and subsequently Title VIII of S. 30, then known as the Organized Crime Control Act of 1969.[26] The bill was not discussed in depth until after the recess,[27] when Senator McClellan led the floor debate.[28] On January 23, 1970, S. 30 passed the Senate without further

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[26] § 1955. Prohibition of illegal gambling businesses.
(a) Whoever participates in an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
(b) As used in this section--
(1) "illegal gambling business" means a gambling business which --
(i) is a violation of the law of a State or political subdivision thereof;
(ii) involves five or more persons who participate in the gambling activity; and
(iii) has been or remains in operation for a period in excess of 30 days or has a gross revenue of $2,000 in any single day.
(2) "gambling" includes pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.
(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.
(c) For the purposes of this section, if it is found that a gambling business has five or more persons who participate in such business and such business operates for two or more successive days, the probability shall have been established that such business receives gross revenue in excess of $2,000 in any single day.
(d) Any property, . . . [forfeiture provision]
(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax . . .

[27] 115 Cong. Rec. S17089 (daily ed. Dec. 18, 1969).

[28] 116 Cong. Rec. S320-S481 (daily ed. Jan. 21-23, 1970). Senator McClellan referred to the President's organized crime message of April 23; 1969. McClellan reviewed the need for the legislation, disclaimed any Federal intention of interfering with internal State concerns, and said in summary that, "The purpose of this legislation is to bring under Federal Jurisdiction all large-scaled illegal gambling operations which involve or affect interstate commerce. The effect of the law will be to give the Attorney General broad latitude to assist local and State government in cracking down on illegal gambling, the wellspring of organized crime's reservoir."

changes in Title VIII[29] and was sent to the House, where it was referred to the House Judiciary Committee and considered over the summer.[30]

The first major witness before the House Judiciary Committee on S. 30 was Senator McClellan, who presented a detailed summary of its provisions and urged its rapid acceptance.[31] The Committee also heard the testimony of Justice Department representatives and various Congressmen in support of the bill.[32] Only two groups actively opposed S. 30 in the House Hearings: the Committee on Federal Legislation of the Association of the Bar of the City of New York and the American Civil

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[29]116 Cong. Rec. S481 (daily ed. Jan. 23, 1970), by a vote of 73 to 1.

[30]Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on S. 30 and related proposals, 91st Cong., 2d Sess., May 20, 21, 27; June 10, 11, 17; July 23, and Aug. 5, 1970 [hereinafter cited as House Hearings].

[31]House Hearings, 81, 84-88, 89, 93, 104-06. In his prepared statement, McClellan sought to allay fears with respect to pervasive Federal intervention, saying that "There is no intent in this legislation, however, to preempt law enforcement efforts under those State and local laws; on the contrary, it is essential that the primary responsibility for enforcement of the gambling and corruption laws remain in the hands of State and local officials. Title VIII's expansion of the existing Federal jurisdiction over gambling cases will improve such local efforts, not merely by providing an impetus for effective and honest law enforcement, but also by making available to assist local efforts the expertise, manpower, and resources of the Federal Bureau of Investigation, the Internal Revenue Service, and other agencies of the Federal Government which, under existing Federal antigambling statutes, have developed high levels of special competence for dealing with gambling and corruption cases." Id. at 105.

[32]Attorney General Mitchell and Assistant Attorney General Wilson of the Criminal Division, id. 191-94. A question of potential conflict of laws difficulty because of the incorporation of a different State law in each jurisdiction into the statute was raised by the subcommittee counsel, Mr. Zelenko, but was dismissed by Wilson as not a significant difficulty under the statute as written. Wilson also suggested that there would be no difficulty with the exemption of charitable institutions despite their sizes, saying that the purpose of Congress in reaching only syndicated gambling was legitimate.

Liberties Union, both of whom submitted lengthy briefs.[33] Title VIII, however, was the least criticized aspect of S. 30; it was a relatively uncontroversial extension of Federal jurisdiction in comparison with the extensive procedural modifications proposed in other titles. What little comment that was directed to Title VIII[34] mostly concerned its alleged vagueness and the lack of a sufficient showing of a 'nexus' with interstate commerce, for purposes of Federal jurisdiction, without specific proof of an effect on interstate commerce in every case.

The Committee made certain changes in Title VIII in response to the criticism,[35] but the thrust of the statute remained unchanged. The

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[33] House Hearings, 322-27, 66-69, 490, 498-99.

[34] The Committee on Federal Legislation questioned as unclear phraseology such as "participates in an illegal gambling business." Only Herman Schwartz, a subcommittee witness who was a law professor from the State University of New York at Buffalo, at House Hearings, 384, questioned the merits of adding to the body of statutory law restricting gambling, arguing that the study of gambling proposed in S. 30 at Title VIII, Part D should precede any further legislation. His comment was not answered by the proponents of the bill, nor mentioned elsewhere in the public debate. The Section of Criminal Law of the American Bar Association also proposed changes in wording at House Hearings, 558, with regard to the probable cause provision inserted by the Senate subcommittee as 18 U.S.C. § 1955(c).

[35] The changes in phraseology made in response to criticism during the hearings were these: 1) "participates in" was changed to "conducts, finances, manages, supervises, directs, or owns all or a part of"; 2) Under § 1955(b)(1)(i) "in which it is conducted" was added to alleviate the potential conflict of laws problem by clarifying which State law should apply; 3) "Substantially continuous operation" became the new wording for the provision under § 1955(b)(1)(iii) concerning duration of of the operation for 30 days; 4) "but is not limited to" was added to the list of types of gambling defined in § 1955(b)(2); 5) § 1955(c), having to do with probable cause, was reworded for clarification so as to make clear that it was intended to apply only to probable cause as to search and arrest warrants and had nothing to do with proof at trial. With these changes, the final wording of 18 U.S.C. § 1955 as enacted into law was produced.

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bill was reported out on September 30.[36] Debate occurred on October 6 and 7, and S. 30 was passed on October 7 without serious question pertaining to Title VIII.[37] The changes made in committee were agreed to without conference with the Senate at the urging of Senator McClellan, who felt that there had been enough delay and that the basic purposes of the bill had not been compromised.[38] The bill became law on October 15, 1970 with the signature of the President.[39]

II. COURT INTERPRETATION

Title VIII has not met with judicial hostility. Its constitutionality has not been seriously threatened in any respect in the approximately 80 reported appellate cases consulted in the preparation of this appendix. Indeed, the great majority of the reported litigation has not involved questions arising under Title VIII, but under the wiretapping provisions enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[40] The cases that have construed section 1955, however, have fallen into two categories: 1) those initially facing the constitutionality of the statute, and 2) those construing various provisions of the statute in light of the relevant legislative history.

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[36] 116 Cong. Rec. HR 9485 (daily ed. Sept. 30, 1970).

[37] 116 Cong. Rec. HR 9779 (daily ed. Oct. 7, 1970), by a vote of 341-26.

[38] 116 Cong. Rec. S17760 (daily ed. Oct. 12, 1970).

[39] 116 Cong. Rec. S18188 (daily ed. Oct. 16, 1970).

[40] 18 U.S.C. §§ 2510-2520, 82 Stat. 197.

The constitutionality of the use of congressional findings to obviate the need to prove interstate commerce in each case for Federal jurisdiction has been challenged and sustained in numerous cases.[41] The issue was anticipated by the Justice Department and was thoroughly briefed and answered at the time of passage.[42] Once the question of the propriety of Federal legislation concerning local gambling that affected interstate commerce was established, the complimentary question of the possible infringements upon State powers under the 10th Amendment was rejected forthrightly.[43]

Constitutional questions under the Fifth Amendment were also raised in prosecutions under Title VIII, and these took several forms. Because Federal violations would overlap violations of State lw,[44] questions arose and were settled concerning problems of conflicts of law

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[41] United States v. Becker, 461 F.2d 230 (2d Cir. 1972), U.S. App. Pndg.; United States v. Riehl, 460 F.2d 454 (3d Cir. 1972); United States v. Harris, 460 F.2d 1041 (5th Cir.), cert. denied, 409 U.S. 877 (1972); United States v. Thaggard, 477 F.2d 626 (5th Cir. 1973), cert. denied, 94 S. Ct. 570 (Dec. 3, 1973); United States v. Hunter, 478 F.2d 1019 (7th Cir.), cert. denied, 414 U.S. 857 (1973); Schneider v. United States, 459 F.2d 540 (8th Cir.), cert. denied, 409 U.S. 877 (1972); and United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973). Virtually all § 1955 Commerce Clause cases cite the analogous Perez v. United States, 402 U.S. 146 (1971), concerning the propriety and constitutionality of "class of activities" Congressional findings in loansharking legislation.

[42] See note 19 and accompanying text supra.

[43] See, e.g., United States v. Harris, supra, 460 F.2d 1049.

[44] See wording of statute as set out in section IV.

and choice of laws.[45] Less easily, but nonetheless disallowed were objections concerning the unequal application of Federal law to citizens residing in different States. Residents of States having stringent prohibitions with regard to gambling were quick to point out that Federal law could now treat them with greater severity than it could their neighbors in sister States. A related point, the potential imposition upon the constitutionally-protected right to travel interstate, was also considered and rejected by the courts.[46] One final equal protection problem concerned the statutory exemption granted to charitable and religious institutions and those others who operated gambling ventures in which the benefits did not inure to individuals.[47] The approach of Congress to reach only syndicated gambling businesses as an aspect of an overall attack directed against organized crime was, however, sustained by the reviewing courts. Vagueness objections have also been disallowed by the courts.[48]

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[45] Schneider v. United States, supra, 542-43; United States v. Bally Manufacturing Corp., 345 F. Supp. 410, 427 (E.D. La. 1972): "The rule is simply that a variation in State laws does not in any way nullify or render unreasonable a Federal antigambling statute which incorporates State law."

[46] United States v. Smaldone, supra, 1343, citing Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311, 327 (1917); Kentucky Whip and Collar Co. v. Illinois C.R. Co., 299 U.S. 334 (1937).

[47] See United States v. Thaggard, supra, 630-31.

[48] United States v. Garrison, 348 F. Supp. 1112, 1119-20 (E.D. La. 1972); United States v. Bally Manufacturing Corp., supra, 427: "Section 1955 does not forbid 'the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . .'", citing Conally v. General Construction Co., 269 U.S. 385, 391 (1926); United States v. Riehl, supra, 459.

Finally, the probable cause presumption was also litigated. A somewhat novel statutory device, this presumption was approved with little difficulty by the Sixty Circuit.[49]

Difficulties of statutory construction have also faced the courts under Title VIII. Joint prosecutions under 18 U.S.C. §§ 371 and 1955 have given rise to claims of election under the so-called Wharton's rule, which states that a person cannot be prosecuted for conspiracy to commit a substantive offense for which an agreement by the same number of persons is also required by the terms of the statute.[50] Although probably only applicable to the common law crimes,[51] Wharton's Rule has raised serious questions on the intent of Congress in the enactment of Title VIII, and it has led to a split among the circuits. Reconciliation is likely in the near future, since several cases involving the rule are docketed in the Supreme Court for the October Term.[52] The focus of the inquiry will revolve around the comparison of Title VIII to the common law crimes. The weight of authority, under Title VIII, however, has been that the requirement of five or more persons is a jurisdictional

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[49] United States v. Palmer, 465 F.2d 697, (6th Cir. 1972), in which former Supreme Court Associate Justice Tom C. Clark was sitting, citing Tot v. United States, 319 U.S. 463 (1963); see also United States v. Fino, 478 F.2d 35, 37 (2d Cir. 1973).

[50] See Note, Wharton's Rule and Conspiracy to Operate an Illegal Gambling Business, 30 Wash. & Lee L. Rev. 613 (1973).

[51] Such as bribery, adultery, and conversion of contraband goods. See United States v. Pacheco, supra, 489 F.2d 554, 558 (5th Cir. 1974), and cases cited therein.

[52] United States v. Becker, supra, docket no. 73-824, 42 U.S.L.W., 3336; United States v. Smaldone, supra, docket nos. 73-710, 73-909, 42 U.S.L.W., 3363; United States v. Fino, supra, docket no. 72-1605, 41 U.S.L.W., 3675.

element having its roots in a policy directed against organized crime, and that there is no inherent difference between enterprises involving more or less than five persons.[53] These cases see the number requirement as a jurisdictional element rather than an inherent, substantive requirement, toward which Wharton's rule was originally directed. On the other hand, the question can also be seen logically in terms of the proof required in order to convict under either the conspiracy or the substantive offense; where the two are identical, it can be argued, the rule, as an embodiment of social policy, should preclude double prosecution. Some courts have also answered the question by holding that where more than five persons are indicted for the conspiracy, the Wharton's rule problem is obviated, because more than the minimum number of defendants are involved, and the proof is necessarily different.[54] Nevertheless, contrary arguments are not unsound and have yet to be finally disallowed.[55]

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[53] United States v. Pacheco, supra, 558: "In asking us to apply Wharton's rule to the section 1955 situation, appellants misconceive the import of that section's jurisdictional requirement that five or more persons be involved in the illegal gambling business. Such jurisdictional requirements are unrelated to the criminal character of the conduct and should be separately treated." citing United States v. Blassingame, 427 F.2d 329, 330 (2d Cir. 1970), cert. denied 402 U.S. 945 (1971).

[54] United States v. Becker, supra, 234; United States v. Iannelli, 477 F.2d 999, 1002, (3d Cir. 1973); United States v. Mainello, 345 F. Supp. 863, 882-83, (E.D. N.Y. 1972), citing for the proposition that conspiracy and the substantive offense are clearly distinguishable Callanan v. United States, 364 U.S. 587 (1961).

[55] United States v. Figueredo, 350 F. Supp. 1031, 1032-36, (M.D. Fla. 1972), reversed sub nom. United States v. Vaglica, 490 F.2d 799 (5th Cir. 1974). See United States v. Pacheco, supra, 559. For an argument in a case holding that Wharton's rule does preclude double count prosecution under both sections 1955 and 371, see United States v. Greenberg, 334 F. Supp. 1092-95, .(N.D. Ohio 1971): "Having chosen

Other difficulties involving statutory construction regarding 18 U.S.C. § 1955 have been litigated. Section 1955(a) is premised on "conducts," a term inserted along with the words "finances, manages, supervises, directs or owns" in lieu of "participates in" by the House Judiciary Committee. The Committee felt the insertion would aid clarity and avoid implicating wagerers not "involved in the business."[56] The meaning of "conduct" has been upheld in several instances as constitutionally definite.[57] The use of the phrase "illegal gambling business" has also been found not to be vague.[58] Questions whether "gross revenue of $2000" in § 1955(b)(1)(iii) means "total income" or "revenue left after expenses" have been raised; it was held to mean "total revenue."[59]

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this means, Congress has established several jurisdictional elements for this offense. One, which makes appropriate the application of 'Wharton's Rule,' is subsection (ii) of the Act. Through this unique section, Congress has made the offense federally cognizable only when there are five or more participants. One of the bases of Federal intervention is a concert of action between the parties. In other words, the offense is one involving the element of concursus necessarius. That is, it is absolutely necessary that there be a plurality of parties and it is necessary that there be concerted action among them. It therefore appears that a charge of conspiring to commit the offense should not be maintainable."

[56] See note 35, supra.

[57] United States v. Becker, supra; 232: "Thus Congress' intent was to include all those who participate in the operation of a gambling business, regardless how minor their roles and whether or not they be labelled agents, runners, independent contractors or the like, and to exclude only customers of the business."

[58] United States v. Riehl, supra, 459.

[59] United States v. Schullo, 363 F. Supp. 246, 248-49 (D. Minn. 1973).

The purpose of "five or more persons" in § 1955(b)(1)(ii) has been questioned.[60] Despite the House Committee's clarification of § 1955(c) the probable cause provision,[61] at least twice the meaning of that provision has been questioned.[62] That § 1955 only applies where State criminal violations have occurred rather than civil violations, such as a Nevada tax infringement, has also been determined.[63] Forfeiture under § 1955(d) was also litigated and approved by the court.[64]

State of mind requirements under § 1955 have also been questioned several times. Based upon the legislative history of S. 30, the courts have had no difficulty in determining that the requirement of knowledge as to surrounding circumstances, including the number of people involved or the nature of the gambling operation, is not high. Nor have they found that there is a state of mind requirement specified or implicit with respect to the existence of the statute or of a relationship with interstate commerce.[65]

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[60] United States v. Ciamacco, 362 F. Supp. 107, 112 (W.D. Pa. 1973); United States v. Iannelli, supra, 1002; United States v. Ceraso, 467 F.2d 653, 657 (3d Cir. 1972); United States v. Hunter, supra, 1021.

[61] See note 35, supra.

[62] United States v. DiMario, 473 F.2d 1046, 1047 (6th Cir. 1973); United States v. Williams, 459 F.2d 909, 911-15, (6th Cir. 1972).

[63] United States v. Gordon, 464 F.2d 359 (9th Cir. 1972).

[64] United States v. 18 Gambling Devices, 347 F. Supp. 653 (S.D. Miss. 1972).

[65] United States v. Thaggard, supra, 632, in which the court held that there was no state of mind requirement as to the existence of a Federal prohibition regarding gambling illegal under applicable State laws. It has also been held that there is a state of mind requirement as to the type of conduct engaged in, syndicated gambling, but not as to the nature of that operation specifically, and that there is no state of mind requirement as to the result. For such statutory analysis

With the exception of the Wharton's rule controversy, now approaching final resolution,[66] there has been no serious difficulty in the courts with § 1955. Rather, each question that has been raised either with regard to the constitutionality of the statute or as to its construction has been answered without serious disagreement. Almost all reported litigation arising under § 1955 now concerns either suggested deficiencies under the requirements of 18 U.S.C. §§ 2510-2520, the wiretapping provisions,[67] or of the immunity statute also enacted by S. 30.[68] As legislation designed to perform a specific function, the prohibition of such syndicated gambling activites by 18 U.S.C. § 1955 seems to be operating satisfactorily.

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of varying quality but with consistent results, see United States v. Iannelli, supra, 1002; United States v. Vigi, 363 F. Supp. 314, 320-21 (E.D. Mich. 1973). Also see United States v. Roselli, 432 F.2d 879, 891 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971); United States v. Blassingame, 427 F.2d 329, 329-30, (2d Cir. 1970), cert. denied 402 U.S. 945 (1971).

[66] See note 52, supra.

[67] See, inter alia, United States v. Curreri, 363 F. Supp. 430 (D. Md. 1973); Quintina v. United States, 359 F. Supp. 769 (D. Mass. 1973); United States v. Askins, 351 F. Supp. 408 (D. Md. 1972); United States v. Bleau, 363 F. Supp. 438 (D. Md. 1973); United States v. Falcone, 364 F. Supp. 877 (D. N.J. 1973); United States v. Kleve, 465 F.2d 187 (8th Cir. 1972); United States v. Lanza, 341 F. Supp. (M.D. Fla. 1972); United States v. Narducci, 341 F. Supp. 1107 (E.D. Pa. 1972); United States v. Roberts, 477 F.2d 57 (7th Cir. 1973), U.S. App. Pndg.; and United States v. Wolk, 336 F. Supp. 990 (D. Minn. 1972).

[68] 18 U.S.C. §§ 6001-04. See In Re Kilgo, 484 F.2d 1215 (4th Cir. 1973); In Re Reno, 331 F. Supp. 507 (E.D. Mich. 1971); United States v. Chalmas, 468 F.2d 234 (9th Cir. 1972); and United States v. Handler, 476 F.2d 709 (2d Cir. 1973).

III. ENFORCEMENT EXPERIENCE

Senate and House Appropriation Committee hearings concerning annual and supplemental funding for the Justice Department have also illuminated the importance of Title VIII. These hearings have provided a forum for Justice Department representatives to explain how the Department views Title VIII as a crime-fighting tool.[69] Thus, the executive branch's view of its role and function in administering Title VIII has been officially articulated.

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[69] In reference to the Justice Department's efforts against organized crime, for example, Assistant Attorney General Henry Peterson stated: "The gambling statutes [referring, inter alia, to Title VIII] have given the FBI additional jurisdiction. All have been of tremendous help." Hearings on H.R. 14989 Before a Subcomm. of the Senate Comm. on Appropriations, 92d Cong., 2d Sess., pt. 1, at 537 (1972).

> The provision on syndicated gambling (Title VIII) is very likely the broadest single piece of legislation ever prepared with regard to its effect on FBI jurisdiction and potential use of manpower. This is primarily for two reasons. First of all predication of this title is based on a congressional finding that illegal gambling (regardless of interstate activity) has an effect on interstate commerce and facilities thereof. This combined with the element of five or more persons conducting a substantially continuous gambling business for a period in excess of 30 days, or where daily gross revenue exceeds $2,000, encompasses practically all significant gambling operations in this country and thus makes virtually all local gambling enterprises of any significance a Federal violation.
>
> Considering the prevalence of illegal gambling throughout the country, a multibillion dollar illegal business, the potential here is almost limitless and of necessity we will be required to exercise a certain degree of selectivity. [emphasis supplied]

Statement of J. Edgar Hoover, Director, Federal Bureau of Investigation. Hearings on H.R. 19928 Before Subcommittees of the Senate Comm. on Appropriations, 91st Cong. 2d Sess., at 1089 (1970).

Questioning of high Justice Department figures also yields significant policy statements:

> SENATOR BYRD. The Organized Crime Control Act of 1970 makes provisions for your organization to investigate gambling at a local level, gambling at an intrastate level. Does it mean you will be investigating all local gambling?
>
> MR. HOOVER. No; it does not. The antigambling provisions which apply intrastate have several qualifications. There must be

The Justice Department has not expressed dissatisfaction with Title VIII. Neither its wording nor its enforceability have been criticized before the congressional appropriation committees. Instead, the Department has consistently emphasized its need for more money and manpower to enforce its provisions in conjunction with other recent antiorganized crime legislation.[70]

> at least five persons involved in the operation. It must have operated in excess of 30 days or have a gross revenue of more than $2,000 in a single day.
>
> I do think there will be a vast increase in the number of cases investigated under this provision. We have had a substantial number of interstate gambling cases but under the new law we will have to go into many gambling operations we haven't been able to go into in the past.

Id. at 1125.

[70] See Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520). Those provisions regulate wiretapping and other interceptions of wire or oral communications and contain a specific provision (18 U.S.C. § 2516(1)(c)) for the authorization of interceptions which may provide evidence of a violation of § 1955. "Our investigations in the interstate gambling field, particularly, have increased greatly during the last year and a half. This increase is attributable for the most part to the extensive data on illegal gambling operations being obtained from court-approved electronic surveillance installations provided for under the Omnibus Crime Control and Safe Streets Act of 1968." J. Edgar Hoover. Id. at 1091. Thus new, broader gambling statutes such as Title VIII coupled with increased use of advanced investigatory techniques as permitted under Title III of the 1968 Act have given new impetus to antigambling law enforcement.

The appropriations committee hearings are filled with Justice Department examples of significant indictments, arrests, and convictions obtained as a result of this new piece of legislation.[71] However,

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[71] "On October 29, 1970, Bureau agents conducted the first Federal intrastate gambling raid under the new Organized Crime Control Act of 1970. In the Philadelphia area three massive numbers banks were smashed, approximately $16,000 in cash was seized, and six persons were arrested. In the Newark area, eight members of a large-scale bookmaking operation were arrested, including one alleged La Cosa Nostra member." Statement of J. Edgar Hoover. Id. at 1092-93.

> On May 6, of this year, Federal grand juries in the Eastern and Western Districts of Michigan returned 16 indictments charging 153 persons on Federal gambling charges, including violation of the Syndicated Gambling Provisions of the Organized Crime Control Act of 1970. In one indictment, 16 members of the Detroit Police Department, including one inspector, three lieutenants and seven sergeants, as well as a number of high echelon Detroit area gamblers, were charged with conspiracy to obstruct the criminal laws of the State of Michigan with intent to facilitate an illegal gambling business. This indictment marks the first employment of Section 1511 of Title 18, United States Code. The return of the indictments was coordinated with the arrests of the defendants and the execution of more than 100 search warrants.
>
> On April 21 of this year a Special Federal grand jury in Brooklyn, New York returned indictments against Joseph Columbo, head of a La Cosa Nostra family in New York City, and 30 other defendants for violation of the prohibited illegal gambling business provisions of Section 1955 of Title 18, United States Code. The interceptions disclosed a large scale racehorse policy operation with an estimated gross revenue of approximately ten million dollars a year.

Statement of L. M. Pellerzi, Assistant Attorney General for Administration. Hearings on H.R. 9272 Before a Subcomm. of the Senate Comm. on Appropriations, 92d Cong., 1st Sess., at 303-04 (1971).

> The Bureau's jurisdiction to investigate illegal gambling operations was significantly expanded in October 1970, with the passage of the Organized Crime Control Act of 1970. Authority provided under this legislation permitted the FBI to conduct some of the largest gambling raids in FBI history, striking a severe blow at a major source of the underworld's illicit funds. During the first 16 months of this law's existence, FBI agents used its various provisions to make more than 1,300 arrests and confiscate some $3.25 million in currency, contraband, weapons, and gambling paraphernalia.

Testimony of J. Edgar Hoover. Hearings on Appropriations for 1973 for the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Before a Subcomm. of the House Comm. on Appropriations, 92d Cong., 2d Sess., pt. 1, at 929 (1972).

> On December 12, 1970, coordinated gambling raids were conducted in 26 cities including Cleveland and Steubenville, Ohio where

although the Department has provided the Congress with details of indictments, arrests, and convictions of high La Cosa Nostra figures, public officials, and others on gambling related offenses, it has not specified under which Federal statutes they were charged.[72] While some of these cases may have been a result of alleged violations of 18 U.S.C. §§ 1955 and 1511, such has not been explicitly stated. Nevertheless, it is apparent that the Justice Department attaches great importance to reducing illicit gambling enterprises, especially such syndicated-related activity, and §§ 1955 and 1511 are significant contributions to the achievement of this goal.

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evidence of a large scale bookmaking operation was seized. December raids were also conducted in S.D. Florida, S.D. Illinois, E.D. Louisiana, Warren, Ohio, and E.D. Pennsylvania where 20 persons were indicted for the first time under Title VIII Syndicated Gambling of the Organized Crime Control Act of 1970. Id. at 507.

"Michael A. Riehl and Arthur J. Rinaldi, mayor and police chief, respectively, of Jeannette, Pennsylvania, were convicted under 18 U.S.C. § 1511, obstructing local law enforcement in furtherance of illegal gambling operations; these are believed to be the first convictions under the statute." Salaries and Expenses, General Legal Activities, Criminal Division. Hearings on Appropriations for 1974 for the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Before a Subcomm. of the House Comm. on Appropriations, 93d Cong., 1st Sess., pt. 1, at 520 (1973).

[72] See "Significant Developments," id. at 518, for a description of the antigambling operation "Anvil" and the largest San Francisco gambling raid up to that time; "Significant Developments," Hearings on Appropriations for 1973 for the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Before a Subcomm. of the House Comm. on Appropriations, 92d Cong., 2d Sess., pt. 1, at 504 (1972) for descriptions of New Jersey gambling arrests and the 21 New Orleans gambling raids; id. at 929-30 for testimony of J. Edgar Hoover referring to sundry gambling arrests; and, Hearings on Appropriations for 1974 for the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Before a Subcomm. of the House Comm. on Appropriations, 93d Cong., 1st Sess., pt. 1, at 520 (1973), for a discussion of the conviction of Nicholas Rattenni and Charles Cassio for "widespread gambling operations and corruption within the New York Police Department."

On the other hand, the requests for additional manpower and other resources have been specifically attributable to the enforcement of Title VIII.[73] In 1970, for example, before a Senate appropriations subcommittee, J. Edgar Hoover stated that based on a survey of FBI field offices the FBI would need 600 additional agents in fiscal year 1971 to handle new investigations in the organized crime field under Title VIII.[74] Even more agents were said to be needed for the same purpose later on.[75] This is a significant increase in FBI manpower.

The Criminal Division of the Justice Department is not organized in such a way that budgetary requests are made specifically for the combatting of syndicated gambling operations or even criminal gambling activities generally.[76] Thus, to interpret the effect of Title VIII

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[73]Justice Department forecasts of the burdens placed on its resources by Title VIII are not necessarily totally accurate. "Because our investigations under these new statutes [including Title VIII] are often lengthy and complex in nature--requiring large numbers of experienced, highly trained agents--the cumulative prosecutive effects have just started to give some indication of what the future holds for us in the way of manpower demands." Statement of J. Edgar Hoover. Hearings on H.R. 19928 Before Subcommittees of the Senate Comm. on Appropriations, 91st Cong., 2d Sess., at 1090-91 (1970).

[74]Id. at 1111.

[75]Id.

[76]The Organized Crime and Racketeering Section of the Criminal Division of the Justice Department handles the syndicated gambling cases spawned by Title VIII. It is divided into the following units: Organized Crime Field Offices, Area Coordinators, Special Operations Unit, Intelligence and Special Services Unit, and Executive Staff. Hearings on Appropriations for 1973 for the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Before a Subcomm. of the House Comm. on Appropriations, 92d Cong., 2d Sess., pt. 1, at 481 (1972).

on resources of the Criminal Division, it is necessary to make an inference of growth by comparing the relative size of succeeding budget requests and examining the general growth and success of the Organized Crime and Racketeering Section of the Criminal Division.[77]

IV. TEXT OF STATUTE

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section --

(1) "illegal gambling business" means a gambling business which --

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business

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[77] See Hearings on Appropriations for 1974 for the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Before a Subcomm. of the House Comm. on Appropriations, 93d Cong., 1st Sess., pt. 1, at 496-542 (1973) for detailed comparative statistics over time of the growth in manpower and workload for the Organized Crime and Racketeering Section. The trend has been a steady increase over the past four years in manpower; manpower growth vis-a-vis other sections of the criminal division, indictments, arrests, and convictions obtained; and number of cases pending. What percentage is specifically attributable to enforcement of Title VIII cannot be determined from the appropriation hearings, although it appears the percentage is more than marginal.

operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; 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 section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in 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 property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for the purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

APPENDIX Q

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

as it relates to

GAMBLING

18 U.S.C. §§ 1961-68

P.S.F.

I. LEGISLATIVE HISTORY

Title IX of the Organized Crime Control Act of 1970[1] was an approach to preventing and eliminating racketeer infiltration of legitimate businesses.[2] Title IX created Chapter 96 in title 18, United States Code, entitled "Racketeer Influenced and Corrupt Organizations." It contains a fourfold standard: (1) making unlawful the receipt or use of income from "racketeering activity" to acquire an interest in or establish an enterprise engaged in interstate commerce, (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity," (3) proscribing the operation of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity," and (4) making unlawful any conspiracy to violate the above prohibitions.[3]

"Racketeering activity" is defined in terms of specific State and Federal criminal statutes characteristically violated by members of organized crime. The specific State offenses include gambling.[4] Violations of specific Federal antigambling statutes that fall within "racketeering activity" are violations of 18 U.S.C. § 1084 (relating to the transmission of gambling information), 18 U.S.C. § 1511 (relating to the obstruction of State or local law enforcement), 18 U.S.C. § 1953

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[1] 18 U.S.C. §§ 1961-68 (Supp. 1972).

[2] Pub. L. No. 91-452, 84 Stat. 922, October 15, 1970.

[3] 18 U.S.C. § 1962 as paraphrased in S. Rep. No. 617, 91st Cong., 1st Sess. 34 (1969) [hereinafter cited as Senate Report].

[4] 18 U.S.C. § 1961(1)(A) (Supp. 1972).

(relating to interstate transportation of wagering paraphernalia), and 18 U.S.C. § 1955 (relating to the prohibition of illegal gambling businesses).[5]

"Pattern" is defined to require at least two "racketeering acts," one of which occurred after the effective date of the statute and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.[6]

A fine of $25,000 or imprisonment for not more than 20 years or both is provided for a violation.[7] In addition, provision is made for the criminal forfeiture of the convicted person's interest in the enterprise engaged in interstate commerce.[8] District courts are authorized to prevent and restrain by civil process violations of the above standard by, inter alia, the issuance of (1) orders of divestment, (2) prohibitions of business activity, and (3) orders of dissolution or reorganization.[9] Victims of such racketeering activity can benefit from the innovative provision of a civil treble damage remedy.[10] Provisions are made for nationwide venue and service of process,[11] the "expedition" of actions,[12] and civil investigative demands.[13]

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[5] 18 U.S.C. § 1961(1)(B) (Supp. 1972).

[6] 18 U.S.C. § 1961(5) (Supp. 1972).

[7] 18 U.S.C. § 1963(a) (Supp. 1972).

[8] 18 U.S.C. § 1963(c) (Supp. 1972).

[9] 18 U.S.C. § 1964(a) (Supp. 1972).

[10] 18 U.S.C. § 1964(c) (Supp. 1972).

[11] 18 U.S.C. § 1965 (Supp. 1972).

[12] 18 U.S.C. § 1966 (Supp. 1972).

[13] 18 U.S.C. § 1968 (Supp. 1972).

The rationale behind Title IX[14] was to stop the pervasive infiltration of organized crime into legitimate businesses. Such infiltration has been often accompanied by the corrupt and violent methods by which organized crime members conduct their gambling and loansharking activities as a means of acquiring and operating legitimate businesses. As observed by Senator McClellan, a chief sponsor of the legislation:

> Threats, arson and assault are used to force competitors out of business and obtain larger shares of the market. Building contractors pay tribute for the privilege of using nonunion labor, while labor unions infiltrated by organized crime raise no objection. A corporation is bled of its assets, goods obtained by the corporation on credit are sold for a quick profit, and then the corporation is forced into bankruptcy while the criminals who infiltrated it disappear. Large sums in stocks and bonds are stolen from brokerage houses and banks, and then used as collateral to obtain loans. Income routinely is understated for tax purposes, so that mob businesses have competitive advantages over businesses which report all their income. These methods and others give such a competitive advantage to the mob enterprise that monopoly power is approached or gained, and prices are raised.[15]

Thus Title IX was enacted in order to halt the illegal economic advances of organized crime and to preserve the free market basis of legitimate commercial activity.

Much of the money used by organized crime to infiltrate legitimate businesses, moreover, was thought to come from the profits derived from illicit gambling. Senator McClellan observed:

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[14] Title IX as enacted is appendixed infra.

[15] Statement of Senator John L. McClellan, Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on S. 30 and Related Proposals, 91st Cong., 2d Sess., ser. 27, at 106 (1969) [hereinafter cited as House Hearings].

> We must recognize, too, that La Cosa Nostra's control of gambling ravishes the entire society, not merely the gamblers, since the $6 or $7 billion profit organized gambling operators earn each year bankrolls not only the Mafia drug trade, but organized crime's infiltration of legitimate business and other activities, and this is one of the Nation's most serious criminal justice and economic problems.[16]

Hence, it was logical that the draftsmen of Title IX included gambling violations as a category of acts which constitutes a "pattern of racketeering activity."

Title IX of the Organized Crime Control Act of 1970 (S. 30) was a derivation of S. 1861, which was originally introduced by Senator McClellan for himself and Senators Ervin and Hruska on April 18, 1969.[17] In turn, S. 1861 was the product of the hearings on S. 1623 by the Senate Subcommittee on Criminal Laws and Procedures. S. 1623 was introduced by Senator Hruska on March 20, 1969.[18] The Justice Department, too, generally approved the changes made in what was to be Title IX throughout its evolution.[19] The concept of Title IX, specifically, was also generally approved by the House of Delegates of the American Bar Association and the Judicial Conference of the United States while it was still undergoing congressional scrutiny.[20]

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[16]Testimony of Senator McClellan, Id. at 87.

[17]115 Cong. Rec. S3856 (daily ed., Apr. 18, 1969), cited from Senate Report at 83.

[18]115 Cong. Rec. S2991 (daily ed., Mar. 20, 1969). S1623, in turn, was based on S2048 and S2049, 90th Cong., 1st Sess. (1968), sponsored at that time by Senator Hruska (cited from Senate Report at 83).

[19]Id. at 83. See also 116 Cong. Rec. 35,295 (1970) (remarks of Representative Poff).

[20]J. McClellan, "The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?," 46 Notre Dame Lawyer 55, 145-46 (1970) [hereinafter cited Notre Dame Lawyer].

The Senate Hearings on S. 30 were held on March 18, 19, 25, and June 3 and 4, 1969[21] and the Senate Report was issued December 18, 1970.[22] House Hearings were held on May 20, 21, 27; June 10, 11, 17; July 23 and August 5, 1970.[23] The House Report was issued on September 30, 1970, and its version of Title IX was subsequently enacted.[24] House consideration and passage of the Act as a whole occurred on October 7, 1970, while Senate consideration and passage occurred on January 23 and October 12, 1970.[25] The Act was signed by the President into law on October 15, 1970.[26]

The passage of Title IX, however, did not take place without controversy. The Association of the Bar of the City of New York, Committee on Federal Legislation reported that while Title IX was an innovative and imaginative statutory scheme, the draftsmen of Title IX produced legislation which would have only marginal or negative effect in combatting organized crime.[27] It was asserted that the chapter underregulated with respect to its intended purpose. The Bar Committee pointed out that legal consequences from the investment of money derived

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[21] Hearings on S. 30, S. 974, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess., (1969) [hereinafter referred to as Senate Hearings].

[22] 3 U.S. Code Cong. & Ad. News 4007 (1970).

[23] See House Hearings.

[24] H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970) [hereinafter cited as House Report].

[25] Id. [26] See note 1 supra.

[27] House Hearings at 327.

from a "pattern of racketeering activity" required two or more convictions (or their evidentiary equivalents), and that it would be exceedingly difficult to convict top La Cosa Nostra figures of even one offense.[28] Also, the Committee felt that the Government would have an almost insuperable burden of tracing back the illegal proceeds of the challenged investment.[29]

In the course of the House hearings, the Bar Committee also pointed out many examples of overregulation by Title IX. Overbroad definitions affecting usury provisions and choice of law alternatives were criticized.[30] The Senate Report stated that "Racketeering activity is defined in terms of specific State and Federal criminal statutes now characteristically violated by members of organized crime."[31] The Bar Committee thought that that statement was not supported by the language of Senate version of § 1961 which included as potential racketeering activity the theft from an interstate shipment regardless of the value of the property stolen, unlawful use of a stolen telephone credit card, small types of illegal gambling businesses, any securities fraud case, and virtually any State felony or Federal misdemeanor involving drugs, including marijuana violations.[32] In addition, the Bar Committee thought inadvisable the requirement that all aspects of the proceedings under the chapter be made public. It was asseted that the nature of the proceedings indicates, if anything, that protection and

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[28] Id. at 328-29.

[29] Id. at 329. The Committee failed to assess the possible effect of the civil provisions.

[30] Id. [31] Senate Report at 34.

[32] House Hearings at 329.

anonymity of witnesses may be highly desirable.[33] The House Judiciary Committee responded to the above criticisms by requiring violations of 18 U.S.C. § 659 (relating to theft of interstate shipments) to be felonious in nature for them to constitute elements of a pattern of racketeering activity.[34] The language referring to "unlawful debts" and their relationship to illegal gambling activity was refined.[35] Public disclosure of civil proceedings was left to the discretion of the court after consideration of the rights of affected persons.[36]

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[33] Id. at 330.

[34] House Report at 16.

[35] The Senate version of § 1961(6) read:

> "unlawful debt" means a debt (A) which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to gambling or usury, and (B) which was incurred in connection with the business of gambling or the business of lending money or a thing of value at a usurious rate, where the usurious rate is at least twice the permitted rate.

Senate Report at 22.

The clarifying House version of § 1961(6), now law, reads:

> "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

House Report at 16.

[36] See House Report at 18.

Senator McClellan responded to the Bar Committee's contentions that the list of crimes constituting racketeering activity is overinclusive. He stated that the listing does not refer to offenses committed principally by organized crime, rather, just those offenses characteristic of organized crime. "The listed offenses lend themselves to organized commercial exploitation, unlike some other offenses such as rape, and experience has shown they are commonly committed by participants in organized crime."[37] Senator McClellan also cited a specific example: the prohibition of using a stolen telephone credit card. While credit card offenses are committed by those with no connections with organized crime, the Senator pointed out that credit cards often play a role in organized crime operations, citing individuals and instances.[38] The Senator claimed that nonracketeers were insulated from Title IX provisions because a pattern of two or more violations is a necessary condition for falling within the purview of that chapter.[39]

The American Civil Liberties Union was also critical of Title IX, echoing many of the sentiments of the Bar Committee.[40] In addition, however, the ACLU pointed out that under the Senate version of the bill, the two convictions sufficient to create a pattern of racketeering activity may cover an overextensive period of time. Although it was necessary that one of the convictions occur after enactment of the Act

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[37] 47 Notre Dame Lawyer at 142-43.

[38] Id. at 144. [39] Id.

[40] See House Hearings at 499 for ACLU arguments on the probable ineffectiveness and overinclusiveness of Title IX.

(in order to prevent it from being an ex post facto law), there was no limitation placed on how far in the past the first violation can occur.[41] The ACLU was also apprehensive about § 1968 providing the Attorney General the power to issue a "civil investigative demand" requiring the production of documentary material whenever he has "reason to believe that any person or enterprise has possession or custody of material relevant to a 'racketeering investigation.'"[42] This provision was said to be in contradiction with United States v. Kordel, holding that a person fearing criminal prosecution has a constitutional right to assert his privilege against self-incrimination in responding to a civil investigative demand.[43] No court order would be required for the issuance of such civil investigative demands creating further constitutional problems, according to the union.[44]

In response to some of the criticisms voiced by the ACLU, the House Judiciary Committee redefined "pattern of racketeering activity" to be limited to at least two acts, one of which occurred after the effective date of the chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.[45] Senator McClellan pointed out that the ACLU's criticism of § 1968 on the basis of the Kordel decision was invalid,[46] and the House Report incorporated the wording of the Senate's version.

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[41] Id. [42] Senate Report at 25.

[43] 397 U.S. 1 (1970); see House Hearings at 500.

[44] Id. [45] House Report at 16.

[46] Notre Dame Lawyer at 147.

The House Report's version of Title IX, later enacted into law,[47] was objected to by House Judiciary Committee members John Conyers Jr., Abner J. Mikva, and William F. Ryan.[48] They, like the ACLU and Bar Committee pointed out the difficulty of tracing funds and securing convictions against racketeers, thus making the statute unworkable.[49] Federal laws, it was said, already adequately dealt with the problem of infiltration of legitimate business with illegally obtained money through the tax evasion statutes.[50] The dissenters noted the choice of law difficulties resulting from the creation of a Federal law dealing with gambling and usury violations of State law, as it appeared in § 1962 and § 1961(6).[51] The Congressmen were also fearful of the use of civil treble damage actions as a means of harassment.[52] The forfeiture

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[47]No amendments were later approved during floor debate.

[48]House Report at 181.

[49]Id. at 186. Senator McClellan, in his law review article published prior to the publication of the House Report pointed out that the tracing of illicit funds going into legitimate business was not an insuperable task. The FBI had in the past traced money skimmed from Las Vegas casinos into Swiss bank accounts. The use of court-supervised electronic surveillance under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was mentioned as an effective tracing method. Other titles of S. 30, permitting such investigative techniques as grants of use-restriction immunity, would also prove helpful. The Senator also noted that only one of the three prohibitions in Title IX requires tracing of funds and that violations of the other two--which essentially proscribe acquisition or operation of a business through racketeering activity--may not be as difficult to prove. Notre Dame Lawyer at 144-45.

[50]House Report at 186.

[51]Id. at 186-87.

[52]Id. at 187-88. An amendment introduced by Representative Mikva, adding a provision to the treble damage remedy section (§ 1964) to discourage frivolous or sham actions, was defeated 22-45. The rejected amendment read: "Provided, any such person who brings a frivolous suit, or a suit for the purpose of harassment, shall be subject to treble damages for injury to the defendant, or to his business or property." 116 Cong. Rec. 35,343 (1970).

provisions were considered too harsh,[53] and the potential for administrative abuse under § 1968 (relating to civil investigative demands) was recognized.[54]

The most innovative feature of Title IX was its provisions for civil remedies patterned after the antitrust laws to redress injuries resulting from the infiltration of legitimate business by organized crime and the operation of other racketeering activities. Section 1964(a) authorizes the Federal District Courts to prevent and restrain violations of § 1962 by issuance of orders of divestment, prohibitions of business activity, and orders of dissolution and reorganization. Section 1964(c) provides a treble damage remedy for victims of § 1962 racketeering activity.

The rationale behind § 1964 was succinctly stated by the Senate Judiciary Committee:

> There is no doubt that the common law criminal trial, hedged in as it is by necessary restrictions on arbitrary governmental power to protect individual rights, is a relatively ineffectual tool to implement economic policy. It must be frankly recognized, moreover, that the infiltration of legitimate organizations by organized crime presents more than a problem in the administration of criminal justice. What is ultimately at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adopting the civil remedies developed in the antitrust field to the problem of organized crime.[55]

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[53] House Report at 188.

[54] Id. at 188-89.

[55] Senate Report at 80-81.

Before Title IX was enacted, antitrust legislation was occasionally employed to restrict invasion of organized crime into legitimate businesses.[56] Title IX, however, is not merely a repetition of established antitrust law. Certain activities of organized crime with respect to legitimate businesses were not subject to antitrust laws until the enactment of the antitrust-like provisions of Title IX. These activities include such techniques as the loaning of money on the condition that a racketeer be appointed to the borrower's board of directors, the investing of concealed profits acquired from illegal operations in legitimate business, and the "victimization" of isolated corporations by draining their assets.[57]

The antitrust-like provisions of Title IX met with no substantial criticism.[58] Rather, a special committee of the American Bar Association and the Justice Department applauded the measure.[59]

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[56] House Hearings at 148-49 (Statement of the American Bar Association Section of Antitrust Law). See also United States v. Bitz, 282 F.2d 465 (2d Cir. 1960), United States v. Pennsylvania Refuse Association, 357 F.2d 806 (3d Cir.), cert. denied, 384 U.S. 961 (1966); Los Angeles Meat and Provision Drivers Union v. United States, 371 U.S. 94 (1962); Note, 70 Columbia Law Journal 307 (1970).

[57] House Hearings at 149.

[58] But see Rep. Mikva's corrective amendment, note 52 supra, to discourage unwarranted treble damage suits. That appears to be the only specific criticism of § 1964.

[59] The section of antitrust law of the American Bar Association in recommending that the ABA House of Delegates adopt a resolution endorsing the principles and objectives of S. 2048 and S. 2049 (forerunners of Title IX) stated: "The time tested machinery of the antitrust laws contains several useful and workable features which are appropriate for use against organized crime." Senate Hearings at 552, cited in Senate Report at 81.

The Justice Department said the following of the civil remedies of Title IX:

> These time tested remedies . . . should enable the Government to intervene in many situations which are not susceptible to proof

II. COURT INTERPRETATION

Title IX has undergone little judicial scrutiny. In United States v. Amato,[60] a Federal district court refused to dismiss indictments charging violations of § 1962(d) (conspiracy). Section 1962 was held not unconstitutionally ambiguous. It was stated that the target crimes of the conspiracy are specifically enumerated and the statute is similar to numerous others proscribing classes of activities affecting commerce without requiring proof that a particular transaction actually affects commerce.[61] Contrary to defendants' assertions, one does not violate

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> of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure . . . with its lesser standard of proof, nonjury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in a similar activity. Finally, these remedies are flexible, allowing of several alternative courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the court to insure that its decrees are not violated.

Id. at 408, cited in Senate Report at 82-83 [Statement of Deputy Attorney General Kleindienst]. For a comprehensive analysis of Title IX and the use of antitrust-like provisions in combatting organized crime, see Hearing on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995, "Victims of Crime," Before the Subcomm. on Criminal Laws and Procedures of the Senate Judiciary Comm., 92d Cong., 1st Sess. at 323 (1972).

[60] 367 F. Supp. 547 (S.D. N.Y. 1973).

[61] The Court cited in support Perez v. United States, 402 U.S. 146 (1971) (Extortionate Credit Transaction Act); United States v. Becker, 334 F. Supp. 546 (S.D. N.Y. 1971), aff'd 461 F.2d 230 (2d Cir. 1972) (illegal gambling). 367 F. Supp. at 549. The Court found the forfeiture provisions of 18 U.S.C. § 1963 to be constitutional without explanation, citing United States v. Parness, 503 F.2d 430 (2d Cir. 1974). 367 F. Supp. at 548.

the statute merely by being "reputed to be an organized crime member." Rather, the crimes necessary to establish a pattern of racketeering under § 1962 must be proved beyond a reasonable doubt.[62]

The defendants in Amato unsuccessfully claimed that one count of the indictment was duplicitous in that it alleges two conspiracy violations, 18 U.S.C. § 1962 and 18 U.S.C. § 371. Section 371 is a general conspiracy statute providing that persons conspiring to commit any offense against the United States are subject to a $10,000 fine and/or five years in jail. Section 1962 makes it a crime to conspire to invest the proceeds of racketeering in legitimate businesses.[63] The Court noted that an indictment count is duplicitous when the count charges more than one separate and distinct offense. However, a count is not duplicitous if it charges violations under a general conspiracy statute as well as under a specific statute.[64] Sections 371 and 1961 of Title 18, United States Code were deemed to be State separate offenses.[65]

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[62]367 F. Supp. at 549. The Court noted that a motion similar to the defendants' was made in United States v. Parness, a case then pending in that district. Judge Bonsal in that case also ruled § 1962 was constitutional. See note 70 infra.

[63]18 U.S.C. § 1963 states that the maximum penalty for violation of § 1962 is a $25,000 fine and/or twenty years in jail plus certain forfeitures.

[64]367 F. Supp. at 549.

[65]Id. In a situation where a defendant is found guilty under such an indictment, the court is required to impose a sentence under the statute providing for the least severe punishment. Brown v. United States, 299 F.2d 438 (4th Cir. 1962), cert. denied sub nom., Thorton v. United States, 370 U.S. 946 (1962).

Only one private treble damage action pursuant to 18 U.S.C. § 1962 has been reported. In King v. Vesco[66] the main thrust of plaintiffs' complaint was that the defendants conspired to utilize income derived from "a pattern of racketeering activities" in order to invest in and to assert control over plaintiffs' enterprises in violation of 18 U.S.C. § 1962. As a result, the plaintiffs claimed they were forced to sell certain securities for less than fair market value and sought, after trebling, an amount in excess of a billion dollars, a return to plaintiffs of "certain control debts or securities," and reasonable attorneys' fees. On defendants' motion to dismiss for improper venue, the district court held that the evidence presented was insufficient to establish venue with respect to both the individual defendant and the corporate defendant. Neither the merits of the case nor any constitutional questions were litigated.

This examination of the scope of the venue provision of Title IX 18 U.S.C. § 1965(a) was one of first impression. The King Court relied upon the antitrust statutes and cases to construe the Title IX venue provision. This was because the legislative history of § 1965(a) was said to reveal that that section was patterned after the venue provisions of the antitrust laws.[67] The same rules of statutory construction and case law precedent for §§ 4 and 12 of the Clayton Act were held

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[66] 342 F. Supp. 120 (N.D. Cal. 1972).

[67] Id. at 122: "Section 1965 contains broad provisions regarding venue and process, which are modeled on present antitrust legislation."

applicable to § 1965(1).[68] Similar, although not exact, wording of the Clayton Act vis-a-vis § 1965(a) were held to be synonymous.[69]

Recently, U.S. Courts of Appeal have also examined Title IX. The constitutionality of Title IX was affirmed in United States v. Parness; the Court held that that chapter contained adequate warning of its prohibitions.[70] As with other Federal statues, § 1962 defines a statutory offense validly predicated upon certain other specified criminal offenses.[71] In Parness, the legitimate business involved was an Antillean corporation, Hotel Corporation. The Court rejected the defendants' claim that Congress did not intend to proscribe the acquisition of foregin businesses by means of criminal conduct committed in the United States despite the impact on domestic commerce. Emphasis by the Court was placed on Title IX's legislative history. For example, the House Report referred to § 1962 stating: "any acquisition meeting the test of subsection (b) is prohibited without exception [emphasis added]."[72] Thus, a foreign corporation was held to be an "enterprise" within the meaning of the Act, and as a result, the convictions of the defendants were upheld.

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[68]"It has long been the rule that the burden is on the plaintiff to support both jurisdiction and venue." Austad v. United States Steel, 141 F. Supp. 443 (N.D. Cal. 1956).

[69]A good example is: ". . . The term 'transacts his affairs' in 18 U.S.C. § 1965(a) (Supp. 1972) was intended to be synonymous with the term 'transacts business' in section 12 of the Clayton Act (15 U.S.C. § 22)." 342 F. Supp. at 124.

[70]503 F.2d 430, 440-41 (2d Cir. 1970).

[71]Id. at 441, citing the Travel Act, 18 U.S.C. § 1952 (1970), and the Gun Control Act, 18 U.S.C. § 921 et seq. (1970) as examples.

[72]House Report at 32.

The first case involving the injunctive remedy provisions of Title IX is United States v. Cappetto.[73] In that case, the Court affirmed the validity of an order for civil injunctive relief obtained by the Government against the defendants, enjoining them from carrying on an illegal gambling enterprise. Once again, the constitutionality of Title IX was upheld, and the court further stated that a statute permitting equitable remedies in what was essentially a criminal proceeding is within the power of Congress:

> Defendants unsuccessfully attempt to distinguish what they refer to as the Federal antitrust, pure food, and similar statutes. They argue that the civil proceedings provided for in these statutes, unlike those under Section 1964, are not designed as alternatives to criminal prosecution to serve when the requisite proofs are lacking. Neither, necessarily, is a proceeding under Section 1964, but the standard of proof is lower in a civil proceeding than it is in a criminal proceeding under any of the statutes we are considering. Defendants argue that the other statutes were designed to serve values "totally different from the purely criminal thrust of the Organized Crime Control Act." We see no basis in this distinction, if it is one, for circumscribing Congress' power to regulate activities affecting interstate commerce. Conduct adversely affecting interstate commerce which is of a kind that is traditionally proscribed under statutes, State or Federal, does not enjoy a special immunity from regulation through civil proceedings as the Supreme Court pointed out in the Debs case [In Re Debs, 158 U.S. 564 (1895)]."[74]

While litigation under Title IX has been sparse, it appears that the constitutionality of its provisions will be upheld, and its effectiveness is apparent in the Cappetto and Parness cases.

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[73] 52 F.2d 1351 (7th Cir. 1974), cert. denied, 43 U.S.L. Week 3452 (2-18-75).

[74] Id. at

III. ENFORCEMENT EXPERIENCE

Through statements and testimony in congressional appropriations committee hearings, the Justice Department has publicly revealed its intention to enforce Title IX vigorously. Large requests for staffing and budget increases were specifically attributed to the increased workload generated by Title IX:

> The increased staffing resulting from program increases would be as follows: (1) The Organized Crime and Racketeering Section would receive 12 positions and $305,000, 5 intelligence analyst positions ($42,000) and $150,000 for computer time would be for the Intelligence and Special Services Unit and 5 attorneys, 2 secretaries and $113,000 would be for the Special Operations Unit to implement Title IX of the Organized Crime Control Act of 1970.[75]

In reference to the above budget request, Assistant Attorney General for the Criminal Division, Will Wilson reiterated the additional workload created by Title IX:

> Then under staffing, we have to create an effort to enforce what might be called antitrust like provisions of S. 30; that is, on extortion situations and tracing racketeer money; so all in all we expect increasingly intense work in that field.[76]

The next year, in a statement justifying increases in the budget of the Justice Department's Criminal Division, Assistant Attorney General Henry E. Peterson detailed how the Criminal Division intended to implement Title IX:

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[75] Budget Request, Hearings on H.R. 9272 Before a Subcomm. of the Senate Comm. on Appropriations, 92d Cong., 1st Sess., at 299 (1971).

[76] Id. at 306.

> The criminal provisions of Title IX of the Organized Crime Control Act of 1970, codified in Title 18, United States Code, Section 1962 et seq. will substantially increase the workload of the Strike Forces when it is fully implemented in FY [fiscal year] 1973.
> * * * *
> Enforcement of this Title will result in a considerable amount of additional work for the Strike Forces. It will be necessary to work with the Federal investigators in analyzing documentary evidence and investigative material in voluminous amounts in an effort to trace the flow of racket money into legitimate businesses, and to determine whether the evidence is sufficient to initiate forfeiture proceedings, which proceedings could involve business and property interests of considerable scope and be extremely complex and time consuming in nature.
> To meet this increasing workload in the strike forces the Division is requesting fourteen attorneys, three GS-15, three GS-14, four GS-13, two GS-12, two GS-11, and five secretaries, GS-5's to permit the majority of the Organized Crime and Racketeering strike forces to have authorized a minimum of seven attorneys and three secretaries.[77]

The FBI has also recognized the importance of Title IX; J. Edgar Hoover, in a statement before a subcommittee of the Senate Appropriations Committee called Title IX "most useful" in the fight against organized crime.[78]

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[77] Hearings on H.R. 14989 Before a Subcomm. of the Senate Comm. on Appropriations, 92d Cong., 2d Sess., 523-24 (1972). For more information on congressional appropriations committee hearings and appearances by Justice Department representatives, see cognate Gambling Commission paper, Prohibition of Illegal Gambling Businesses, 18 U.S.C. § 1955 and Obstruction of State or Local Law Enforcement, 18 U.S.C. § 1511: Congressional Appropriations Committee Hearings Testimony.

[78] Hearings on H.R. 9272 Before a Subcomm. of the Senate Comm. on Appropriations, 92d Cong., 1st Sess., at 276 (1971).

IV. TEXT OF STATUTE

Chapter 96.--RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.
1961. Definitions.
1962. Prohibited racketeering activities.
1963. Criminal penalties.
1964. Civil remedies.
1965. Venue and process.
1966. Expedition of actions.
1967. Evidence.
1968. Civil investigative demand.

§ 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473, (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any

territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of

racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other

interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foregin commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that

the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall--

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall--

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by--

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian

substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of--

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly--

(i) designate another racketeering investigator to serve as

custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or petition of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

(b) The table of contents of part I, title 18, United States Code, is amended by adding immediately after

95. Racketeering----------1951

the following new item:

96. Racketeer Influenced and Corrupt Organization------1961

SEC. 902. (a) Paragraph (c), subsection (1), section 2516, title 18, United States Code, is amended by inserting at the end thereof between the parenthesis and the semicolon ", section 1963 (violations with respect to racketeer influenced and corrupt organizations)".

(b) Subsection (3), section 2517, title 18, United States Code, is amended by striking "criminal proceedings in any court of the United States or of any State or in any Federal or State grand jury proceeding" and inserting in lieu thereof "proceeding held under the authority of the United States or of any State or political subdivision thereof".

SEC. 903. The third paragraph, section 1505, title 18, United States Code, is amended by inserting "or section 1968 of this title" after "Act" and before "willfully".

SEC. 904. (a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

(c) Nothing contained in this title shall impair the authority of any attorney representing the United States to--

(1) lay before any grand jury impaneled by any district court of the United States any evidence concerning any alleged racketeering violation of law;

(2) invoke the power of any such court to compel the production of any evidence before any such grand jury; or

(3) institute any proceeding to enforce any order or process issued in execution of such power or to punish disobedience of any such order or process by any person.

APPENDIX R

AUTHORIZATION FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS as it relates to GAMBLING

18 U.S.C. § 2516

G.R.B.

I. LEGISLATIVE HISTORY

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968.[1] Title III of the Act authorized (subject to court order) the interception of wire and oral communications. The Senate Report noted:

> Organized criminals must hold meetings to lay plans. Where the geographical area over which they operate is large, they must use telephones. Wiretapping and electronic surveillance techniques can intercept wire and oral communications. This is not, however, the whole situation. More than the securing of an evidentiary substitute for live testimony, which is not subject to being eliminated or tampered with by fear or favor, is necessary. To realize the potential possible from the use of criminal sanctions, it will be necessary to comit [sic] to the system more than legal tools. Time, talent, and personnel --without the necessary tools--will work, and authorized wiretapping and electronic surveillance techniques by law enforcement officials are indispensable legal tools.[2]

The Senate Report also noted that organized crime was:

> . . . active in, and largely . . . [in control of] professional gambling, which can only be described as exploitive, corruptive, and parasitic, draining income away from food, clothing, shelter, health, and education in our urban ghettos.[3]

Section 2516 of Title 18, as enacted by Title III, authorized the Attorney General of the United States and the principal prosecuting attorneys of States having surveillance legislation to apply for court orders in the investigation of designated offenses.

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[1]Pub. L. No. 90-351, 82 Stat. 197 et seq.

[2]S. Rept. No. 1097, 90th Cong. 2d Sess., 73-74 (1968)

[3]Id. at 70.

On the Federal level, the designated offenses included:

18 U.S.C. § 224 (bribes in sporting contest)
18 U.S.C. § 1084 (transmission of wagering information), and
18 U.S.C. § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises).

On the State level, the designated offenses included "gambling."

In 1970, Congress passed the Organized Crime Control Act of 1970.[4] Title VIII of that Act amended 18 U.S.C. § 2516 and added 18 U.S.C. § 2511 (obstruction of State and local law enforcement) and 18 U.S.C. § 1955 (prohibition of business enterprise of gambling) to the list of designated offenses. Title IX of the 1970 Act also added 18 U.S.C. § 1963 (violations with respect to racketeer influenced and corrupt organizations).

II. COURT INTERPRETATION

Only one major issue has arisen in the course of litigation over the scope of Section 2516 in reference to gambling. Subsection (2) says ". . . gambling . . . or other crime dangerous to life limb or property and punishable by imprisonment for more than one year, designated in any applicable State statute . . ." It has been argued that the limitation "punishable by more than one year" modified "gambling" as well as "or other crime." Under this construction, it would not be possible to use wiretapping in misdemeanor gambling investigations. The courts have not resolved the question,[5] even though the legislative history seemingly

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[4]Pub. L. No. 91-452, 84 Stat. 922 et seq.

[5]People v. Martin, 176 Colo. 322, 490 P. 2d 924 (1971) (Drug case in which issue recognized, but not resolved); United States v. Pochico, 489 F. 2d 554 (5th Cir. 1974) (Gambling case, in which issue recognized, but resolved on ground incidentally intercepted offense not limited).

resolves the ambiguity in favor of permitting such surveillance.[6] Other cases have raised the issue of the scope of "gambling". The courts have found both lotteries[7] and bookmaking[8] within its scope.

III. ENFORCEMENT EXPERIENCE

The Annual Reports of the Administrative Office of the United States Courts included statistics on the use of wiretaps in the gambling area.[9] The Reports indicated that a majority of the orders, State and Federal, issued since 1968 have been in the gambling area.

IV. TEXT OF THE STATUTE

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of--

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[6] See S. Rep. No. 1097, 90th Cong. 2d Sess. 99 (1968): Specifically designed offenses include . . . gambling . . . . All other crimes designated in the statute would have to be . . . punishable by imprisonment for more than 1 year. (emphasis added)

[7] United States v. Pochico, 484 F.2d 554 (5th Cir. 1974).

[8] People v. Fusco, 348 N.Y.S.2d 858, 75 Misc.2d 981 (1973).

[9] See, e.g., Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communication, Administrative Office of the United States Courts, Table 7, p. 23 (1973) (446 out of 864). Additional enforcement experience is set out in the enforcement experience section under the specific offenses appendix. See, e.g., Appendix P (18 U.S.C. § 1955).

CONTINUED

4 OF 6

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement, section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations), or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

APPENDIX S

PROHIBITION OF IMPORTATION OF IMMORAL ARTICLES

as it relates to

GAMBLING

19 U.S.C. § 1305

J.J.D.

I. LEGISLATIVE HISTORY

The predecessor of 19 U.S.C. § 1305[1] was enacted in 1894. The Tariff of 1894 prohibited the importation of "any lottery ticket, or any advertisement of any lottery."[2] At that time, lotteries were considered a species of gambling, an evil which the public wanted suppressed.[3] Congress had moved against the infamous Louisiana lottery in 1890,[4] banning the use of United States mails for the purpose of advertising lotteries.[5] But the Louisiana lottery reorganized in Honduras and continued to operate in the United States.[6] Congress, therefore, prohibited the importation of lottery materials as an added measure against the operation of both foreign and domestic lotteries. Congress reenacted the prohibition in 1913.[7] Finally, Congress passed the Act of September 21, 1922,[8] which contained the language relating to lotteries now found in the present statute. 19 U.S.C. § 1305 is, therefore, a codification of section 305 of the Tariff Act of 1930,[9] which superseded the Act of September 21, 1922.

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[1]For text of the statute see section III.

[2]Tariff of 1894, ch. 349, § 10, 28 Stat. 549.

[3]26 Cong. Rec. 8631 (1894).

[4]21 Cong. Rec. 8699 (1890).

[5]Act of September 19, 1890, ch. 908, 26 Stat. 465.

[6]27 Cong. Rec. 3013 (1895).

[7]Tariff of 1913, ch. 16, § IV, subs. 1, 38 Stat. 194.

[8]Act of September 21, 1922, ch. 356, § 305(a), 46 Stat. 688.

[9]Tariff Act of 1930, ch. 497, § 305(a), 46 Stat. 688.

As now drafted, 19 U.S.C. § 1305(a) prohibits the importation into the United States of, among other things, "any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery."[10] It also provides for seizure and forfeiture of such goods and for their destruction if found to be prohibited articles.

II. COURT INTERPRETATION

United States v. 83 Cases of Merchandise[11] dealt with interpretation of the word "lottery" as used in the statute. Relying on Horner v. United States,[12] it was held that an element of chance was necessary for a lottery. Since there was no element of chance in a game where a prize was given for each number selected from a board, there was no lottery. Further, the exact prize did not have to be known at the time of selecting the number.

III. TEXT OF THE STATUTE

19 U.S.C. § 1305. Immoral articles; importation prohibited.

(a) Prohibition of Importation

> All persons are prohibited from importing into the United States from any foreign country . . . any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery.

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[10] See section III.

[11] United States v. 83 Cases of Merchandise, Etc., 29 F. Supp. 912 (D.C.Md. 1939)

[12] 147 U.S. 449 (1893)

APPENDIX T

THE INTERNAL REVENUE CODE

as it relates to

WAGERING EXCISE TAXES

and

GAMBLING

P.D.B.
P.B.F.

I. THE DEVELOPMENT OF THE WAGERING EXCISE TAX: THE 1951 ACT

The present Federal wagering tax evolved from a 1951 addition to the tax laws.[1] This 1951 law placed a 10 percent tax on wagers on sports contests, betting pools on sports contests, and lotteries conducted for profit.[2] Persons who accepted wagers or conducted pools or lotteries were liable for the payment of the tax. These persons were also liable to pay a $50 a year occupational tax. Agents, who received the bets for them, were similarly taxed. Finally, they were further required to keep a daily record showing the gross amounts of all their wagers.[3] Those who had to pay the $50 occupational tax also had to register with the district Internal Revenue Service office, giving their name, home and business addresses, and the names of their agents.

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[1]The only excise tax law related to gambling prior to 1951 was 26 U.S.C. (IRC 1939) § 3267(a) which imposed a $150 tax on coin-operated gambling devices; this law was originally passed in 1941, Act of September 20, 1941, Ch. 412 § 555, 55 Stat. 722. Initially, the tax was $50 per machine.

[2]The wagering tax did not extend to social or friendly wagers. Nor were card games, roulette games, or dice games subject to taxation. These types of gambling were not excluded

> because of any belief that they were not suitable subjects for taxation. However, the method of taxation which the bill proposes, while particularly appropriate to bookmaking and to policy operation, does not appear readily adaptable to these other forms of gambling . . . . In any event your committee believes that the tax . . . will cover at least 90 percent of total commercial wagering.

H.R. Rep. No. 586, 82d Cong., 1st Sess.; 1951 U.S. Code Cong. & Ad. News 1781 at 1840-41.

[3]The 10 percent tax applied to the gross amounts wagered--that is, to the amount risked rather than to the expected return.

In addition, they had to post conspicuously the stamp that indicated payment of the $50 occupational tax at their places of business. Finally, required records could be inspected as frequently as necessary by IRS Agents. Penalties included a fine of $1,000 to $5,000 for failure to obtain the occupational tax stamp and a $100 fine plus costs of prosecution for failure to post the stamp. These penalties were in addition to the general sanctions of up to five years in prison and a fine of up to $10,000 for willful evasion of certain excise taxes.

The 1951 Act, however, specifically excluded all State licensed parimutual wagering enterprises from the 10 percent tax on wagers[4] as well as all wagers made on coin operated gambling machines. Nevertheless, the separate tax on coin operated gambling machines was increased to $250 a year per machine.[5] Finally, the Act stated that payment of the tax liabilities imposed under the Act did not exempt any person from any penalty provided by State or Federal law for engaging in the taxed gambling activities.[6]

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[4]In 1965, State conducted sweepstakes and lotteries, where the winner was determined by the results of a horse race, were exempted from the 10 percent excise tax on wagers. Act of June 21, 1965, Pub. L. No. 89-44 Title VIII § 813(a), 79 Stat. 170.

[5]Int. Rev. Code of 1954, § 4461.

[6]Act of October 20, 1951, Pub. L. No. 82-183, §§ 463-72, 65 Stat. 528-32.

This Act also included definitions of "wager" and "lottery" and provided for a refund of the tax in certain cases where the tax was not collected or was refunded or the wager was laid off.

The 1951 Act seems to have been passed in response to two different pressures upon the Congress. One was the need to increase government revenues to offset the rapid rise in defense spending brought on by the Korean war and the cold war in Europe.[7] The House and Senate reports on the bill both estimated a revenue of 407 million dollars per year from the levies on wagering activities previously untapped as a Federal revenue source.[8] The other impetus for the Act came from the increasing awareness of the importance of gambling to the success of organized

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[7]President Truman, in his message to Congress of February 2, 1951, on increased taxation, insisted that the nation must "pay as it goes" and asked for an increase in personal and corporate income taxes, and new excise taxes to cover increased government spending.

[8]H.R. Rep. No. 586, 82d Cong., 1st Sess. 1; 1951 U.S. Code Cong. & Ad. News 1781, 1837 (1951); S. Rep. No. 781, 82d Cong., 1st Sess. 1; 1951 U.S. Code Cong. & Ad. News 1969, 2089 (1951).

The reports of both houses stated that it was incongruous that many semi-necessity consumer goods should bear an increased tax burden to finance Federal expenditures while commercialized gambling remained comparatively free from taxation. Further, by taxing gambling, the Federal government was not sanctioning the activity, but merely applying the Federal taxing power without distinction between the legality or illegality of the source--a practice long since established in the income tax.

crime fostered, by the Kefauver investigations[9] and legal scholars.[10] They urged the use of aspects of the Federal taxing structure as a means to control organized crime. While the Congress itself did not explicitly acknowledge that the 1951 Revenue Act was a means to fight organized crime, it seems clear that many individual Congressmen recognized the potential of the Act for crime control.[11] Indeed, the Congress adopted

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[9]The Kefauver Committee felt that gambling was the mainstays of organized crime:

> Gambling Profits are the principal support of big-time racketeering and gangsterism. These profits provide the financial resources whereby ordinary criminals are converted into big-time racketeers, political bosses, pseudo-businessmen, and philanthropists.

Third Interim Report. Special Committee to Investigate Organized Crime in Interstate Commerce, S. Rep. No. 307, 82d Cong., 1st Sess., p. 2. (1951).

Although Senator Kefauver himself recognized the limits of using tax law as an enforcement procedure in the debate over the 1951 Act by stating:

> Let us not attempt to use the Federal Tax authority to do a job which it cannot do and is not designed to do. Let us not convert the Internal Revenue Bureau into a crime-control agency.

97th Cong. Rec. 12478 (1950).

The original Kefauver Committee recommendations did place major emphasis on having the Bureau of Internal Revenue maintain files on gamblers by requiring the maintenance of detailed records by gamblers which would be open to the Bureau of Internal Revenue (and presumably other Federal and State law enforcement agencies) as a means of controlling organized crime. The Kefauver Committee Report, Organized Crime (Didier ed. 1951) 182-86 recommendations 4-7, 9.

[10]DeMattei, The Use of Taxation to Control Organized Crime, 39 Cal. L. Rev. 226 (1951) puts more emphasis on placing a crippling tax on the gambling income of organized crime to stop the flow of gambling profits to organized crime. One such tax (up to 99 percent) was suggested to Internal Revenue Commissioner Shoeneman by Senator Hunt during the Kefauver hearings. The Commissioner recognized its potential effectiveness, but envisioned enforcement difficulties.

Legislative History of Tax Statutes Relating to Gambling and Internal Revenue Enforcement Activities 1953-1973. Internal Revenue Service Intelligence Division, March, 1974 (submitted to National Gambling Commission) p.3.

[11]While the House and Senate Committee reports on the bill speak only in terms of a revenue measure, records of floor debates on the bill

the recommendations of those urging a heavy tax on wagers to cut deeply into the profits organized crime would otherwise receive from gambling; it also adopted strict reporting requirements,[12] of clear potential help to

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reveal that some Congressmen viewed it as a potential weapon to destroy organized gambling. In a floor debate in the House of Representatives, Congressman Hoffen of Tennessee, a Ways and Means Committee member, for example, answered questions as to whether the new tax would have the result of condoning gambling by saying:

> . . . . We might indulge the hope that the imposition of this type of tax might eliminate that level of activity . . . . To put the gambler out of business which enforcement of the tax may do is desirable, as is collection of the tax if he remains in business.

97th Cong. Rec. 7054, 7068 (1951).

Representative Cooper was of the view that the tax would be an additional penalty on illegal gambling and that it might even eliminate it. 97th Cong. Rec. 6892 (1951).

Indeed, the New York Times reported that the Committee

> . . . in an effort to make professional gambling a less desirable occupation, voted yesterday to impose a special 10 percent tax on the gross business of bookmakers and policy operators. One purpose of these decisions . . . is to produce Federal Revenue. Committee members said that a more important aim was to give the Federal government a hand in the war against gambling and racketeering.

N.Y. Times, May 17, 1951, at 10, col. 2.

However, these individual reactions are not the official position of the Committee. When Senator George introduced the Senate Finance Committee Report on the Senate floor, he affirmed the Committee's purpose that the excise tax was "purely a revenue measure . . . . not intended to have any effect beyond its productivity as a revenue provision." 97th Cong. Rec. 11876 (1951); see also Sen. Rep. No. 781, 82d Cong., 1st Sess. 112-13 (1951).

[12]The 1951 Act provided that Int. Rev. Code of 1939, § 3275, which stated that each district collector would keep a list of persons who had paid special taxes and their places of business. Such a list would be open for public inspection and a copy of it would be furnished to prosecuting officers, and would apply to the $50 special occupational tax on gamblers. Act of October 20, 1951, Pub. L. No. 82-183 § 472, 65 Stat. 531.

This provision for public inspection and the turning over of the list of special taxpayers to public prosecutors remained in effect until 1968, when it was repealed by Act of October 22, 1968, Pub. L. No. 90-618, Title II § 203(a), 82 Stat. 1235, as part of an effort to solve the Fifth Amendment self-incrimination problem raised by then recent Supreme Court cases.

crime control efforts, as well as the usual criminal enforcement provisions.[13]

II. ENFORCEMENT EXPERIENCE UNDER THE 1951 ACT

The Internal Revenue Service was opposed to the 1951 wagering tax at its inception. It believed that the tax would be unproductive and unenforceable.[14] Commissioner Dunlap, testifying before the House Appropriations Committee, expressed concern that, if not properly enforced, the law would breed contempt for other tax provisions.[15] In addition, the Internal Revenue Service viewed the disclosure provisions of the Act as self-defeating, since they "militat[ed] against voluntary compliance."[16]

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[13] As noted earlier, the 1951 Act provided that the Int. Rev. Code of 1939, Ch. 25, § 2707, 53 Stat. 290 (now Int. Rev. Code of 1954 §§ 6671(a)(b), 6672, 7201, 7203, 7343) fine of up to $10,000 and up to five years imprisonment for willful failure to collect and pay over certain excise taxes would apply to wagering taxes.

[14] Legislative History of Tax Statutes, supra note 10, at 3. See also Summary of Testimony of Donald Alexander, Commissioner of the Internal Revenue Service; John Olszewski, Director, Intelligence Division, Internal Revenue Service; and, Mervin D. Boyd, Program Analyst, Intelligence Division, Internal Revenue Service. May 15, 1974.

[15] Legislative History, supra note 10, at 4; Summary of Testimony, supra note 14.

Indeed, while doubting the 1951 Act's enforceability, the Internal Revenue Service has questioned its professed purpose as a revenue measure. The Internal Revenue Service thus, questions its own jurisdiction--viewing gambling enforcement as the responsibility of local police. Id.

[16] Legislative History, supra note 10, at 5.

The subsequent history of the 1951 Act has confirmed the Internal Revenue Service's doubts about its productiveness. The 10 percent wagering tax has been shown to be a poor revenue raising measure. Although Congress estimated a $407 million annual yield, actual collections between 1952 and 1966 totalled only $106 million.[17] Aside from disappointments in the actual dollar returns, the tax has been inefficient when viewed both from the perspective of the amount of gambling activity potentially subject to tax[18] and from the perspective of the costs of enforcement compared with other taxes.[19]

Finally, the tax as a crime control measure did not even approach the desired effect of capturing the working capital of organized crime.[20] The $7,500,000 actually collected appears minute when compared to the

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[17] Id. at 19.

[18] Gross "handle" in illegal gambling activities has been estimated at between $20 and $40 billion per year (more inclusive estimates range as high as $500 billion). Easy Money: Report of the Task Force on Legalized Gambling, sponsored by the Fund for the City of New York and the Twentieth Century Fund, p. 53-54 (1974) (hereinafter cited Easy Money).

[19] The Internal Revenue Service estimated that it cost $18,600,000 to collect the wagering tax between 1952 and 1966. More importantly, between 2.9 percent and 11.4 percent of Intelligence Division time was devoted to enforcing the wagering tax. This time can hardly be said to have resulted in a comparable percentage of total Federal tax revenues. Legislative History, supra note 10, at 19.

[20] In 1967, The President's Crime Commission concluded that organized crime was still a growth industry. The Challenge of Crime in a Free Society, 188 (1967).

$2 billion net profits estimated to be derived from illegal gambling.[21] Indeed, the wagering tax undoubtably strengthened the attraction to illegal gambling as opposed to legal ventures. The unpaid 10 percent tax could be passed on to the wagerer in the form of increased winning payouts. Thus, the unenforced wagering tax law discriminated in favor of illegal gambling.

Although the disclosure provisions became an impediment to collection for those wishing to remain covert, much of the blame for the inefficiency of the statute as a revenue raising measure can be attributed to the lack of manpower available to the Internal Revenue Service for enforcement.[22] This manpower shortage was equally evident in Internal Revenue Service efforts to pursue the criminal sanctions. The Internal Revenue Service conducted 13,609 full scale investigations, which resulted in 6,266 arrests between 1955 and 1973.[23]

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[21] Easy Money, supra note 18, at 55-57.
This "dent" into illicit gambling revenues is even more insignificant with the recognition that the $7,500,000 annual collection from the wagering tax is primarily from legal gambling.
Illegal gambling, moreover, already possessed a de facto tax break in that neither winners nor operators report their winnings as gross income subject to Federal income tax. Easy Money, supra note 18, at 84-85.

[22] While the Senate committee recommending the wagering tax bill had acknowledged the need for more Internal Revenue Service employees to insure adequate enforcement of the bill (S. Rep., 1951 U.S. Code Cong. & Ad. News at 2096), the request of then Commissioner of Internal Revenue, Mortimer M. Caplin, for 4,333 additional Internal Revenue Service employees to carry out the provisions of the bill was not granted by Congress. (Caplin, The Gambling Business and Federal Taxes, 8 Crime & Delinq. 371, 373 (1962)).
Subsequent requests have also been largely ignored. Legislative History, supra note 10 at 5-7.

[23] Summary of Testimony, supra note 14.

III. COURT INTERPRETATION UNDER THE 1951 ACT

Nevertheless, the early cases seemed to show that the wagering tax bill could be an effective weapon against criminal gamblers. The first major case involving the enforcement of the wagering tax to reach the Supreme Court, United States v. Kahriger,[24] held that the statute was a

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[24] 345 U.S. 22 (1952). In this case, the defendant was charged with willful failure to pay the $50 occupational tax and to register with the collector of the district Internal Revenue Service office. After deciding that the Federal excise tax on gambling was constitutional, the Court turned to the registration requirements:

> Nor do we find the registration requirements of the wagering tax offensive. All that is required is the filing of names, addresses, and places of business. This is quite general in tax returns. Such data are directly and intimately related to the collection of the tax and are "obviously supportable as in aid of a revenue purpose."

On the issue of the registration being a denial of the privilege against self-incrimination the Court stated:

> Since appellee failed to register for the wagering tax it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for . . . . Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. [Citation omitted.] If respondent wishes to take wagers subject to excise taxes under §3285 supra, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions.

345 U.S. at 31-33. The Court also indicated that the statute was neither arbitrary as to what specific types of wagering it taxed, nor vague in its definitions and therefore was not in violation of the Due Process Clause of the Fifth Amendment.
See also Lewis v. United States, 348 U.S. 419 (1952).

valid exercise of the governmental taxing power and not a penalty under the guise of a tax. Nor were the registration and reporting requirements held to be in violation of Fifth Amendment rights of freedom from compulsory self-incrimination. While most State legislatures and courts did not use or allow the proof of purchase of an occupational or gambling device stamp as evidence in their criminal and administrative actions against illegal gambling,[25] the Federal authorities were not timid in using State and local prosecutions as a means of identifying those engaged in taxable lottery operations and subject to prosecution for failure to pay the wagering taxes. The Federal Court of Appeals for the Sixth Circuit, for example, held in 1957 that the Internal Revenue Service could prosecute an individual for operating a lottery without a gambling stamp, after a city court tried and acquitted him of operating a lottery in violation of city ordinances. Such prosecutions were not double jeopardy and the city court acquittal was not a res judicata bar to the Federal prosecution.[26] Thus, in 1957 the wagering tax on gambling

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[25] In Jefferson v. Sweat, 76 So.2d 494 (Fla. 1954), the Florida Supreme Court held that possession of a gambling stamp was not prima facie evidence of a violation of State antigambling laws, and the State statute which made possession of the gambling stamp prima facie evidence of a violation was unconstitutional and void. See also Shoot v. Illinois Liquor Control Commission, 30 Ill.2d 570, 198 N.E.2d 497 (1964), where the State liquor control commission's revocation of Shoot's liquor license due to the purchase of an occupational gambling device stamp was held to be based on an arbitrary presumption that the stamp was purchased for gambling purposes.

A few states still have statutory presumptions that the possessor of Federal wagering tax stamps are in violation of State antigambling laws. See Ala. Code Tit. 14 §§ 302(8)-(10) 1958. Ga. Code Ann. § 26-6413 (Supp. 1967).

[26] Smith v. United States, 243 F.2d 877 (6th Cir. 1957).

seemed to be a powerful tool with which to combat bookmaking and lottery type gambling. Not only were commercial gamblers subject to fines and imprisonment for failure to comply with the wagering tax, but, moreover, any gambling money taken from them upon which the wagering tax should have been, but was not, paid was subject to civil forfeiture proceedings as property intended to be used in violation of provisions of the Internal Revenue laws.[27]

The first obstacle in the use of the wagering tax law as a means of prosecuting those engaged in organized gambling came in 1957,[28] when the Supreme Court in United States v. Calamaro[29] decided that "pickup men" and "runners" in the numbers game were merely messengers and were not engaged in receiving wagers on behalf of anyone else. that they did not have a proprietary interest in the enterprise, and that they thus were not subject to the $50 special occupational tax on gambling.

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[27]See, e.g., United States v. Currency in Total Amount of $2,223.40, 157 F. Supp. 300 (D.C. Ill. 1957).

[28]Prior to 1957, the Supreme Court had refused to review lower court cases which held that "pickup men" and "runners" were subject to the $50 occupational tax on gamblers. See, e.g., Sagonias v. United States, 223 F.2d 146 (5th Cir.), cert. denied, 350 U.S. 840 (1955).

[29]United States v. Calamaro, 354 U.S. 351 (1957). See also Ingram v. United States, 259 F.2d 886 (5th Cir.), aff'd in part, rev'd in part on other grounds, 360 U.S. 672 (1958), rehearing denied 361 U.S. 856 (1959), which held that "runners" were not liable for payment of the 10 percent excise tax on all wagers but could be convicted of conspiring to evade and defeat the payment of the wagering taxes upon an adequate factual showing.

When this loophole had become apparent from lower court cases, Congress reacted by amending the definition of those who were liable for the 10 percent wagering tax so that it included

> [a]ny person required to register under section 4412 [the occupational tax registration provision] who receives wagers for or on behalf of another person without having registered under section 4412 . . . on all such wagers received by him.[30]

Congressional intent behind this action was clearly spelled out in the Senate report on the bill:

> It is the intent of the House and your committee that in any case where the "runner" has failed to register as required by section 4412, both the runner and the principal shall be liable for the tax imposed by section 4401(a) until that tax is paid.[31]

Under this amendment, "runners" were faced with the choice of either paying the $50 special occupational tax and registering with the Internal Revenue Service (and thus identifying his principal--the banker of the operation) or being personally liable for the 10 percent tax on all wagers he carried for the principal. Since this tax liability could be enforced by attaching all the runner's property or by a jail sentence, enforcement agencies were given additional leverage with which to pry the names of higher ups out of the runners. The Senate Report on the bill further stated that: "It is estimated that the revenue gain from this provision will be negligible."[32] Thus, credence could be given to the view that some Congressmen saw the wagering tax more as a crime fighting measure than as a revenue measure.

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[30] Act of September 2, 1958, Pub. L. No. 85-859, Title I, § 151(a), 72 Stat. 1304 (now Int. Rev. Code of 1954, § 4401(c)).

[31] S. Rep. No. 2090, 85th Cong. 2d Sess.; 1958 U.S. Code Cong. & Ad. News 4457.

[32] Id. at 4458.

The amendment, however, did not have the effect that Congress wanted. Congress had assumed that a runner was liable for the $50 occupational tax imposed by § 4411 of the Int. Rev. Code (1954), but not for the 10 percent excise tax imposed by § 4401.[33] When the Supreme Court clearly held, in United States v. Calamaro,[34] that runners were not subject to the $50 occupational tax, the failure to close the loophole became clear. While Congress had changed the definition of those liable for the 10 percent excise tax to specifically include those liable for the special $50 occupational tax, it did not change the definition of those who were liable to pay the latter tax. Later cases confirmed this error by holding that runners and pickup men were still not liable for the $50 occupational tax and the 10 percent excise tax on wagers.[35]

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[33]". . . under present law he [the runner] is not liable for the 10 percent excise tax on wagers, but only for the $50 occupational tax imposed by section 4411." Id. at 4457.

[34]354 U.S. 351 (1957).

[35]United States v. Cooperstein, 221 F. Supp. 522 (1963). The circularity of definitions caused the congressional purpose to fail. Congress amended Int. Rev. Code of 1954 § 4401, which imposed a 10 percent excise tax on certain wagers; so that liability for the tax would now also fall on those who were to register with the Internal Revenue Service under § 4412. However, § 4412 only required those who were liable for the $50 occupational tax under § 4411 to register. Since the Supreme Court had held that § 4411 did not include runners and pickup men and the congressional amendment did not affect the definition of those required to pay the $50 occupational tax in § 4411, runners and pickup men were not liable for the 10 percent excise tax imposed by § 4401.

Congress has not moved to correct this error. Bills have bee introduced in subsequent attempts to include runners, but have not been passed.[36]

The biggest setback for the wagering tax provisions as a crime control measure came in 1968. In two companion cases, the Supreme Court held that assertion of the Fifth Amendment privilege against self-incrimination barred prosecution of individuals for violating the Federal wagering statutes. In the first case, Marchetti v. United States,[37] the Court dealt with a conviction for conspiring to evade payment of the $50 occupational tax on wagers imposed by 26 U.S.C. § 4411 and failure to comply with the registration requirements of § 4412. The Court noted that all states, except Nevada, had broad penal prohibitions against gambling and that information revealed in registering under the Federal wagering tax law was readily available to State and Federal law enforcement authorities.[38] From this, the Court concluded that Marchetti

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[36]For example, in 1969, Senator McClellan introduced S. 1624 which placed a $100 occupational tax stamp requirement on "essential employees in gambling operations." The purpose was to create a broad-based liability for "runners", "bagmen", and anyone else involved in the gambling operation in order to more effectively pursue the principals. S. Rep. No. 91-840, 91st Cong. 2d Sess., May 5, 1970. A similar provision was also included in S. 431 the next year. The Senate Report stated that

> by reaching beyond the principals and agents to pickup men and other employees, S. 431 affords IRS a tool with which to pierce the shield of silence too often surrounding the activities of the gambling hierarchy.

S. Rep. No. 92-764, 92d Cong. 2d Sess. (1972).

[37]390 U.S. 39 (1968).

[38]Id. at 48.

> was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant "link in a chain" of evidence tending to establish his guilt . . . . It would appear to follow that petitioner's assertion of the privilege [against self-incrimination] as a defense to this prosecution was entirely proper, and accordingly should have sufficed to prevent his conviction.[39]

The Court dismissed the government's contentions that Marchetti did not have standing to assert the self-incrimination privilege[40] and that the "required records doctrine," as enunciated in Shapiro v. United States,[41] applied to the gambling information on the tax forms.[42]

In Grosso v. United States[43] the Court reversed a conviction for failure to pay the 10 percent excise tax on wagering as well as the $50 occupational tax. The reversal was on the same grounds as Marchetti, the privilege against self-incrimination, but it had additional significance because it was applied to the Federal excise tax on wagers.[44] The excise tax provisions, while calling for a monthly statement showing the amounts wagered,[45] did not require that the district internal revenue offices furnish the names of registrants to prosecutors, as the $50 special occupational tax did. The Court noted, however, that the general practice of the Revenue Service was to make this information available to the prosecuting authorities. Consequently,

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[39] Id. at 48-49.

[40] Id. at 50-54.

[41] 335 U.S. 1 (1940).

[42] 390 U.S. at 56-57.

[43] 390 U.S. 62 (1968).

[44] See Int. Rev. Code of 1954 §§ 4401-4405.

[45] Treas. Reg. § 44.6011(a)-1(a) (1955).

> . . . those liable for payment of the excise tax may reasonably expect that information obtainable from its payment . . . will ultimately be proffered to State and Federal prosecuting officers.[46]

In both cases, the Court refused the government's request that they preserve the validity of the wagering tax registration provisions by implying restrictions upon the use of information that prosecutors could obtain from them. The Court stated that it was up to Congress and not the courts to determine whether immunity from prosecution on the basis of information obtained from wagering tax registration should be established.[47] The Court in both cases also stressed that the tax on wagering itself was not unconstitutional, and that they were only holding "that those who properly asserted the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."[48] The effect of these two decisions was that under the wagering tax law, as it stood in 1968, no one could be criminally punished for noncompliance. Consequently, forfeiture

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[46] 390 U.S. 62, 66.

[47] Moreover, the imposition of such restrictions would necessarily oblige State prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the Federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of State prohibitions against gambling. We cannot know how Congress would assess the competing demands of the Federal treasury and of State gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values. We therefore must decide that it would be improper for the Court to impose restrictions of the kind urged by the United States.
390 U.S. 59-60.

[48] 390 U.S. 39, 61.

proceedings, which would also be reduced in effectiveness by a later Supreme Court decision, and civil collection suits were the only means left to enforce the wagering tax.

Congressional reaction to the Court's decision came swiftly. In less than nine months after the decisions were handed down, the provision of the Internal Revenue Code calling for the disclosure to prosecuting officials of the list of people who paid special occupational taxes was repealed, when the Congress enacted gun control legislation.[49] The section of the Code calling for conspicuous placement of stamps

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[49] Act of October 22, 1968, Pub. L. No. 90-618 § 203, 82 Stat. 1235.

There is no doubt that this change was in response to the recent Supreme Court decisions on the Fifth Amendment self-incrimination problem. The Senate Report stated:

> This section provides for the repeal of section 6107 of the Internal Revenue Code of 1954 relating to disclosure of the identity of persons paying special (occupational) tax which was subjected to criticism in the three cases handed down by the Supreme Court on January 29, 1968. The repeal of this section should make it completely clear that it is not the desire or intent of the Congress that the entire system of Federal taxation be rendered impotent or ineffectual because a State or local jurisdiction has a law rendering aspects of the activity illegal. The Federal taxing power is of such fundamental importance that it is difficult to conceive that it was the intent of the framers of the Constitution that the act of a State or local government could thwart the effective operation of the internal revenue laws of the United States. Since the section no longer serves any useful purpose, and since it now jeopardizes the effective operation of the internal revenue laws, it should be repealed.

S. Rep. No. 1501, 90th Cong. 2d. Sess. 52 (1968).

The three cases referred to in the report were Marchetti, Grosso, and Haynes v. United States (390 U.S. 85, 1968) where an individual was charged with violating 26 U.S.C. § 5851, a tax statute which was part of a regulatory scheme calling for the taxation and registration of certain classes of firearms used chiefly by persons engaged in illegal activity. As in Marchetti and Grosso, the Haynes Court had held that a claim of the privilege against self-incrimination would be a complete defense to a prosecution for failure to register or for a possession or an unregistered gun charge.

denoting payment of special occupational taxes was also amended to exclude those who purchased the occupational wagering tax stamp.[50] The purpose of these changes was to eliminate the self-incrimination problem that was brought out in the Marchetti line of cases.[51] However, Congress had only done away with the requirement that the Internal Revenue Service disclose names of those who paid the special wagering occupational tax. They did not forbid their disclosure.[52] There was still the possibility of wagering tax information being volunteered to prosecutors, leading to a self-incrimination defense similar to that of Marchetti and Grosso. This possibility caused the

> Intelligence Division [of the Internal Revenue Service] to discontinue criminal investigations directed toward prosecution for failure to register and pay the occupational tax and willful failure to file wagering excise tax returns except for cases involving legal wagering operations.[53]

While the criminal sanctions for evading wagering taxes were nullified by Marchetti and Grosso, the civil forfeiture law still remained available as a means of hindering gambling operations. The Code[54] provided that money or other property confiscated from a gambler who was liable for but did not pay the wagering excise tax or the special occupational tax, was subject to civil forfeiture proceedings as

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[50]Act of October 22, 1968, Pub. L. No. 90-618, § 204, 82 Stat. 1235.

[51]See note 49 supra.

[52]In the case of firearms registration, however, the Congress did provide that registration information could not be used directly or indirectly against the registrant in any criminal proceeding. Act of October 22, 1968, Pub. L. No. 90-618, Title II, § 201, 82 Stat. 1232 (now 26 U.S.C. 5848).

[53]Summary of Testimony, supra note 14, at 2.

[54]26 U.S.C. §§ 4401(a), 4411, 7203, 7302 (1954).

property intended to be used in violating provisions of the Internal Revenue laws. Thus, if law enforcement agencies could raid the "banks" of large numbers, policy or bookmaking operations they could confiscate the money seized and force the gamblers to pay winners out of their own pockets or cause them to fail to pay off the winners. If enough of the gambler's money was forfeited, he would be forced to stop operating (of course, the same result could probably be effectuated under local law).

Prior to Marchetti, there seemed to be no problem in enforcing civil forfeitures.[55] After the Marchetti decision, however, one Federal appellate court took the position that the civil forfeiture of the gambling property for noncompliance with the wagering tax laws had a coercive effect similar to the criminal sanctions--that the gambler was forced either to pay the tax and give incriminating evidence against himself or be subject to the forfeiture of the gambling property. It held, therefore, that this was an impermissible choice under the Fourth and Fifth Amendments.[56] On the other hand, another Federal appellate court held that the Marchetti privilege against self-incrimination for criminal offenses did not apply to forfeiture of property that arises from the same violation: "The mere fact that an exclusionary rule of evidence may prevent a conviction for the criminal offense of violating the Internal Revenue laws, does not expunge civil liability for payment

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[55] United States v. Currency in Total Amount of $2,223.40, 157 F. Supp. 300 (D.C. Ill. 1957); United States v. Grossman, 315 F.2d 94 (2d Cir. 1963).

[56] United States v. United States Coin and Currency in the Amount of $8,674.00, 393 F.2d 499 (7th Cir. 1968). The Court concluded by saying: "As a practical matter Marchetti means that such violations are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture." 393 F.2d at 500.

of the tax."[57] The Supreme Court finally reconciled these two views in 1970 in United States v. United States Coin and Currency[58] by holding that the Fifth Amendment privilege could properly be asserted to defeat a forfeiture proceeding of property seized from a gambler who had not paid the wagering tax. The Court reasoned that since the forfeiture of property was by reason of the offense committed, the forfeiture proceedings were criminal in nature although civil in form and the Fifth Amendment privilege applied.

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[57] United States v. One 1965 Buick, 392 F.2d 672, 676 (6th Cir. 1968), vacated and remanded, 402 U.S. 937 (1970).

[58] 401 U.S. 715 (1970):

> The Government now relies heavily on the fact that Marchetti and Grosso only held that "a claim of privilege precludes a criminal conviction premised on failure to pay the tax." [Emphasis supplied.] It argues that just as it may collect taxes in a civil action, the Government may also initiate forfeiture proceedings --which are also formally civil in nature--without offending Marchetti and Grosso. But as Boyd v. United States, 116 U.S. 616, 634 (1886), makes clear, "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal" for Fifth Amendment purposes. [Emphasis supplied.] From the relevant constitutional standpoint there is no difference between a man who "forfeits" $8,674 because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of $8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force. See also One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965). 401 U.S. at 718.
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> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise. It follows from Boyd, Marchetti, and Grosso that the Fifth Amendment's privilege may properly be invoked in these proceedings. 401 U.S. at 721-722.

For a detailed analysis of the reasoning of the outcome of this case, see Constitutional Law - Fifth Amendment's Privilege Against Self-Incrimination Proper Defense in Civil Suits Involving Federal Wagering Tax Statutes - Marchetti v. United States and Grosso v. United States Extended, 33 Albany L. Rev. 158 (1968).

With this decision, it seemed that the Federal wagering tax laws were useless in penalizing gamblers effectively. However, there seemed to be no urgent cry to amend the tax laws to overcome their constitutional deficiencies in the criminal punishment area. One reason for this was the Internal Revenue Service's continued lack of enthusiasm for the wagering tax laws because they perceived enforcement difficulties, little actual revenue, and viewed the tax merely as a way to get Federal tax authorities in the crime fighting business,[59] which was not a job the Internal Revenue Service particularly desired. The Department of the Treasury did not push to amend the enforcement defects in the law.

Another important reason for the lack of urgency in repairing the organized crime fighting aspect of the wagering tax law may have been the Organized Crime Control Act of 1970.[60] Title VIII of this Act put the Federal government directly involved in the enforcement of criminal sanctions against local organized gambling.[61] Since there was now an alternate method for the Federal government to fight organized gambling, the amending of the tax laws for that purpose no longer seemed necessary. Consequently, while bills were introduced to correct the constitutional

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[59] Legislative History, supra note 10, at 4-5.

[60] Act of October 15, 1970, Pub. L. No. 91-452, 84 Stat. 922.

[61] Title VIII became 18 U.S.C. §§ 1511, 1955 (1970). It provides penalties of fines of up to $20,000 and up to five years imprisonment for conducting, financing or managing gambling operations that have been in continuous operation for more than thirty days, or have a gross revenue of more than $2,000 on any single day that involves more than five people, or for two or more people to conspire to obstruct the enforcement of the criminal laws of a State with intent to facilitate an illegal gambling business.

Congress rested its power to enact such legislation on a finding that organized crime and hence organized gambling, affected interstate commerce.

difficulties raised by Marchetti and Grosso, they did not get the support needed to become law.[62] Ironically, it was the noticeable failure of the 1951 wagering tax law to suppress organized crime or even organized gambling, which served as a factor in the drafting and passage of title VIII of the Organized Crime Control Act of 1970.[63]

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[62] See, e.g., S. Rep. No. 91-840, 91st Cong., 2d Sess. (1970) which accompanied S. 1624, supra note 36. The bill sought to: (1) Raise the occupational tax to $1,000 per annum for principals and agents; (2) Impose an occupational tax of $100 on punchboard operators, pickup men, and other employees; (3) Affirmatively prohibit the Internal Revenue Service from disclosing to outside sources any information submitted by the taxpaying gambler; (4) Abolish the minimum mandatory penalty for a nonwillful violation and establish a separate penalty provision, and; (5) Provide for the restrictive use of certain testimony provided by a witness under compulsion. This report pointed out that organized crime was a grave threat to America, that illegal gambling was the single largest source of illicit income for organized crime and that under Marchetti and Grosso the present wagering tax laws were unenforceable and that these proposed amendments to the wagering tax laws would correct that, bring in needed revenue, and fight crime; and yet the bill could not gain the support needed for enactment.

[63] The attention of the subcommittee was also directed at a major city where extensive police corruption has reportedly existed. Shortly after passage of the wagering tax laws in 1951, efforts were made by agents of the Internal Revenue Service to coordinate their activities with the city's vice squad, but after a large percentage of the joint raids were unsuccessful, investigation disclosed that the vice squad members, almost to a man, were being paid off by lottery operators and bookmakers. Federal authorities were unable to develop viable tax evasion cases, and in the local trials of the police officers involved, numerous members of the police force came forward to testify that they would not believe either the Federal or State officers who testified for the prosecution. None of the local policemen were convicted.

The effect of such police corruption is stultifying on Federal-State cooperation in the campaign against organized gambling. This inability of Federal agencies properly to enforce the statutes within their jurisdiction is an important basis for the Congress to take action in this area.

S. Rep. No. 91-617, 91st Cong. 1st Sess. (1969), which accompanied S. 30, which became the Organized Crime Control Act of 1970.

Even though the criminal and civil penalties for noncompliance with the 1970 wagering tax law were inoperative because of the self-incrimination immunity, it was still possible to use the tax laws to hinder those who owned the banks of the illegal bookmakers and lotteries by holding those engaged in illegal bookmaking and lottery operations liable for the 10 percent excise tax itself on all wagers they received. The Marchetti court had made that clear,[64] as did later cases.[65] Assessing these operators the tax that they owed all at once could severely hurt them financially. While the amount they owed would be an estimate, because most illegal operators would not normally keep records, previous cases had allowed such estimates.[66] Further, since the wagering tax was an excise tax and not an income tax, the taxpayer had to pay the tax immediately and then sue for a refund. He was not allowed to contest the tax and then pay after a final

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[64]"We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements." Marchetti v. United States, 390 U.S. at 61 (1968).

[65]Urban v. United States, 445 F.2d 641 (5th Cir.), cert. denied, 404 U.S. 1015 (1971).

[66]See, e.g., Hodoh v. United States, 153 F. Supp. 822 (S.D. N.Y. 1957). There, a gambling taxpayer did not keep records. The Court held it was proper to estimate the excise taxes owed on the basis of statements made by police, taxpayers' solicitors, and the Internal Revenue agents' own experience.

determination of liability.[67] Since the profit margin of a bookmaker is only 5 to 6 percent and that of a lottery operator is 5 1/2 percent,[68] the assessment of a lump sum, tax liability of approximately 10 percent would at a minimum put a severe financial strain on them or more probably lead to attachment of all their property to pay the tax

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[67] Trent v. United States, 442 F.2d 405 (6th Cir. 1971). The Court held that the wagering tax itself, and the assessment and collection procedure under 26 U.S.C. §§ 4401, 4421, 6331, 7421(a) (which allows the government to require the taxpayer to pay the assessment first and then litigate the question of liability) were constitutional.

For additional cases, see Hamilton v. United States, 309 F. Supp. 468 (S.D. N.Y. 1969), aff'd, 429 F.2d 427 (2d Cir.), cert. denied 401 U.S. 913 (1970). While the other cases did not discuss, or merely assumed, that the Marchetti decision would protect gamblers from criminal liability if they gave evidence to contest the amount of liability, this Court decided that there was no self-incrimination problem because the gambler could wait for the statute of limitation for his illegal gambling activities to run and then sue for a refund on the assessed wagering tax. McAlister v. Cohen et. al., 70-1 U.S.T.C. ¶¶ 15, 943.

While 26 U.S.C. § 7421(a) provides that no suit to prevent the collection of taxes shall be maintained there are judicial exceptions to this statute. A gambler would have to show either that the government could not possibly win its case in court or that there are special equitable circumstances which make the collection of the tax liability from him unjust in order to get an injunction to prevent the government from enforcing the wagering tax liability. See Trent v. United States, id.; McAlister v. Cohen et al. id.

[68] See generally Easy Money, supra note 18.

liability.[69] Their gambling operation would be crippled or destroyed.

Whether this type of approach would have been successful in terms of enforcement costs, revenue raised, and gambling operations shut down, is only speculative, since the Internal Revenue Service stopped all enforcement efforts against wagering tax violators in 1968 after the Marchetti and Grosso decisions.[70]

At the same time that these enforcement difficulties developed, a relatively unforeseen corollary effect of the wagering tax began to emerge: the effect on the decriminalization process.[71]

The effect is two-fold. First, by taxing legal operations, the government has created a substantial impediment towards competition with illegal gambling.[72] Second, by imposing levies on state run operations, the government is pre-empting a State income source--it is competing for revenues with the states.[73]

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[69] See Cole v. Cardoza, 441 F.2d 1337 (6th Cir. 1971), where a lottery operator was assessed $14,744.58 in wagering tax liabilities and a lien was put on his home. The court held that the assessment was neither an unconstitutional bill of attainder nor a violation of the Fifth Amendment privilege against self-incrimination.

However, this case also points out a potential problem with tax liens on gamblers property. In this case both the gambler and his wife owned the house by the entirety. Since only the husband-gambler owed the taxes, the court held that under State law it was improper to put a tax lien on the house, because it put a cloud on the wife's portion of the title.

[70] Legislative History, supra note 10, at 7.

[71] See generally Easy Money, supra note 18.

[72] See text accompanying note 21 supra.

[73] See Legislative History, supra note 10, at 41.

Such an effect was partially foreseen in the original exemption of State run parimutual operations and of casino-type gambling. It became much more apparent when the New Hampshire Sweepstakes began operation in 1964. A subsequent amendment was added to the 1951 Act to exempt State run lotteries where the "ultimate winners are determined by the result of a horse race."[74]

The Internal Revenue Service expressed the opinion in March, 1974 that none of the State lotteries were then operating in accordance with the exemption.[75] However, the Treasury Department has been reluctant to enforce the tax on State lotteries.

The growing possibilities of the establishment of more and different legal games by the states[76] may necessitate some amendment to the wagering tax so as not to hamper State efforts either to raise revenue, or to compete with organized crime.[77] It must be reiterated,

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[74] Id. at 43.

[75] Legislative History, supra note 10, at 41; Summary of Testimony supra, note 14, at 45.
"It has led to silly technical manuevering by the lottery states and is bound to produce more legal contortions as other legal games are introduced." Easy Money, supra note 18, at 83.

[76] See, e.g., Legal Gambling in New York: A Discussion of Numbers and Sports Betting (1972).

[77] The competition aspect is most significant in terms of numbers and sports betting. A 10 percent tax would make these activities totally unfeasible. See Legal Gambling, supra note 76, at 49-55.
Revenue raising and effective competition may be mutually exclusive goals. See Legal Gambling, supra note 76, at 1-21; Easy Money, supra note 18, at 2.

however, that the wagering tax is not broad in scope. It does not now cover casino-type gambling. Moreover, any great number of new exemptions could narrow the Act to reach only illegal operations--thus posing Tenth Amendment problems.[78]

IV. THE 1974 AMENDMENTS

From 1968 to the present there has been no enforcement activity in relation to the wagering tax laws. However, it appears that this will soon change because of an amendment to the wagering tax laws enacted in late October, 1974. This change gave the wagering tax laws a drastic overhaul probably leading to a serious effort to enforce the law. The changes consist of lowering the excise tax on wagers from 10 percent to 2 percent and raising the occupational tax from $50 to $500. In addition, no wagering tax information from any tax return or registration may be disclosed except in enforcing the civil or criminal tax laws. Finally, no tax document, such as a tax stamp, tax return, or registration, possessed by a taxpayer, can be used against the taxpayer in any criminal proceeding, except those connected with the enforcement of the tax laws.[79] The conference report on the bill specifically stated that the new provisions prohibiting disclosure or use of wagering tax information in all but tax cases were a response to the Marchetti-Grosso immunity problems and concluded by saying: "It is expected that these changes in the law will remove any constitutional

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[78] See Federal Regulation of Gambling: Betting on a Long Shot, 57 Geo. L. J. 588 (1957), citing a similar occurrence with liquor taxes. See United States v. Constantine, 296 U.S. 287 (1935).

[79] Pub. L. No. 93-499 § 3 (October 29, 1974).

problems regarding enforcement of the wagering taxes."[80]

Whether Congressional expectations are met, of course, depends on the courts. If they view these safeguards to non-tax criminal liabilities as effective enough to remove any "real and appreciable" danger of self-incrimination, then the tax laws on wagering, with their accompanying civil and criminal penalties, can once again be enforced. While a future Supreme Court decision will definitely tell us if the self-incrimination problem has been overcome, it can fairly safely be assumed, based on past Court decisions, that the problem has been solved. This judgment is

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[80]The Conference Committee observed:

> The amendment also provides specific restrictions as to the disclosure and use of information pertaining to taxpayer compliance with Federal wagering taxes. Although existing law (sec. 6103) provides broad limitations on the publicity of income tax returns, no such restrictions exist for returns and other documents related to the wagering taxes. In 1968 Congress repealed section 6107 of the Internal Revenue Code which provided for public inspection of the names of all persons paying occupational taxes, including the wagering occupational tax. Despite this repeal, current law remains ambiguous in that no specific provision exists barring disclosure of wagering tax information.
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> Consequently, to resolve any remaining doubts which may exist under the rationale of the Marchetti v. United States (390 U.S. 39 (1968)) and Grosso v. United States (390 U.S. 62 (1968)) cases, the amendment provides that no Treasury Department official or employee may disclose, except in connection with the administration or enforcement of internal revenue taxes, any document or record supplied by a taxpayer in connection with such taxes, or any information obtained through any such documents or records. Additionally, the amendment provides that certain documents related to the wagering taxes, and information obtained through such documents, may not be used against the taxpayer in any criminal proceeding, except in connection with the administration or enforcement of internal revenue taxes.
>
> It is expected that these changes in the law will remove any constitutional problems regarding enforcement of the wagering taxes.

Conference Rep. No. 93-1401, 93rd Cong. 2d Sess., 1974 U.S. Code Cong. & Ad. News 6168, 6169.

based on the cases of Haynes v. United States[81] and United States v. Freed.[82] In Haynes, the petitioner was charged with failing to register a gun as required by law.[83] The Court noted:

> The registration requirement is thus directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements, and who therefore are immediately threatened by criminal prosecutions under §§ 5851 and 5861. They are unmistakably persons "inherently suspect of criminal activities."[84]

Because of the relationship between registration and criminal law violation, "[t]he hazards of incrimination created by the registration requirement can thus only be termed 'real and appreciable.'"[85] This meant that under the Marchetti rationale the Fifth Amendment privilege against self-incrimination was a complete defense to criminal charges based on the failure to register. Following the Haynes decision, however, Congress revised the National Firearms Act. The revised Act provided that only transferors had to or could register certain firearms,[86] (the transferee had to supply fingerprints and a photograph for the transfer registration)[87] and that

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[81] 390 U.S. 85 (1968).

[82] 401 U.S. 601 (1971).

[83] 26 U.S.C. § 5851.

[84] 390 U.S. at 96.

[85] Id. at 97

[86] 26 U.S.C. § 5841.

[87] 26 U.S.C. § 5812(a).

> no information or evidence provided in compliance with the registration or transfer provisions of the Act can be used, directly or indirectly, as evidence against the registrant or applicant "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence."[88]

These changes, in addition to the policy of the Internal Revenue Service, as a matter of practice, not to make firearm registration information available to State or other Federal authorities, led the Supreme Court in United States v. Freed[89] to hold that

> the claimant is not confronted by "substantial and 'real'" but merely "trifling or imaginary hazards of incrimination"--first by reason of the statutory barrier against use in a prosecution for prior or concurrent offenses, and second by reason of the unavailability of the registration data, as a matter of administration, to local, State, and other Federal agencies.

The Fifth Amendment self-incrimination privilege was, therefore, no longer a defense to a criminal prosecution for failing to register a firearm as required by law.

The new wagering tax laws follow the legal pattern sustained in the Freed case. There is a provision for nondisclosure of registration and tax return information,[90] and a prohibition against use of any wagering tax document required to be kept by the taxpayer in any

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[88] 26 U.S.C. § 5848.

[89] 401 U.S. 601, 606 (1971).

[90] 26 U.S.C. 4424(a). In the Freed case the nondisclosure was only by administrative practice; in the wagering tax, it is by statute.

non-tax criminal or civil case.[91] While the new wagering tax laws do not specifically bar the use of non-taxpayer possessed wagering tax documents from use in civil or criminal prosecutions, the courts would probably bar such use as it did in Murphy v. Waterfront Commission of New York Harbor.[92] While the Court refused to make a similar ruling in the Marchetti and Grosso decisions, it was because they felt that Congress did not intend such a restriction on the use of wagering tax information,[93] but this clearly is not true now.[94] Thus, the probability of constitutional barriers to the enforcement of the wagering tax laws appears slight.

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[91] 26 U.S.C. § 4424(c). In the case of the firearms registration statute, the use of any information obtained from any firearm registration is prohibited from being used in any non-firearm criminal proceeding; it does not depend on whose possession the documents are in. (26 U.S.C. § 5848).

[92] 378 U.S. 52 (1964). Here, the Court took a State immunity statute for witnesses in State proceedings and broadened it to preclude Federal authorities from using information gained by such compelled testimony to keep the State immunity statute from running afoul of the Fifth Amendment's privilege against self-incrimination.

[93] The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities. See 26 U.S.C. § 6107. This has evidently been the consistent practice of the Revenue Service. We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes.
Marchetti v. United States, 390 U.S. at 58-59 (1968).

[94] See note 58 supra.

Along with these changes in law, the Department of the Treasury has transferred responsibility for the enforcement of the wagering tax laws from its Intelligence Division to the Bureau of Alcohol, Tobacco, and Firearms.[95] This apparently indicates that the Department feels that the new law presents valid enforcement opportunities and these opportunities will be pursued. It may also indicate a recognition that the wagering tax is of more importance as a crime fighting than a revenue raising measure.

However, the immunity provisions of the new wagering tax laws could cause some problems for State law enforcement agencies. If a gambler did register and pay the Federal taxes on wagering and then was brought to trial by State authorities for violation of State antigambling laws, he could raise the issue that State evidence against him was procured from leads gained from his tax registration or returns. It would, thus, be tainted and suppressible.[96] If this issue is raised, it will be incumbent on the State authorities to convince the Court that the evidence it introduces is not the product of wagering tax information supplied by the gambler,[97] something which may be hard to do. The

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[95]U.S. Dept. of the Treasury. Dept. Order 221-3, December 24, 1974. See also Scott, Enforcing Gambling Tax Pushed, Washington Post, January 10, 1975 at 24, col. 2.

[96]"Evidence gathered illegally, i.e. against a constitutional right, is tainted, 'fruit of the poisonous tree', and will not be admitted as evidence." Nardone v. United States, 308 U.S. 338 (1939).

[97]"Once it becomes apparent that the issue [tainted evidence] is in the case [citation omitted], the government bears the burden of convincing the Court that evidence it seeks to introduce at a criminal trial was not obtained by it in violation of a defendant's constitutional rights." United States v. Schipani, 289 F. Supp. 43, 54 (S.D. N.Y. 1968), aff'd, 435 F.2d 26 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971).

Supreme Court foreshadowed this problem in the Marchetti decision, when it refused to impose immunity restrictions on the wagering tax information:

> Moreover, the imposition of such restrictions would necessarily oblige State prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the Federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of State prohibitions against gambling.[98]

Whether the Internal Revenue Service can safegaurd its wagering tax information to the extent required in order to preclude the tainted evidence issue from being raised, is a question that has to await future judicial decision. If the answer is in the negative, many gamblers may pay the wagering taxes, feeling that $500 per year plus 2 percent of their gross take is a good price to pay for immunity from state criminal prosecution.[99]

V. CONCLUSION: THE WAGERING EXCISE TAX

While the new immunity provisions may make the wagering taxes and their accompanying civil and criminal penalties enforceable, the change from a 10 percent to a 2 percent excise tax on wagers takes much of the sting out of the law. Illegal gambling operators can much more easily

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[98] Marchetti v. United States, 390 U.S. 39, 59 (1968).

[99] Gamblers could decrease their payouts to winners or slightly cut their protection payouts to law enforcement to cover these 2 percent "insurance premiums from State criminal prosecution." A very enterprising gambler might even stage a "Watergate break-in" in reverse at district Internal Revenue Service offices to make sure that there is a "tainted evidence issue."

afford to pay 2 percent of their gross take than 10 percent. While the criminal penalties for avoiding the payment of the taxes will not be affected by the change (still up to a $10,000 fine and/or up to 5 years imprisonment) the civil penalties, the assessment of taxes owed, will be substantially reduced. Thus, Congress may have put life back into the effect of the Federal tax laws on organized criminal gambling, but at the same time, it may have weakened that effect because of the decreased rate of tax.

On the other hand, the 2 percent tax may actually increase revenues. Voluntary compliance (especially with the absence of a disclosure jeopardy) may increase. Certainly there is less incentive to avoid the tax.[100] Furthermore, the ability of legal games to compete has been enhanced. The legitimate bookies appear more than willing to absorb a 2 percent tax for increased business.

The lowering of the tax could affect the potential feasibility of other proposed decriminalizations. Congress may have attempted to avoid the politically awkward decision of removing the tax altogether (and thus condone gambling) while at the same time allowing the states realistic alternatives in making their own decisions.

The new amendment, however, may not have removed all of the conflicting interests, which worked against the 1951 Act. Although the lowering of the tax to 2 percent may increase actual revenue, the Treasury Department will still need more manpower to effectively enforce the law. This need for manpower may be even more acute if local

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[100] The Treasury Department adheres to that analysis. Summary of Testimony, supra note 14, at 4.

authorities are reluctant to cooperate in investigations which may result in tainted evidence--inadmissible in local trials.

If the immunity provisions can be viewed as an attempt to bolster the anticrime impact of the statute, its resultant potential for lack of cooperation with other enforcement agencies may reduce the ability of the Treasury Department to impose criminal sanctions for avoidance of tax. Indeed, if the 1951 Act was an attempt to effectuate a national commitment to fight organized crime by making national resources available to local officials, that purpose may have now been injured.

Further, while the immunity provision by itself may increase the possibility of tax-based criminal sanctions, it reduces the possibility of imposing more general criminal sanctions. Moreover, while tax revenues may in fact increase, the potential revenue source has decreased. Indeed, the ability of the tax to hurt organized crime by way of excise penalty has decreased. However, the ability to attack organized crime by way of competition has improved, yet even a 2 percent tax may prove too much. It has not been accompanied by a concerted decision to compete for revenue with organized crime.

As the discussion above seeks to point out, the major difficulty with the amendments may be that they do little to clarify the purpose of the wagering tax. Is it a revenue measure or an anticrime measure? Does it attempt to accomplish cross purposes by the 1951 wishful reliance on tax laws? Or has it effectively reconciled the conflicts by compromise? Without an enunciation of purpose in light of a national gambling policy, the wagering tax may be little more than a patchwork measure with contradictory significance.

VI. THE FEDERAL INCOME TAX AND GAMBLING

The Internal Revenue Code has an impact on gambling beyond the operation of its various excise tax provisions. Income from gambling activities, whether legal or illegal, is also includable in gross income under the general Federal income tax.[101] The tax treatment of gambling transactions is similar to that of other illegal activities--that is, there is no distinction as to the lawfulness of the source of gain.[102]

There are only two income tax provisions which relate specifically to gambling. I.R.C. § 165(d) limits the deductibility of gambling losses to the extent of gambling winnings[103] and Information Form 1099 requires

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[101] 26 U.S.C. § 61. See, e.g., Weiner v. Commissioner, 10 B.T.A. 905 (1928) (card playing); Droge v. Commissioner, 35 B.T.A. 829 (1937) (lottery). The winnings of a wager are treated in much the same way as the return on a capital investment. Income is restricted to the actual gain over the amount bet (or invested). Income, therefore, does not include the amount bet--that is, the return of capital. Silver v. Commissioner, 42 B.T.A. 461 (1940).

[102] Commissioner v. Sullivan, 356 U.S. 27 (1958); James v. United States, 366 U.S. 213 (1961).

[103] 26 U.S.C. § 165(d) (1967), (originally enacted as § 23(g) of the Revenue Act of 1934). The House Ways and Means Committee Report indicates that § 23(g) was an attempt to limit the deduction for legal gambling transactions. The report acknowledges an existing court-made limitation for illegal gambling losses. The reason given for an extension of the limitation is that

> [u]nder present law many taxpayers take deductions for gambling losses but fail to report gambling gains. This limitation will force taxpayers to report their gambling gains if they desire to deduct their gambling losses.

Report Ways & Means Committee (73rd Cong. 2d Sess., H.R. Rep. No. 704) p. 22; Seidman's Legislative History of Federal Income Tax Laws: 1938-1961, New York, 304, 1938.

the reporting of all payouts over $600.[104]

The restrictions imposed in § 165(d) are broad. Any excess of gambling loss cannot be used to offset any other form of gain, including business gains.[105] This limitation applies even to legal gambling enterprises.[106]

There are no limitations within the class of gambling losses. Thus, a loss on a horse race can be used to offset gains from a newspaper pool.[107]

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[104] Authorized by 26 U.S.C. § 604(a), which states:

§6041. Information at source

(a) Payments of $600 or more--All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments to which section 6042(a)(1), 6044(a)(1), or 6049(a)(1) applies, and other than payments with respect to which a statement is required under the authority of section 6042(a)(2), 6044(a)(2), 6045, 6049(a)(2), or 6049(a)(3), of $600 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Secretary or his delegate, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary or his delegate, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

[105] McClanahan v. United States, 292 F.2d 630 (5th Cir.), cert. denied, 368 U.S. 913 (1961).

[106] Offutt v. Commissioner, 16 T.C. 1214 (1951) (wagering losses cannot be used as a carry-over loss.)

[107] Drews v. Commissioner, 25 T.C. 1354 (1956).

The burden of proof to show a deductible gambling loss is on the taxpayer.[108] However, the standard of proof has not been defined and has been articulated only on a case by case basis.[109] Some courts, for example, view a collection of losing parimutual tickets as inconclusive--reasoning that there is no proof as to the taxpayer's actual purchase.[110] However, a 1972 Internal Revenue Service study pointed out that "it is still easy to avoid payment of the tax since many winners [at racetracks] pick up discarded losing tickets to establish offsetting losses for the year."[111]

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[108] Donovan v. Commissioner, 359 F.2d 64, (1st Cir. 1966), T.C. Memo 1965-247; Mack v. Commissioner, 429 F.2d 182 (6th Cir. 1970).

[109] See, e.g., Aaron Greenfeld, T.C. Memo 1966-83 (more than taxpayer's own master sheets were required); Anthony F. & Barbara B. Gallagher, T.C. Memo 1968-27 (partial losses were allowed on the theory that most gamblers incur some loss); Jacoby, T.C. Memo 1970-244 (taxpayers cancelled checks which were corroborated by witnesses were held sufficient proof).

[110] Manzo, T.C. Memo 1972-142.

[111] "Taxation of Gambling Winnings", Office of Planning and Research Internal Revenue Service as cited in Legislative History of Tax Statutes Relating to Gambling and Internal Revenue Service Enforcement Activities: 1953-1973, I.R.S. Intelligence Division, March 1974.

In any event, there appears to be a movement towards stricter proof requirements as part of a general Internal Revenue Service deduction policy. This is exemplified by the trend away from the speculative application of the Cohan rule[112] towards the more rigid requirements of I.R.C. § 274.[113]

Unlike the limitations of § 165(d), the tax code places no such restrictions on the deduction of business expenses by commercialized gambling. If the expenditures are not in themselves violative of public policy, they will be deductible items even to illegal gambling operations.[114] Thus, amounts expended to lease a hall or hire employees for an illegal bookmaking operation are deductible as ordinary and necessary business expenses.[115] However, illegal bribes[116] and legal

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[112] Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930) where the celebrated songwriter George M. Cohan was allowed travel deductions despite poor records and proof. Judge Learned Hand wrote:

> Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily, if it chooses, upon the taxpayer whose inexactitude is of his own making.

Id. at 544.

But see Stein v. Commissioner, 322 F.2d 78 (2d Cir. 1963), where the Cohan rule was declared inapplicable to the inconsistent statement of a professional gambler. Perhaps the nature of the taxpayer has some bearing on the decision to allow unproveable deductions.

[113] 26 U.S.C. § 274 (1967).

[114] Commissioner v. Sullivan, 356 U.S. 27 (1958).

[115] Id. Here, the Court, noting the deductibility of the Federal wagering excise tax, stated that "the 'fact that an expenditure bears a remote relation to an illegal act' does not make it nondeductible." Id. at 29. See also Commissioner v. Heminger, 320 U.S. 467 (1943).

[116] See 26 U.S.C. § 162(c).

fees incurred in unsuccessful attempts to avoid gambling prosecutions[117] are not deductible.

Enforcement of the income tax against gamblers has been difficult. Voluntary compliance is minimal[118] with respect to both the professional and the casual gamblers.[119] Indeed, Internal Revenue Service Intelligence Division operations estimated that even legal Nevada casinos understated reported receipts by 7.75 percent in 1963.[120]

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[117] Thomas v. Commissioner, 16 T.C. 1417 (1951). But see Commissioner v. Tellier, 383 U.S. 687 (1966).

[118] Legislative History, supra note 10, at 22-24. See also Summary of Testimony of Donald Alexander, Commissioner of Internal Revenue Service; John Olsiewski, Director Intelligence Division of Internal Revenue Service; and, Mervin D. Boyd, Program Analyst, Intelligence Division, Internal Revenue Service, May 15, 1974. p. 3.

[119] The Treasury Department recognizes the distinction between the professional and the casual gambler.

The professional gambler, according to the Internal Revenue Service, earns his living by some gambling scheme. "He really does not gamble, but as a businessman, makes direct levies on the play, or receives a percentage of the play, the odds being in his favor." Legislative History, supra note 11, at 22-23.

The casual gambler, on the other hand, loses as a class, and thus poses less of an enforcement problem. See Easy Money, supra note 18, at 81-85.

Thus, the Internal Revenue Service treats the two differently. For example, unreported winnings have been held to be tax fraud for a professional gambler. Wilson, T.C. Memo 1956-53. Yet, similar unreported winnings were not held to be fraud for a casual gambler. Estate of Corum v. Commissioner, 260 F.2d 551 (6th Cir. 1958), rev'g T.C. Memo 1957-111 (where the court took into account the taxpayer's probable offsetting losses).

[120] Legislative History, supra note 10, at 22.

Part of the problem--at least with respect to legalized gambling--is the administratively awkward Information Form 1099. As required by Internal Revenue Code § 6041, all gambling establishments must file information returns for all customers who win over $600 in a tax year.[121] In practice, the use of 1099 forms has been limited to discrete racetrack payoffs on special pools at odds of 299-1.[122] Attempts have been made, largely unsuccessfully, to impose information returns on Nevada Keno and Bingo games.[123] In general, however, the Internal Revenue Service recognizes that strict enforcement of information return requirements would "create record keeping burdens of staggering proportions."[124] Thus, the conclusion seems sound that "a major defect of the present system of withholding on gambling winnings is that it reaches only the rare and extraordinary windfall, leaving most winnings untouched."[125] In addition, the 1099 procedure is highly inequitable. Often it forces a parimutual better to report a $600 winning, while allowing a $25,000 roulette winner to pocket his cash in silence. Only the guilty are caught, but too many of those who are similarly situated go free.

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[121] 26 U.S.C.A. § 6041.

[122] E.g., daily double, exacta, quinella, trifecta, etc. See Legislative History, supra note 11, at 24; Easy Money, supra note 18, at 82.

[123] Legislative History, supra note 10, at 25; Easy Money, supra note 18, at 83.

[124] Legislative History, supra note 10, at 25; probably not worth the effort, since overall losses exceed gain.

[125] Id.

A further problem posed by the 1099 forms has been the use of so called "ten percenters": persons who cash in winning tickets for a fee of 10 percent.[126] They prepare false reports and pocket the 10 percent while the real winner's "tax" is limited to that 10 percent. Crackdowns on ten percenters have run into some difficulty as § 6041 requires only the identification of the "recipient of payment." Since that could arguably be either the true winner or the ten percenter, some courts have ruled the phrase too ambiguous to sustain a conviction.[127]

The Internal Revenue Service has thus turned to prosecution under § 7201 (evasion), § 7203 (failure to file), and § 7206(2) (aiding and abetting the preparation of false documents).[128]

The enforcement of the general tax laws against the operators of illegal commercialized gambling also poses great problems. Evidence is extremely difficult to obtain.[129] The Internal Revenue Service does no wiretapping itself[130] and there are problems of self-incrimination.[131]

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[126] Id. at 27-28.

[127] Blumberg v. Commissioner, 258 F. Supp. 885 (D.Del. 1966).

[128] Legislative History, supra note 10, at 28; Summary of Testimony, supra note 118, at 3.

[129] "Detailed records of gambling income are seldom available for inspection by the Service." Legislative History, supra note 11, at 23. Further, unlike the wagering excise tax, the Internal Revenue Service cannot impose an estimate and demand immediate payment before the taxpayer can defend himself (often being faced with the choice of losing the tax assessment or incriminating himself in defense). The Internal Revenue Service must prove its case in the Tax Court before a levy can be effectuated. See note 67, supra.

[130] Summary of Testimony, supra note 118, at 3.

[131] See Ianelli v. Commissioner, 333 F. Supp. 407 (W.D.Pa. 1971).

Indeed, the Internal Revenue Service recognizes that most gambling income tax evasion cases "were identified because of the wagering enforcement action against the same individual."[132]

Much of the evidence used to enforce the income tax comes from the reconstruction of income from bank accounts, property, etc. The Internal Revenue Service uses both the cost of living method[133] and the net worth method.[134] With more direct evidence, the reconstruction of business income can be accomplished through averaging.[135] Although not wholly accurate, such reconstruction may be enough to establish fraud or tax evasion.

Despite such imaginative efforts the Internal Revenue Service still concludes that most people fail to report their income from gambling sources.[136] Thus, this type of income remains largely untaxed.

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[132] Legislative History, supra note 10, at 21-22.

[133] Giddio v. Commissioner, 54 T.C. 1530 (1970) (determination of bookmakers' tax by making estimates based on "the normal cost of supporting a family of petitioner's in New York City." The burden of proving the inaccuracy of the estimate was on the taxpayer).

[134] Estate of Phillips, 246 F.2d 209 (5th Cir. 1957). The net worth method works on the assumption an increase in net assets plus nondeductible expenditures must have come from currently unreported income. However, in Phillips (the taxpayer was a Bolita, a Spanish numbers racketeer), the Internal Revenue Service failed to establish the amount of "cash on hand" the taxpayer had at the beginning of the net worth period. Without such an "opening determination" of cash assets, any subsequent expenditures can be explained as coming from property already owned. Id. at 212-13.

[135] Hamilton v. Commissioner, 309 F. Supp. 408 (S.D. N.Y. 1970).

[136] Legislative History, supra note 10, at 28.

VII. TEXT OF STATUTES

§ 4401. Imposition of tax

(a) Wagers.--There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 2 percent of the amount thereof.

(b) Amount of wager.--In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.--Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

§ 4402. Exemptions

No tax shall be imposed by this subchapter--

(1) Parimutuels.--On any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law,

(2) Coin-operated devices.--On any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 4461, or on any amount paid, in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462(a)(2), if an occupational tax is imposed with respect to such device by section 4461, or

(3) State-conducted sweepstakes.--On any wager placed in a sweepstakes, wagering pool, or lottery--

(A) which is conducted by an agency of a State acting under authority of State law, and

(B) the ultimate winners in which are determined by the results of a horse race,

but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

§ 4403. Record requirements

Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001(a).

§ 4404. Territorial extent

The tax imposed by this subchapter shall apply only to wagers

(1) accepted in the United States, or

(2) placed by a person who is in the United States

(A) with a person who is a citizen or resident of the United States, or

(B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

§ 4411. Imposition of tax

There shall be imposed a special tax of $500 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

§ 4412. Registration

(a) Requirement.--Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district--

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.--Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.--In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

§ 4413. Certain provisions made applicable

Sections 4901, 4902, 4904, 4905, and 4906 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation referred to in such sections. No other provision of sections 4901 to 4907, inclusive, shall so extend or apply.

§ 4421. Definitions

For purposes of this chapter--

(1) Wager.--The term "wager" means--

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery.--The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include--

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

§ 4422. Applicability of Federal and State laws

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

§ 4423. Inspection of books

Notwithstanding section 7605(b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

§ 4424. Disclosure of wagering tax information.

(a) General Rule.--Except as otherwise provided in this section, neither the Secretary or his delegate nor any other officer or employee of the Treasury Department may divulge or make known in any manner whatever to any person--

(1) any original, copy, or abstract of any return, payment, or registration made pursuant to this chapter,

(2) any record required for making any such return, payment, or registration, which the Secretary or his delegate is permitted by the taxpayer to examine or which is produced pursuant to section 7602, or

(3) any information come at by the exploitation of any such return, payment, registration, or record.

(b) Permissible Disclosure.--A disclosure otherwise prohibited by subsection (a) may be made in connection with the administration or civil or criminal enforcement of any tax imposed by this title. However, any document or information so disclosed may not be--

(1) divulged or made known in any manner whatever by any officer or employee of the United States to any person except in connection with the administration or civil or criminal enforcement of this title, nor

(2) used, directly or indirectly, in any criminal prosecution for any offense occurring before the date of enactment of this section.

(c) Use of Documents Possessed by Taxpayer.--Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title--

(1) any stamp denoting payment of the special tax under this chapter,

(2) any original, copy, or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and

(3) any information come at by the exploitation of any such document,

shall not be used against such taxpayer in any criminal proceeding.

(d) Inspection by Committees of Congress.--Section 6103(d) shall apply with respect to any return, payment, or registration made pursuant to this chapter.

(2) The table of sections for such subchapter is amended by adding at the end thereof the following:

"Sec. 4424. Disclosure of wagering tax in information.".

(d) Effective Date.--

(1) In general.--The amendments made by this section take effect on December 1, 1974, and shall apply only with respect to wagers placed on or after such date.

(2) Transitional rules.--

(A) Any person who, on December 1, 1974, is engaged in an activity which makes him liable for payment of the tax imposed by section 4411 of the Internal Revenue Code of 1954 (as in effect on such date) shall be treated as commencing such activity on such date for purposes of such section and section 4901 of such Code.

(B) Any person who, before December 1, 1974.--

(i) became liable for and paid the tax imposed by section 4411 of the Internal Revenue Code of 1954 (as in effect on July 1, 1974) for the year ending June 30, 1975, shall not be liable for any additional tax under such section for such year, and

(ii) registered under section 4412 of such Code (as in effect on July 1, 1974) for the year ending June 30, 1975, shall not be required to reregister under such section for such year.

§ 4461. Imposition of tax

(a) In general.--There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated gaming device (as defined in section 4462) at the following rates:

(1) $250 per year; and

(2) $250 per year for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device.

(b) Exception.--No tax shall be imposed on a device which is commonly known as a claw, crane, or digger machine if--

(1) the charge for each operation of such device is not more than 10 cents,

(2) such device never dispenses a prize other than merchandise of a maximum retail value of $1, and with respect to such device there is never a display or offer of any prize or merchandise other than merchandise dispensed by such machine,

(3) such device is actuated by a crank and operates solely by means of a nonelectrical mechanism, and

(4) such device is not operated other than in connection with and as part of carnivals or county or State fairs.

§ 4462. Definition of coin-operated gaming device

(a) In general.--For purposes of this subchapter, the term "coin-operated gaming device" means any machine which is--

(1) a so-called "slot" machine which operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens, or

(2) a machine which is similar to machines described in paragraph (1) and is operated without the insertion of a coin, token, or similar object.

(b) Exclusions.--The term "coin-operated gaming device" does not include--

(1) a bona fide vending or amusement machine in which gaming features are not incorporated; or

(2) a vending machine operated by means of the insertion of a one cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, of entitles a person to receive a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens.

§ 4464. Credit for State-imposed taxes

(a) In general.--There shall be allowed as a credit against the tax imposed by section 4461 with respect to any coin-operated gaming device for any year an amount equal to the amount of State tax paid for such year with respect to such device by the person liable for the tax imposed by section 4461, if such State tax (1) is paid under a law of the State in which the place or premises on which such device is maintained or used is located, and (2) is similar to the tax imposed by section 4461 (including a tax, other than a general personal property tax, imposed on such device).

(b) Limitations.--

(1) Devices must be legal under State law.--Credit shall be allowed under subsection (a) for a tax imposed by a State only if the maintenance of the coin-operated gaming device by the person liable for the tax imposed by section 4461 on the place or premised occupied by him does not violate any law of such State.

(2) Credit not to exceed 80 percent of tax.--The credit under subsection (a) with respect to any coin-operated gaming device shall not exceed 80 percent of the tax imposed by section 4461 with respect to such device.

(c) Special provisions for payment of tax.--Under regulations prescribed by the Secretary or his delegate, a person who believes he will be entitled to a credit under subsection (a) with respect to any coin-operated gaming device for any year shall, for purposes of this subtitle and subtitle F, satisfy his liability for the tax imposed by section 4461 with respect to such device for such year if--

(1) on or before the date prescribed by law for payment of the tax imposed by section 4461 with respect to such device for such year, he has paid the amount of such tax reduced by the amount of the credit which he estimates will be allowable under subsection (a) with respect to such device for such year, and

(2) on or before the last day of such year, pays the amount (if any) by which the credit for such year is less than the credit estimated under paragraph (1).

§ 6001. Notice or regulations requiring records, statements, and special returns

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

§ 6806. Occupational tax stamps

Every person engaged in any business, avocation, or employment, who is thereby made liable to a special tax (other than a special tax under subchapter B of chapter 35, under subchapter B of chapter 36, or under subtitle E) shall place and keep conspicuously in his establishment or place of business all stamps denoting payment of such special tax.

§ 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7202. Willful failure to collect or pay over tax

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

APPENDIX U

MAIL IMPOUNDMENT:

FALSE REPRESENTATIONS AND LOTTERIES

39 U.S.C. § 3005

D.F.D.

I. LEGISLATIVE HISTORY

Section 3005 of Title 39 of the United States Code is the current version of a statute which dates back over a hundred years. It enables the Postal Service (formerly the Post Office Department) to impound mail, which is addressed to someone it suspects is engaged in a lottery or is in the business of obtaining money through the mail by fraudulent means.

The section was first added to the laws pertaining to the Post Office Department in the general revision and consolidation of postal laws which took place in 1872.[1] The provision, § 300 of that Act, enabled the Postmaster General, "upon evidence satisfactory to him," to forbid local postmasters from paying money orders or delivering registered letters to those engaging in "any fraudulent lottery, gift-enterprise, or scheme for the distribution of money . . . by lot, chance, or drawing of any kind" or "conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretences . . . ."[2] As the nineteenth century was drawing near its three-quarter mark, Congress was showing signs of the lottery disfavor, which would sweep it twenty years later. Cognizant of a Fourth Amendment problem, however, the authors of the section did add an important proviso:

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[1]Act of June 8, 1872, ch. 335, 17 Stat. 283.

[2]Id. § 300, 17 Stat. at 322.

> That nothing in this act contained shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.

When the Revised Statutes were published several years later, the provisions regarding registered letters and money orders were split into two sections and included in the postal laws title as §§ 3929 and 4041.[3] The proviso against opening mail was carried over into each section, but only one minor word change was made.[4]

By 1890, Congress was beginning to be particularly concerned about the infamous Louisiana lottery and enacted a special amendment to the two sections to add to the Federal Government's arsenal of antilottery weapons. The question of the morality of lotteries was not even debated. As the House Report on the bill curtly stated:

> The day is passed for such discussion. It is admitted, or probably not seriously denied, that the existence of such swindling schemes is promotive of the spirit of gambling, and results in serious disaster to many citizens.[5]

The Louisiana lottery was the principal concern. Under §§ 3929 and 4041 of the Revised Statutes the Postmaster General, in an attempt to do in the lottery, had forbidden the delivery to its officers of registered letters or money orders. The lottery, however, promptly announced that

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[3]Rev. Stat. §§ 3929, 4041 (1875 ed.)

[4]The original statute referred to any "person, firm, or corporation," while the Revised Statutes version included only "person." The word "person" was defined in § 1 of the Revised Statutes, however, to include partnerships and corporations.

[5]H.R. Rep. No. 2844, 51st Cong., 1st Sess. 5 (1890). The Senate report for the bill, S. Rep. No. 1677, 51st Cong., 1st Sess.

"thereafter registered letters and money-orders could be sent to the New Orleans National Bank," which would serve as its agent,[6] and the bank was successful in obtaining an injunction restraining the local postmaster from carrying out a subsequent fraud order, on the grounds that it was beyond the scope of the statute.[7] It was to counter this "giant monopoly" which had reached "enormous and alarming proportions" that the amendments were proposed.[8]

The sections as amended were reenacted to read as follows. The underlined portions were added by amendment.

> SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any postoffice at which registered letters arise directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General shall prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation,

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[6] H. R. Rep. No. 2844, 51st Cong., 1st Sess. 4 (1890).

[7] New Orleans National Bank v. Merchant, 18 F. 841 (C.C.E.D.La. 1884)

[8] H. R. Rep. No. 2844, supra note 6, at 1. The Report contained some evidence showing the tremendous volume of mail flowing to the Louisiana lottery, which drew customers nationwide.

or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of said agency in any other legal way satisfactory to himself.

SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money-orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money-orders. But this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money-order to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way.[9]

In addition to these changes, the 1890 amendments also deleted the adjective "fraudulent" before the word "lottery" in each of the two sections.

The provisions were aimed directly at the Louisiana operation and its earlier evasion of the statutes. Mail to agents of persons conducting lotteries or other fraudulent schemes could be impounded, and the mere advertisement of the agency was sufficient grounds for the action. Although a few House members proposed minor amendments and some

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[9]Act of September 19, 1890, ch. 908, § 2, 26 Stat. 466.

others seized the opportunity to take the floor denouncing lotteries,[10] the measure passed the House with little substantive dissent, was approved by the Senate without debate, and was signed into law by the President.[11]

Succeeding years saw almost no statutory mention of the prior statutes,[12] and by 1952 they were included, almost precisely as worded in 1890, as §§ 259 and 732 of Title 39 of the United States Code.[13] When that Title was revised and enacted into positive law in 1960,[14] the provisions were combined into one section, renumbered 39 U.S.C. § 4005, with slight language revisions.[15] A more specific post office order was authorized, to replace the old "fraud" order which was felt to be inappropriate in

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[10] 21 Cong. Rec. 8698-8721 (1890). One Representative called the Louisiana lottery a "hydra-headed monster, which is demoralizing the young, the poor, and the needy throughout the country, as no other institution in America has ever done." Id. at 8705 (remarks of Representative Moore).

[11] 21 Cong. Rec. 10641 (1890).

[12] One Act, signed in 1895, prohibiting the interstate shipment of lottery tickets, did provide that §§ 3929 and 4041 would "apply in furtherance of this Act." Act of March 2, 1895, ch. 191, § 2, 28 Stat. 963.

[13] The words "mail matter" were substituted for "letters" in § 259 (formerly § 3929) and that section was expanded to cover ordinary letters as well as registered ones.

[14] Pub. L. No. 82-682, September 2, 1960, 74 Stat. 578.

[15] § 4005 was almost identical to the current 39 U.S.C. § 3005, which is printed in section III. Subsection (a)(1) was taken from the previous § 259 (Rev. Stat. § 3929) and subsection (a)(2) was the ascendant of § 732 (Rev. Stat. § 4041). The provision relating to public advertisements as sufficient evidence was included as subsection (b).

such circumstances,[16] and a due process clause was added to the statute, although Post Office practice for many years had been to conduct hearings before impounding mail.[17] The requirement that no letters be opened was deleted from this and other sections of the Code, and added as a separate section by itself.[18]

In 1970 the Post Office Department was changed by statute to the United States Postal Service, a corporation.[19] The statute was again reenacted with a number change,[20] and the words "Postal Service" were inserted in lieu of "Postmaster General."

Section 3005 was amended again just recently, when Congress enacted a law designed to protect State-conducted lotteries from the various Federal statutory provisions.[21] The new law adds a subsection (d) to the provision, exempting general circulation newspapers and state lottery mail from the impoundments authorized by § 3005, so long as such mail is directed to addressees within the lottery state.

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[16] H.R. Rep. No. 36, 86th Cong., 1st Sess. A45 (1959); S. Rep. No. 1763, 86th Cong., 2d Sess. A45 (1960).

[17] See section II, infra.

[18] 39 U.S.C. § 4057 (1964), now contained as part of 39 U.S.C. § 3623(d).

[19] Pub. L. No. 82-682, supra note 14. See H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 3649; and S. Rep. No. 912, 91st Cong., 2d Sess. (1970).

[20] The provision is now numbered 39 U.S.C. § 3005.

[21] Pub. L. No. 93-583, January 2, 1975.

II. COURT AND ADMINISTRATIVE INTERPRETATION

Judicial review of impoundment orders under 39 U.S.C. § 3005 is possible by means of a suit to enjoin the local postmaster from carrying out the order.[22] Most cases which have arisen on such judicial review concern procedural requirements and constitutional challenges, and virtually all arise not in the lottery context but in situations where the post office impounded mail which contained fraudulent advertising.

In the landmark case of Champion v. Ames, [23] the Supreme Court held lottery mail statutes as valid exercises of congressional power under the commerce clause[24] and this statute has not been attacked on that ground again. Several cases have arisen, however, challenging the provision on First Amendment grounds. In Public Clearing House v. Coyne,[25] the Supreme Court turned back First Amendment and Due Process challenges to the section, holding:

> We find no difficulty in sustaining the constitutionality of these sections. The postal service is by no means an indispensable adjunct to a civil government . . . .

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[22] Williams v. Fanning, 332 U.S. 490, 494 (1947). The Postmaster General himself is not an indispensable party to the equity proceeding. The Supreme Court decided more than sixty years ago that a postal fraud order is not directly reviewable via a writ of certiorari. Degge v. Hitchcock, 229 U.S. 162 (1913).

[23] 188 U.S. 321 (1903).

[24] Id. at 354.

[25] 194 U.S. 497 (1904).

> It is not . . . a necessary part of the civil government in the same sense in which the protection of life, liberty, and property, the defence of the government against insurrection and foreign invasion, and the administration of public justice are; but it is a public function assumed and established by Congress for the general welfare . . . . The legislative body in thus establishing a postal service may annex such conditions to it as it chooses.[26]

Notwithstanding this decision, Justice Holmes and Brandeis launched a vigorous First Amendment attack on the statute years later in a dissenting opinion in a subsequent case, saying:

> The transmission of letters by any general means other than the postoffice is forbidden by the Criminal Code, §§ 183-185. Therefore, if these prohibitions are valid, this form of communication with people at a distance is through the postoffice alone; and notwithstanding all modern inventions letters still are the principal means of speech with those who are not before our face. I do not suppose that anyone would say that the freedom of written speech is less protected by the First Amendment than the freedom of spoken words. Therefore, I cannot understand by what authority Congress undertakes to authorize anyone to determine in advance, on the grounds before us, that certain words shall not be uttered. Even those of us who interpret the Amendment most strictly agree that it was intended to prevent previous restraints . . . . If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so.[27]

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[26] Id. at 506.

[27] Leach v. Carlile, 258 U.S. 138, 140-41 (1922) (Holmes and Brandeis, dissenting)

Earlier decisions upholding the statute's constitutionality, however, prevailed. In Donaldson v. Read Magazine,[28] the Court upheld a fraud order impounding the mail of magazine editors who were conducting a puzzle contest, and observed, without further comment, that postal impoundment statutes

> manifest a purpose of Congress to utilize its powers, particularly over the mails and interstate commerce, to protect people against fraud. This governmental power has always been recognized in this country and is firmly established.[29]

Recent lower court opinions have continued to uphold the statute's constitutionality, generally relying on the reasoning that advertisers "possess no constitutional right to disseminate false and misleading materials. Therefore, Congress has the power to prohibit such deception through appropriate legislation."[30]

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[28] 333 U.S. 178 (1948).

[29] Id. at 190.

[30] U.S. Postal Service v. Beamish, 466 F.2d 804, 807 (3d Cir. 1972). See also Lynch v. Blount, 330 F. Supp. 689, 694 (S.D.N.Y. 1971), aff'd 404 U.S. 1007 (1972), and Cherry v. Postmaster General, 272 F. Supp. 982, 986 (D.C.Puerto Rico 1967).

Fraud orders by the Postmaster General are rarely reviewed by the courts, except in constitutional and procedural cases. Courts must not overturn such an order, the Coyne decision held, unless "the Postmaster General has exceeded his authority or his action is palpably wrong."[31] Early cases did establish the requirement that a fact-finding hearing must be conducted before mail can be withheld,[32] but the latitude of the Postmaster General is wide.[33] Almost never are such hearings declared a violation of Due Process, although there are rare cases such as Jeffries v. Oleson,[34] where an order was thrown out because the Postmaster General refused to move a hearing from Washington, D.C., even though a California addressee was involved. Usually, however, the attitude of the courts is much less strict. As a District Court noted in the recent case of Lynch v. Blount:[35]

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[31] Id. note 25, at 509. See also Crane v. Nichols, 1 F.2d 33, 36 (S.D.Texas 1924).

[32] Donnell Mfg. Co. v. Wyman, 156 F. 415 (C.C.E.D.Mo. 1907); Elliott Works, Inc. v. Frisk, 58 F.2d 820 (S.D.Ga. 1932). In the more recent case of Greene v. Kern, 174 F. Supp. 480 (D.N.J. 1959), aff'd 269 F.2d 344 (3d Cir. 1959), a Federal District Court noted that:

> The impounding of mail prior to determination of fraud would involve the imposition of a penalty upon the addressee without an opportunity to be heard and an adjudication upon evidence. Such interim impounding would also effect a deprivation of property without just cause and without fair compensation.

Id. at 484.

[33] Elliott Works, Inc. v. Frisk, 58 F.2d 820, 824 (S.D.Ga. 1932). See also 39 C.F.R. § 952.18.

[34] 121 F. Supp. 463 (D.C.Cal. 1954). The court held that a fair hearing required "a reasonably fair opportunity to be present at the time and place fixed, to cross-examine any opposing witnesses, to offer evidence, and to be heard at least briefly in defense." Id. at 475. Post Office regulations now provide for a change of hearing location when necessary. 39 C.F.R. § 952.15.

[35] 330 F. Supp. 689 (S.D.N.Y. 1971), aff'd 404 U.S. 1007 (1972).

> A scheme to defraud by false representations can be objectively proved by evidence in an administrative hearing without going through the delay of a trial before a judge. Good old-fashioned schemes to defraud by the use of false representations are as old as the hills, and as easily recognized once the issues of credibility have been resolved . . . .
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> . . . . We doubt that any politician, religious group, or legitimate businessman has or will feel threatened by the authority granted to the Postmaster General by the provisions of Section 3005.[36]

To facilitate such hearings, the Postal Service has issued regulations prescribing the procedure to be followed, including provisions for notice of hearing, service of process, filing of an answer, etc.[37] There is also a procedure for appeal.[38] 39 U.S.C. § 3007, moreover, provides that the Postal Service may, upon a showing of "probable cause," obtain a temporary restraining order directing the detention of the suspected mail pending completion of the full hearing.

Most cases that have been decided under the statute on the merits have centered on the question of the Postmaster General's latitude to decide the question of what constitutes fraudulent advertising. In the early case of American School of Magnetic Healing v. McAnnulty,[39] the Supreme Court overturned a postal fraud order directed at a corporation which assumed to cure the sickly through the power of the mind. After observing that medical opinion on the efficacy of such a process differed, the Court set down the general rule:

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[36] Id. at 695.

[37] 39 C.F.R. §§ 952.1-952.26, promulgated under the authority of 39 U.S.C. § 401. The regulations were adopted by 36 Fed. Reg. 11563 (1971) and have been amended several times since.

[38] 39 C.F.R. § 952.25.

[39] 187 U.S. 94 (1902).

> Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter.[40]

The application of this rule, however, has broadened and narrowed with the changing personnel of the Court. In 1922, the Postmaster General's determination of fact was not for the review of the Court, [41] while by 1949 the Postmaster General could not "condemn new ideas as fraudulent solely because some cling to traditional opinions with unquestioning tenacity."[42] In any event, the rule has been often repeated that the false statement must be material and substantial, something beyond mere "puffing," to warrant the sanction of withholding mail, [43] and that intent to mislead is required.[44]

Practically all of the decisions concerning the lottery portion of the statute, however, have been Opinions of the Attorney General and not court cases. In 1890, the Postmaster General inquired whether he could use the statute in the case of a newspaper which was conducting a contest which would award prize to those who could accurately guess

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[40] Id. at 106.

[41] Leach v. Carlile, 258 U.S. 138, 139 (1922).

[42] Reilly v. Pinkus, 338 U.S. 269, 274 (1949).

[43] See, e.g., Lynch v. Blount, supra note 35, at 693. See, however, the decision in Gottlieb v. Schaffer, 141 F. Supp. 7, 16 (S.D.N.Y. 1956), which noted that

> The fact that informed and sophisticated persons would readily recognize, laugh off, or even be amused by, obviously false and absurd statements in an advertisement does not detract from their power to deceive the ignorant, gullible, and less experienced.

[44] Reilly v. Pinkus, supra note 42. See also G.J. Howard Co. v. Cassidy, 162 F. Supp. 568, 572 (E.D.N.Y. 1958).

the numbers of votes which the Democratic and Republican candidates would receive in the upcoming off-year elections. The Attorney General decided that the statute could not be so invoked:

> It is clear that the statute is directed against only such enterprises as are "dependent upon lot or chance." It will hardly be contended that the enterprise under consideration was dependent upon lot. Was it dependent upon chance within the meaning of the statute? It seems to me this question must be answered in the negative.[45]

Even though the law was originally said to be penal in nature and thus strictly construed,[46] later Attorneys General have interpreted it broadly on occasion. Thus, one held that a lottery "covers any determination of gain or loss by the issue of an event which is merely contrived for the occasion,"[47] and another held that a contest conducted at the St. Louis World's Fair to award prizes to those guessing the total attendance at the Fair was "largely a matter of chance" and thus a lottery.[48] In cases where the scheme is found to be a lottery, there is no requirement of intent, as is the case in the fraudulent advertising section of the statute.[49]

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[45] 19 Op. Att'y Gen. 681 (1890). See also 23 Op. Att'y Gen. 207 (1900) and 23 Op. Att'y Gen. 492 (1900).

[46] Id. at 681, 682. See also 23 Op. Att'y Gen. 519 (1901).

[47] 21 Op. Att'y Gen. 317 (1896).

[48] 25 Op. Att'y Gen. 290 (1906).

[49] 24 Op. Att'y Gen. 568 (1903).

Use of the statute to bar delivery of mail to lotteries has entered a state of stagnation following the demise of the Louisiana lottery. No Attorney General opinions on the subject have been issued for several decades, and there has apparently been only one reported case on the statute as it pertains to lotteries in the past fifty years.[50]

III. TEXT OF THE STATUTE

§ 3005. False representations; lotteries

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which--

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

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[50] National Conference on Legalizing Lotteries v. Farley, 96 F.2d 861 (D.C. Cir. 1938). There have also been a few tax cases, holding that businessmen defending themselves from mail fraud orders can deduct the legal fees as "ordinary and necessary" business expenses. Commissioner v. Heininger, 320 U.S. 467 (1945).

In 1970, the Postal Service adopted a regulation to help define lotteries and false representations. 39 C.F.R. § 123.4.

(c) As used in this section and section 3006 of this title, the term "representative" includes an agent or representative acting as an individual or as a firm, bank, corporation, or association of any kind.

APPENDIX V

"GAMBLING"

as used in the

DEFINITION OF "ORGANIZED CRIME"

for the

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

42 U.S.C. § 3781

J.J.D.

I. LEGISLATIVE HISTORY

The Omnibus Crime Control and Safe Streets Act of 1968[1] established the Law Enforcement Assistance Administration (LEAA). The LEAA was created to make law enforcement and criminal justice efforts better coordinated, intensified, and more effective at all levels of government.[2] One of the objectives of the LEAA is to assist in the fight against organized crime. Committees of the Congress had repeatedly found gambling to be a major activity and revenue source for organized crime.[3] In defining organized crime, Congress, therefore, included "gambling" in the list of illegal services provided by organized crime. This definition is found in subchapter VI, section 3781, of Title 42.

II. TEXT OF STATUTE

§ 3781. Definitions.
As used in this chapter --

(b) Organized Crime.

"Organized crime" means the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.

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[1]Pub. L. No. 90-351, 82 Stat. 209.

[2]42 U.S.C. § 3701.

[3]See, e.g., S. Rep. No. 1310, 87th Cong., 2nd Sess. 43 (1962).

APPENDIX W

DEVELOPMENT OF THE LAW OF GAMBLING

THE UNITED STATES POSSESSIONS:

American Samoa
The Canal Zone
Guam
Trust Territory of the Pacific
The Virgin Islands

M.J.H.

SUMMARY

The development of the law of gambling has varied greatly among the United States possessions. Most of the territories were initially governed by the U.S. Navy, which generally enacted laws comprehensively prohibiting gambling. Decriminalization of gambling has since progressed at different paces. For example, American Samoa prohibits all gambling with the exception of charitable raffles, while the Trust Territory of the Pacific Islands has apparently never enacted legislation prohibiting gambling of any kind.

I. AMERICAN SAMOA

American Samoa is an unincorporated territory of the United States, lying approximately 2,300 miles southwest of Hawaii and 1,600 miles northeast of the northern tip of New Zealand. This series of islands was first discovered by Dutch Admiral Jacob Roggeveen in 1722. The Samoan islands remained unimportant to the Western world, however, until the European nationalist struggle of the 19th century. The United States first expressed an interest in the islands in 1878 when they acquired the right to maintain a naval station in Pago Pago Bay. In 1899, Britain, Germany, and the United States agreed to partition the islands, ceding Eastern Samoa to the United States.

American Samoa was administered by the United States Navy until July 1, 1951. The commandant of the Navy was empowered to enact

regulations for the government of the islands.[1] Since the Samoans are a gay people, fond of dancing, games, feasting, and entertainment, it is not surprising that one of the first regulations promulgated was designed to curb gambling.

In 1903, Commander E. B. Underwood enacted a regulation which comprehensively outlawed all gambling.[2] Unlike early American laws governing gambling, no distinction was drawn between public and private gambling. The professional gambling entrepreneur and the amateur player were accorded identical treatment under the law. The maximum penalty for gambling was a $250 fine and imprisonment at hard labor for six months.[3] Persons convicted of cheating at any game were subject to a similar sanction.[4]

In 1951, administration of American Samoa was placed under the jurisdiction of the Secretary of the Interior. The governor of the islands is presently appointed by the Secretary of the Interior, though one house of the Samoan bicameral legislature is elected by universal suffrage.

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[1] 1917 Codification of the Regulations and Orders for the Government of American Samoa, § 3(4).

[2] Id. § 65.

[3] Id. § 65(1).

[4] Id. § 65(3).

The Samoans have continued to embrace their native customs despite the impact of Western culture. The natives continue to live in a cooperative, communal mode of life in which all necessities are provided for within the extended family. The law governing gambling has also remained unchanged. All forms of gambling are currently prohibited and violators are subject to a maximum $250 fine and six months imprisonment.[5] In 1961, an exception to this general prohibition was enacted which permitted the "occasional playing of bingo" and raffles when the profits from such activities are used for religious, educational or eleemosynary purposes.[6]

II. THE CANAL ZONE

The Canal Zone, situated in the Isthmus of Panama, is unique among the United States possessions in that it is, in effect, a government reservation. Only business directly related to the canal's operation is permitted, and generally only persons employed by the United States Government may reside in the zone.

The Isthmus of Panama was first discovered by Vasco Nunez de Balboa in 1513 during his search for a water route leading to the Indian Ocean. The isthmus remained under Spanish rule until 1923 when Central America severed its political connections with Spain. In February of 1881, a French company undertook the construction of an isthmian canal. The project proved disastrous. On November 3, 1903, in a bloodless

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[5] 15 A.S.C. § 521(a) (1973).

[6] Id. § 521(b).

revolt, Panama declared itself independent of Colombia. The United States, anxious to secure the rights to build, operate, and control a canal in Panama, recognized the new republic three days after its birth. The treaty between the United States and the Republic of Panama granted America full control of the Canal Zone just as though it were the actual sovereign of that territory.

The building of the Panama Canal was a tedious and laborious project, beset with disease and perilous working conditions.[7] Among the lesser difficulties plaguing the project was the presence of gambling. Willis Johnson observed:

> Gambling had long been one of the chief vices of Panama. It was one of the worst features of the regime of the French canal companies. The purveyor of lottery tickets and the tout for gambling dens dogged the heels of the paymaster, and a large share of the wages paid went quickly into the pockets of professional gamblers.[8]

In order to expediate the work of canal construction, the United States promulgated laws to regulate gambling within the Canal Zone.[9] American concern over gambling is evident in the fact that this legislation was among the first laws enacted by the Isthmian Canal Commission.

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[7]During the ten year construction period more than 6,000 persons lost their lives.

[8]W. Johnson, Four Centuries of the Panama Canal, 338 (1906).

[9]1904 Report of the Isthmian Canal Commission, Act No. 4, Section 9 stated that ". . . an emergency exist[ed] . . ."

Existing franchises to maintain lotteries were declared null and void,[10] and the establishment of any lottery was declared unlawful.[11] Stiff penalties were provided to enforce this prohibition. For example, a person convicted of establishing a lottery in the Canal Zone was subject to a maximum fine of $1,000 and five years imprisonment.[12] Heavier penalties were provided for subsequent lottery violations. Persons who aided or were employed by lottery entrepreneurs were subject to lesser, though substantial, sanctions.[13]

Though it was expressly forbidden to sell any foreign lottery tickets in the Canal Zone,[14] an exception was made for religious and charitable organizations. Such organizations were authorized to conduct raffles and gift enterprises if they secured a permit from the governor.[15] A permit would issue, however, only if all the proceeds were to be used for charitable purposes, and if the articles to be awarded as prizes were acquired by donation rather than by purchase.[16]

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[10] 1904 Report of the Isthmian Canal Commission, Act No. 3, § 1.

[11] Id. § 2.

[12] Id. § 3.

[13] Id. § 4. Persons who sold tickets in a lottery were subject to a fine not exceeding $500 and/or imprisonment not exceeding two years. Identical penalties were provided for persons who published an account of or advertised any lottery. Id. §§ 5,6.

[14] Id. § 6.

[15] Id. § 10.

[16] Id.

Both professional and social gambling were enjoined and stiff penalties provided.[17] The professional gambler and the amateur player were subject to identical liability.[18] Unlike early American gambling laws, no distinction was drawn between gambling in private as opposed to public places.

Persons who engaged in gambling for a livelihood were deemed common gamblers and subject to a fine not exceeding $1,000 and imprisonment for six months.[19] The courts were authorized to imprison a common gambler, in default of any fine imposed, at a rate of one day per dollar.[20] Thus, if a common gambler was arrested after a run of poor luck, he might languish in jail for over three years.

Provision was also made authorizing a civil action to recover any property or money lost by gambling. Both the operators and players could be sued and were considered jointly and severally liable.[21]

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[17] Id. Act No. 4.

[18] Id. §§ 1, 2, 5. Such convicted persons were subject to a fine not exceeding $500 and/or imprisonment for one year. A second offender was liable for a fine not exceeding $1,000 and/or two years imprisonment.

[19] Id. § 6.

[20] Id. § 7.

[21] Id. § 8.

The validity of these laws was challenged in the very first case heard by the Supreme Court of the Canal Zone. In Canal Zone v. Christian,[22] the defendant had been operating roulette tables by virtue of a concession granted by the Republic of Panama. Rejecting the defendant's argument that the act prohibiting gambling was unauthorized by the Panamanian Treaty, Judge Gudger concluded that the United States had absolute control over the Canal Zone free from any privileges previously conferred by the Republic of Panama. The prohibition of gambling within the zone was therefore valid.[23] In Willis Johnson's words, this decision represented "[a] victory . . . for morals and thrift in the Canal Zone . . . ."[24]

Though the canal was completed in 1914, the gambling laws remained unchanged until 1932. In 1932, penalties for conducting a gambling game were slightly reduced and the law punishing mere participants in the game repealed. Social gambling apparently was permitted, though the issue remained unresolved for nearly ten years. In Government v. Chen,[25] the Court concluded that such gambling was not enjoined by any statute and was therefore lawful.

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[22] 1 C. Z. 1 (1905).

[23] Id. at 5.

[24] W. Johnson, Four Centuries of the Panama Canal, 338 (1906).

[25] Crim. No. 2706, D. C. C. Z. Cris. Div. (1942).

The laws governing lotteries were also amended in 1932. Lotteries remained unlawful, except for charitable raffles, but the penalties for lottery offenses were slightly reduced.[26] The term lottery was broadly defined to include "any lottery, policy-lottery, gift concert or similar enterprise of any description by whatever name, style or title the same may be designated or known."[27] Provision was also made for facilitating proof upon trial for a violation of the lottery laws. There was no need to establish the existence of a purported lottery if there was proof of the sale of a lottery ticket.[28]

The 1934 Codification of the Canal Zone laws omitted the earlier provision authorizing a person to recover any money lost in gambling through a civil action. No explanation was offered for the deletion of this law, nor has it been included in any subsequent codification. Presently, authorized gambling in the Canal Zone is restricted to social gambling and charitable raffles.

III. GUAM

Guam is an unincorporated territory of the United States located approximately 1400 miles southeast of Tokyo in the Pacific Ocean. Ferdinand Magellan is credited with discovering the island in 1521, though it was not brought under Spanish rule until the late 17th century. Guam remained a Spanish possession until 1898, when it was ceded to the

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[26] 1934 Canal Zone Code, Title 5, §§ 472-477.

[27] Id. § 471.

[28] Id. Title 6, § 386.

United States under the Treaty of Paris, an act which ended the Spanish-American War. The island remained under naval administration until 1950, with the exception of three years of Japanese occupation during World War II. Though a civil government was instituted in 1950, the governor continues to be appointed by the President of the United States with the advice and consent of the Senate. The legislature is popularly elected. Any legislation promulgated, however, is subject to annulment by the U. S. Congress. Guamanians are considered citizens of the United States, but they do not have the right to vote in national elections.

Captain Richard P. Leary, U.S.N., became the first American Governor of Guam on August 7, 1899. The first orders issued under the new naval administration were designed to foster order among the spirited natives. Orders curtailing the sale of liquor, prohibiting public intoxication, forbidding religious processions in the streets and outlawing cockfights on Sunday were promulgated. Prominent among the very first laws enacted was General Order No. 19 which was issued to "check the pernicious habit of gambling that prevail[ed] among the young children and to discourage the habit among adults."[29]

The written law of Guam from 1899 to 1951 consisted of a variety of typewritten and mimeographed executive orders and naval orders. Thus the development of gambling during this period is quite obscure, though there exists no indication that the initial law generally prohibiting gambling was repealed.

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[29]P. Carano and P. Sanchez, A Complete History of Guam, 191 (1964).

The uncertainty of the status of gambling in Guam was clarified in 1953 upon the publication of a penal code. Both professional and private gambling were outlawed but only de minimis sanctions were imposed.[30] The penalties for gambling offenses in Guam are the most lenient ones imposed throughout the United States possessions. Mere gambling participants are subject to a maximum $100 fine and three months imprisonment.[31] The entrepreneur conducting the game or owning the gambling devices is subject to a maximum $500 fine and six months imprisonment.[32]

Gambling has been statutorily defined as:

> . . . a contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivances, and that one shall be the winner and the other or others the loser or losers of money or other objects.[33]

Cheating at any of the proscribed games is loathed and treated as a theft of property of like value.[34] The 1953 code further punished any witness who refused to attend a trial for gambling offense[35] and guaranteed that such testimony would not be used in any subsequent prosecution against him or her.[36]

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[30] 1953 Guam Penal Code § 330.

[31] Id.

[32] Id. § 330a.

[33] Id. § 330.

[34] Id. § 332. Section 489 of the penal code states that theft of money exceeding $50 constitutes grand theft and is punishable by a fine not exceeding $10,000 and/or imprisonment not exceeding ten years.

[35] Id. § 333.

[36] Id. § 334.

Cockfighting, an inveterate pastime of the Guamanians, was expressly excepted from the prohibition against gambling. Wagering on cockfights is lawful among persons over seventeen years old and permitted only at licensed cockpits.[37] Penalties were imposed on persons who operated a cockpit without a license[38] or who drugged or injured any gamecock.[39]

Lotteries were declared unlawful, and mild sanctions were imposed on persons who established or aided a lottery.[40] A lottery was statutorily defined as:

> . . . any scheme for the disposal or distribution of money by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same be known.[41]

An exception was made, however, for lotteries which had as their sole purpose a charitable or worthy public cause.[42] Such lotteries required the written approval of the governor, and all proceeds were required to be devoted exclusively to the charitable cause.[43] A strict accounting

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[37] Id. § 330.

[38] Id. § 337. Violators were subject to a $50 fine.

[39] Id. The sanction was a fine exceeding $500 and/or imprisonment not exceeding one year.

[40] Id. §§ 320-323. Violators were subject to a fine not exceeding $500 and/or six months imprisonment.

[41] Id. § 319.

[42] Id. § 324.

[43] Id.

was to be kept of all such lottery receipts,[44] and persons convicted of violating any provision regulating charitable lotteries were subject to comparatively heavy sanctions.[45]

The 1953 code notably omitted a provision authorizing the seizure and destruction of gambling apparatus and devices. There is no legislation in force which permits the recovery of money lost through gambling. Also, the sanctions imposed for gambling are de minimis. It is questionable, then, whether the professional gambler finds it troublesome to ply his trade in Guam.

The law of gambling has remained substantially unchanged since 1953. In 1960, the legislature enacted the Bingo Law.[46] This law stated, in effect, that bingo constituted a form of lottery and was prohibited except for religious, charitable, fraternal and nonprofit organizations.[47]

A more important amendment in 1960 concerned the regulation of gambling on United States military bases. Approval of the governor of Guam for lotteries conducted solely within military reservations of the United States was totally dispensed with.[48] This discrimination towards lotteries is unique among the United States possessions. There is presently no indication, however, that the gambling laws will be further liberalized for military personnel.

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[44] Id. § 327.

[45] Id. § 329. Violators were subject to a fine not exceeding $1,000 and/or imprisonment not exceeding one year.

[46] 1970 Guam Penal Code § 324.5.

[47] Id. § 324.1.

[48] Id. § 324.

Presently, authorized gambling in Guam is restricted to betting on cockfights and charitable lotteries.

IV. TRUST TERRITORY OF THE PACIFIC ISLANDS

The Trust Territory of the Pacific Islands is a United Nations trust territory administered by the United States. Located in the Western Pacific Ocean, the territory includes the Marshall, Caroline, and Mariana Islands. The Marianas were discovered by Ferdinand Magellan in 1521, though not claimed by Spain until the end of the 17th century. The three islands were purchased by Germany after the Spanish-American War and subsequently seized by Japan immediately after the beginning of World War I. After World War II, these islands were designated a strategic trusteeship to be administered by the United States. The territory was governed by the U. S. Navy from 1947 until July 1, 1951. The present government is headed by a High Commissioner, appointed by the President of the United States and responsible to the Secretary of the Department of the Interior. Locally elected congresses do function in all districts of the trust territory.

The trusteeship agreement for the Trust Territory directs that the administering authority ". . . give due recognition to the customs of the inhabitants in providing a system of law for the territory."[49] Furthermore, the governing body is instructed to ". . . institute such other regulations as may be necessary to protect the inhabitants against social abuses."[50]

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[49] Trusteeship Agreement for the Trust Territory of the Pacific Islands, U. W. T/Agreement/11, at 3, as found in VI A U. N. Trusteeship (1946/1947/1951).

[50] Id. at 4.

The Trust Territory of the Pacific Islands is unique among United States possessions to the extent that it apparently has no laws prohibiting gambling of any type. The naval administration that governed the islands from 1947 to 1951 failed to promulgate any orders prohibiting gambling, although it did enact detailed legislation prohibiting other crimes.[51] While the Trust Territory of the Pacific Islands does have an explicit criminal code published in 1952 and 1970, the code lacks, with one exception, any provision that might have bearing upon gambling. The exception is a section which prohibits "cheating".[52]

V. THE VIRGIN ISLANDS

The Virgin Islands are an unincorporated territory of the United States, lying between the Caribbean Sea and the Atlantic Ocean. The main islands comprising the American Virgin Islands are St. Thomas, St. Croix, and St. John. The islands, discovered by Christopher Columbus in 1493, were named after the virgins of St. Ursula, the sailor's patron saint. The islands were under Danish rule from 1672 until 1917, when the United States purchased them from Denmark because of their strategic position with respect to the American mainland. The U. S. Navy managed the islands' affairs until 1931, when a civil administration was established. Presently, the Virgin Islands' legislature is popularly elected, and the governor is appointed by the President of the United States. The islanders are United States citizens but are not permitted to participate in United States national elections.

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[51] See Interim Regulations of the Trust Territory of the Pacific Islands, Criminal Code 5-48 (1948).

[52] 1952 Code of the Trust Territory of the Pacific Islands, § 392.

The first codes promulgated in the Virgin Islands after it became a United States territory contained provisions enjoining gambling. Persons convicted of conducting or playing at any game of chance were subject to a fine not exceeding $100 and/or imprisonment not exceeding six months.[53] Chance had to be the dominant rather than a mere subordinate element, however, in order to constitute a "game of chance".[54] Slightly heavier, though still de minimis, sanctions were imposed on anyone who maintained a gambling establishment.[55]

Gambling in the Virgin Islands persisted despite these prohibitions. Gambling had been similarly enjoined on the islands under Danish rule. In his Leaflets From the Danish West Indies, Charles E. Taylor observed that though ". . . [g]ambling is prohibited in St. Thomas . . . a great deal is said to go on privately."[56]

Lotteries enjoyed a more favored status in the islands. A lottery was statutorily defined as:

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[53] 1921 Code of St. Thomas and St. John, Title IV, c. 6, § 30; 1921 Code of St. Croix, Title IV, c. 6, § 32. Specific games such as faro, monte, roulette, fantan, poker, seven-and-a-half, twenty-one, and hoky-poky were expressly prohibited also. These were omitted in later amendments to these sections because they were thought to be included in the term "game of chance".

[54] 2 V. I. Op. A. G. 92 (1950).

[55] 1921 Code of St. Thomas and St. John, Title IV, c. 6, § 31; 1921 Code of St. Croix, Title IV, c. 6, § 33.

[56] C. Taylor, Leaflets From the Danish West Indies: Descriptive of the Social, Political, and Commercial Condition of These Islands, 50 (1899).

> . . . any scheme for the disposal or distribution of money or property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property . . . upon an agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, gift enterprise, or by whatever name the same may be known.[57]

It was unlawful to establish any lottery other than an official lottery of the Virgin Islands, though the Director of Police was expressly authorized to permit raffles in good faith.[58]

St. Thomas had authorized a lottery under Danish rule which proved financially unsuccessful.[59] In a discussion concerning lotteries, Charles E. Taylor observed: "To the excitable natives of the West Indies there is a peculiar fascination about this kind of gambling, or indeed, any other, whether cockfighting, the roulette, or Spanish monte."[60]

In 1937, St. Thomas and St. John enacted ordinances creating an official lottery under the direct supervision of the governor of the Virgin Islands.[61] A lottery board was established to recommend lottery regulations to the governor and to determine the number of tickets to be drawn, the value of each ticket and the prizes of each drawing.[62] Each lottery drawing was to be directed by a "Board of Drawing" composed of

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[57] 1921 Code of St. Thomas and St. John, Title IV, c. 6, § 27; 1921 Code of St. Croix, Title IV, c. 6, § 29.

[58] Id.

[59] C. Taylor, supra, note 56, at 50.

[60] C. Taylor, supra, note 56, at 50.

[61] Ord. Mun. C. St. Thomas and St. John approved June 1, 1937, § 1.

[62] Id. §§ 2-4.

"three persons of good reputation."[63] No more than one drawing of the lottery was permitted each month.[64] Lottery tickets could only be sold by appointed dealers who collected a surcharge on each fraction of a ticket sold by them.[65] The lottery tickets were deemed securities of the Virgin Islands' government, and persons convicted of forging them were subject to a maximum $2,000 fine and fifteen years imprisonment.[66]

In 1938, legislation was enacted in St. Croix authorizing the sale of lottery tickets and providing for payment of a percentage to the municipal coffers of St. Croix.[67]

The trend in the United States during the 1940's towards the illegal use of slot machines was legally evident in the Virgin Islands. In 1943, both St. John and St. Thomas enacted ordinances legalizing slot machines.[68] This liberalization of the gambling laws proved shortlived, however, for these municipalities passed legislation the subsequent year prohibiting slot machines.[69]

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[63] Id. § 12. These persons were appointed by the director of the lottery board and received the munificent sum of $7.50 as compensation.

[64] Id. § 5.

[65] Id. § 6.

[66] 1921 Code of St. Thomas and St. John, Title IV, c. 10, §§ 12-15.

[67] Ords. Mun. C. St. Croix, approved January 12, 1938 (Bill no. 62), § 3; February 28, 1938 (Bill no. 77); November 3, 1948 (Bill no. 51).

[68] See 15 V. I. C. § 1224 (1962) Revision Note.

[69] Id.

Subsequent attempts at decriminalization of gambling were more auspicious. By the end of 1951, all three municipalities had legalized parimutuel betting at licensed racetracks.[70] All horse racing was subject to the general supervision of a Racing Commissioner. All regulations proposed by the racing clubs had to be approved by the governor.[71] Seventy-five percent of the net profits realized belonged to the racing club, while the other twenty-five percent went to a "poor fund" in St. Thomas and St. John, and to the municipality on St. Croix.[72]

Parimutuel betting has been restricted to horse racing, despite attempts to extend its legitimacy.[73] In 1968, the legislature passed a law expressly prohibiting man-to-man betting on horse races at which parimutuel racing is permitted.[74]

Enforcement of the gambling laws was bolstered in 1961 upon the enactment of a provision authorizing the seizure of all gambling devices found in an offender's possession.[75] Prior to 1961, the only gambling devices which police were authorized to seize were slot machines.[76]

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[70] Ord. Mun. C. St. Thomas and St. John app. April 20, 1951 (Bill no. 34), § 2; Ord. Mun. C. St. Croix app. May 22, 1950 (Bill no. 32) §§ 2,3.

[71] 32 V. I. C. § 201 (1962).

[72] Ord. Mun. C. St. Thomas and St. John app. April 20, 1951 (Bill no. 34) § 3; Ord. Mun. C. St. Croix app. May 22, 1950 (Bill no. 32) § 3.

[73] In 3 V. I. Op. A. G. 12 (1954) the Attorney General stated that parimutuel betting on turtle races is illegal even though the proceeds are donated to a charitable cause.

[74] 32 V. I. C. § 202(b) (1973 Supp.).

[75] 14 V. I. C. § 1226 (1962).

[76] Amended Nickelodean Ordinance January 31, 1944. See 2 V. I. Op. A. G. 234 (1952).

In 1971, the Virgin Islands Lottery Commission was established. The commission consists of five members who are appointed by the governor with the advice and consent of the legislature. Members serve five-year terms and may be removed from office by the governor for cause. The commissioners are not compensated.[77]

The Lottery Commission is empowered to promulgate rules governing the operation of the official Virgin Islands Lottery[78] and is required to report monthly to the governor and legislature.[79] Among its various duties the commission is required to ". . . guard against the use of [the rules governing the Virgin Islands' Lottery] as a cloak for the carrying on of organized gambling and crime."[80] In order to implement this duty, the commission may utilize a subpoena power.[81]

The Virgin Islands Lottery Commission is under the immediate supervision of a director appointed by the governor. The position of Director is full time and is salaried. The director is responsible for the licensing of ticket agents and is authorized to enter into contracts for the operation of the lottery.[82]

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[77] 32 V. I. C. § 244 (1973 Supp.).

[78] Id. § 246(a).

[79] Id. § 246(b).

[80] Id. § 246(f)(3).

[81] Id. § 249.

[82] Id. § 247.

The growing trend towards partial decriminalization of gambling is evident in a recent decision of the St. Croix municipal court. At issue in Virgin Islands v. Thomas[83] was the legality of social gambling. Section 1224 of Title 14 of the Virgin Islands Code specifically states:

> Whoever (1) deals . . . or conducts, either as owner or employee, . . . any game of chance . . . or (2) plays or bets at or against any [game of chance] . . . shall be fined not more than $200 or imprisoned not more than 180 days or both.

The court concluded that this section merely prohibited commercial gambling. The statutory prerequisite of "as owner or employee" did not, deduced the court, prohibit social gambling. The 1972 legislature failed to enact any new gambling legislation, thus apparently acquiescing to the court's decision.

The Virgin Islands remain one of the more liberal United States possessions with regard to the decriminalization of gambling. Parimutuel betting, government and charitable lotteries and raffles, and social gambling are presently authorized.

OTHER POSSESSIONS

Several other islands in the Pacific Ocean are considered United States possessions: Baker Island, Midway Islands, Navassa, Palmyra, Wake Island, Howland Island, Jarvis Island, Johnston Island, and Kingman Reef. Most of these possessions are coral atolls which average 2 1/2 square miles and are generally uninhabited. None of these territories have promulgated laws. Therefore, they have not been treated here.

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[83] 9 V. I. 17 (Mun. Ct. St. Croix 1971).

APPENDIX X

THE DEVELOPMENT OF THE LAW OF GAMBLING

THE DISTRICT OF COLUMBIA

P.K.S.
R.M.S.
D.F.D.

CONTINUED

5 OF 6

SUMMARY

The development of the law of gambling in the District of Columbia has paralleled that of the Nation. During the early nineteenth century when lotteries were fashionable, the District of Columbia became a center for ticket sales. Later, when gambling halls followed settlers into the Midwest and West, Washington became the hottest gambling town in the East. Finally, as reform movement elsewhere first sought to prohibit gambling legislatively and then to secure the enforcement of the prohibition, the District of Columbia followed suit. Today, gambling in all its forms is comprehensively outlawed by a patchwork of old statutes. No forms of gambling have been decriminalized.

I. INTRODUCTION

The territory that is now the District of Columbia originally was part of Maryland and Virginia. The government of the District of Columbia, despite that original organization, however, has never enjoyed powers as broad as those vested in the governments of individual states.[1] In 1889, the United States Supreme Court aptly described the District

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[1]The years 1871-1874 constituted an historical exception. During those years Congress vested the District with full legislative powers and authority, subject only to the ultimate veto of Congress. Today, however, the government of the District of Columbia is purely administrative; all legislative functions are assumed by Congress. The "home-rule" movement is becoming increasingly popular, however. See An Act to prove a Government for the District of Columbia, February 21, 1871, ch. 62, 16 Stat. 419; An Act for the government of the District of Columbia and for other purposes, June 20, 1874, ch. 337, 18 Stat. 116. For a discussion of the status of the District of Columbia government, see Metropolitan Railroad Co. v. District of Columbia, 132 U.S. 1 (1889).

as "a qualified State" whose sovereign power "is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress." Crimes committed in the District are, therefore, crimes against the United States.[2] The history of the District's legal status, however, is a good deal more complicated than this simple analysis seems to indicate.

The District of Columbia was formally created in 1801 as the Nation's Capitol from lands carved out of Virginia and Maryland. The 1801 Act provided that the laws of these states should continue in force in the respective areas ceded by them. Likewise, its two municipal governments, Washington and Georgetown, were to continue intact.[3] The Virginia portion was retroceded in 1846,[4] and the laws of the District were unified, although the two chartered cities remained with their own distinct ordinances. The application of British common law in the states as mere persuasive authority had been settled long before,[5] but its place in the law of the District of Columbia remained in doubt until an act passed in 1901 finally declared that:

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[2] Metropolitan Railroad v. District of Columbia, supra note 1, at 9.

[3] Act of February 27, 1801, ch. 15, § 1, 2 Stat. 103.

[4] Act of July 9, 1846, ch. 35, 9 Stat. 35.

[5] Judicial decisions of British courts are accepted as indicative of the common law in this country, but no American court is bound by those decisions, whether made before or after the American Revolution. For pertinent discussions, see Seymour v. McAvoy, 121 Cal. 438, 53 P. 946 (1898); Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (1928); Dudrow v. King, 117 Md. 182, 83 A. 34 (1912). These are only a few of the many cases decided on the point.

> The Common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty . . . shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress.[6]

Thus, Justice Douglas of the Supreme Court observed several years ago that the law of the District "is a compendium of a variety of laws drawn from various sources,"[7] including (1) the principles and maxims of equity as they existed in England and in the colonies in 1776, (2) the common law of England, (3) the laws of Maryland and Virginia as they existed on February 27, 1801,[8] (4) the Acts of the Legislative Assembly created in 1871 but dismissed three years later, and (5) all Acts of Congress applicable to the District.[9]

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[6]Act of March 3, 1901, ch. 854, § 1, 31 Stat. 1189; D.C. Code §§ 49-301.

[7]Universal Interpretive Shuttle Corporation v. Washington Metropolitan Area Transit Commission, 393 U.S. 186, 196 (1968) (dissenting opinion).

[8]See Act of March 3, 1901, supra note 6. Included in the Maryland laws received by the District is a reception statute regarding British law which assumes (a) all common law up to 1770, (b) all British statutes enacted prior to the first settlement in Maryland (1633), and (c) all British statutes enacted between the settlement and the American Revolution (1633-1776) which had already been introduced into Maryland law by judicial decision. See the Maryland Declaration of Rights (1776) § 3, reprinted in 1 D.C.C.E. 28-34 (1967), and the Maryland Constitution art. 5 (1867, 1970).

[9]See note 1, supra.

Today, although all of the present gambling laws are collected in the District of Columbia Code, the original statutes are found primarily in riders to Federal statutory material and in the mishmash of laws received from Virginia, Maryland, Great Britain, and the common law. Authoritative interpretations of these laws have been made, successively, by the United States Court of Appeals for the District of Columbia and currently by the District of Columbia Court of Appeals.[10]

I. THE EARLY EXPERIENCE (TO 1831)

From 1801 to 1831 the gambling law of the District of Columbia consisted of relatively discrete statutory prohibitions supplemented by principles of the common law.

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[10]Prior to 1971 the court of last resort in the District of Columbia was the United States Court of Appeals for the District of Columbia, formerly known as the Supreme Court of the District of Columbia. The District of Columbia Court of Appeals, formerly known as the Municipal Court of Appeals, served as an intermediate appellate tribunal. In 1970, however, the District of Columbia Court Reorganization Act, Act of July 29, 1970, Pub. L. No. 91-358, 84 Stat. 475, made the District of Columbia Court of Appeals the District's highest court. Its orders can be reviewed by the United States Supreme Court but not by the United States Court of Appeals for the District of Columbia, though decisions by the latter court prior to February, 1971 will be followed unless determined otherwise en banc. M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C.App. 1971).

For a good summation of the labyrinth of District of Columbia laws, see James S. Easby-Smith's comments in "History of Code Compilation in the District of Columbia," 1 D.C.C.E. 1, 2 (1966).

From the District's very beginning, an antigambling attitude, inherited from Maryland, was written into law. A 1792 Maryland Act had forbidden the sale of tickets in lotteries not approved by the Maryland legislature,[11] and a 1797 Act prohibited the keeping of gambling tables in taverns or in houses occupied by retailers of wines and spirits.[12]

The two cities within the District, Georgetown and Washington, continued to enact antigambling municipal ordinances following the creation of the District. An 1806 Georgetown bylaw prescribed a $20 fine for keeping a public gaming table or device.[13] An 1802 Act by Congress authorized the Washington City Council to take measures to "restrain or prohibit gambling,"[14] and the Council in 1809 accordingly prohibited the keeping of faro tables.[15]

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[11]Md. Acts 1792, ch. 58, 1 Dorsey's Laws 288, cited in Hawkins v. Cox, 11 F. Cas. 878 (No. 6,243) (C.C.D.C. 1819).

[12]Md. Acts 1797, ch. 110, § 2, cited in United States v. Dixon, 25 F. Cas. 872 (No. 14,970) (C.C.D.C. 1830).

[13]Georgetown bylaw of March 7, 1806, cited in United States v. Wells, 28 F. Cas. 521 (No. 16,662) (C.C.D.C. 1812).
Georgetown, which was chartered by the Maryland legislature in 1751, remained an independent city until 1895.

[14]Act of May 3, 1902, ch. 53, § 7, 2 Stat. 195.

[15]Washington bylaw, August 16, 1809, cited in Washington v. Strother, 29 F. Cas. 356 (No. 17, 233) (C.C.D.C. 1824).

Such measures, however, hardly sufficed to limit the gambling itch felt by Washington and its many visitors. Though Washington remained a small town in its first decades, disappointing the Government's hope that the city would become a major metropolitan area, it did experience large influxes of visitors in the early nineteenth century, and tourism quickly became its leading industry. Tourists, of course, must be entertained, and in 1830 an exasperated City Council passed a more comprehensive bylaw:

> No E.O., A.B.C., L.S.D., faro, rolly-bolly, shuffleboard, equality table, or other device, to be used with cards, balls, dice, coin, or money, or any other game of hazard (except the game of billiards upon licensed billiard tables) for the purpose of playing, or gaming for money or anything in lieu thereof, shall be set up, kept, or exhibited in any part of this city, under a penalty of fifty dollars for every day or less time that such [device] shall be so kept or exhibited.[16]

The common law was also used to suppress gambling during the District's early years. The principle that gaming houses are indictable as common nuisances was recognized as early as 1803.[17] In 1830, one Jacob Dixon sought reversal of his conviction for keeping a house where faro was played, on the ground that faro playing was not a crime at common law. Chief Justice Cranch affirmed the conviction, explaining that the essence of the offense was not the private vice but the public inconvenience:

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[16]Washington bylaw, January 12, 1830 § 1. Cited in Hall v. Washington, 11 F. Cas. 278 (No. 5, 953) (C.C.D.C. 1836); Dixon v. Washington, 7 F. Cas. 766 (No. 3,935) (C.C.D.C. 1830).

[17]United States v. Ismenard, 26 F. Cas. 554 (No. 15,450) (C.C.D.C. 1803).

> Hawkins (book 1, c. 75, § 1) says ". . . all common gaming houses are nuisances in the eye of the law;" not only because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood. . .
> . . . . It has been said, in argument, that if the law be so, every man who has a whist party at his house is liable to be prosecuted and punished for a nuisance. But the distinction is broad and palpable. To become a common nuisance, it must be a common gaming house, kept for lucre and gain, holding out allurement to all who are disposed to game, and kept for that purpose.[18]

Washington, however, had become a gambling town, and these earlier restrictions were generally ignored by the law enforcement agencies.

While sporadic efforts were made to suppress the more common forms of gambling, the outstanding phenomenon of the eighteenth and early nineteenth centuries was the disproportionate volume of legal gambling in the form of lotteries. As one history of gambling in the District notes:

> The District of Columbia had a special experience with lotteries. It was the Federal capital before it was a city and the finance of grandeur created problems.[19]

Back in 1792, Congress had authorized a lottery to finance important projects in the planned Capital for which ordinary revenues might prove insufficient. As historian John Samuel Ezell remarked, "the day of insufficiency soon dawned."[20] The National Lottery got underway in 1793 with the appointment of architect, economist, and real estate speculator Samuel Blodget as lottery agent. Blodget proposed to sell 50,000 tickets throughout the country at $7 each, promising 16,000

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[18] United States v. Dixon, supra note 12, at 874-75.

[19] Washington Lawyers' Committee for Civil Rights Under Law, Legalized Numbers in Washington, 11 (1973).

[20] J. Ezell, Fortune's Merry Wheel, 102 (1950).

prizes: a grand prize of a $50,000 hotel, and cash prizes from $10 to $20,000. Blodget's lottery was slow to catch on, however, since American citizens in the 1890's were inundated on all sides by tickets for a variety of lotteries. Rumors quickly spread to the effect that the more valuable prizes had not been put in the wheel, and Blodget was forced to pledge his real and personal property to guarantee payment of prizes. By 1798, with the hotel not yet completed, the grand prize winner brought suit against Blodget, and Blodget's property was sold to satisfy the adverse judgment.[21]

Public opinion had, for the moment, turned against lotteries. The transplanted English journalist William Cobbett commented on the Blodget affair:

> Have you an itching propensity to turn your wit to advantage? Make a lottery. A splendid scheme is a bait that cannot fail to catch the gulls. Be sure to spangle it with rich prizes: the fewer blanks--on paper--the better; for on winding up the business, you know, it is easy to make as many blanks as you please. Witness a late lottery on the Potowmack. The winding up, however, is not absolutely necessary . . . . The better way is to delay the drawing; or should it ever begin, there is no hurry about the end, or rather, let it have no end at all.[22]

The unfortunate end to the Blodget affair, however, was far from the end of lotteries in the District of Columbia. On the contrary, while other forms of gambling were being outlawed, lotteries were being held more frequently than ever. In 1812, the Municipal Charter authorized lotteries, provided the amount to be raised in each year did not exceed $10,000 and provided the President of the United States approved the

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[21] Id. at 104.

[22] Id. at 105.

object to be benefitted. Drawings were held to construct public schools in 1812, a penitentiary in 1814, and a city hall in 1815.[23]

This second wave of lotteries proved to be a municipal nightmare, and two cases arising from lottery problems went all the way to the Supreme Court. In 1812, Congress agreed with the State of Marylnnd to authorize a lottery in order to finance the construction of a canal between the District of Columbia and Maryland. Ticket sales for the lottery continued in surrounding states for several years. In 1820, Virginia passed a law outlawing the sale of chances not authorized by the Virginia legislature, but the promoters of the lottery, confident of the power of their congressional license, continued to sell tickets in Virginia. The Virginia authorities, who were not so confident of the scheme's legitimacy, promptly arrested them, and the lottery holders appealed their convictions to the Supreme Court. The famous case of Cohens v. Virginia[24] is best remembered for its affirmation of the Supreme Court's appellate jurisdiction, but the actual holding of the case, long forgotten by many scholars, was that the congressional license did not authorize ticket sales in states where such sales were otherwise prohibited.

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[23] Id. at 105-6.

[24] 6 Wheat. (19 U.S.) 264 (1821).

A second Supreme Court case arose when a lottery franchise agent, a Mr. Gillespie of New York, defaulted on the prizes for a lottery conducted for the purpose of financing the building of two public schools, a penitentiary, and a town hall. One of the winners brought suit, and the Supreme Court in Clark v. Corporation of Washington[25] dealt the city another blow, holding it directly liable to the disappointed prizewinners. The city was forced to sell stock to pay all the claims which followed this case. Ezell observed:

> [T]his suit alone cost more than $200,000! Needless to say, there were no more lotteries instituted in the District of Columbia.[26]

The District, however, remained a center of lottery activity. Vendors for lotteries from all over the Nation proliferated. In 1832, the licensing of ticket sellers was instituted. In 1827, the sale of tickets for lotteries not authorized by a particular State was forbidden. It was not until 1842, however, when most states had already taken the step, that lotteries were entirely prohibited in the District of Columbia.[27]

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[25] 12 Wheat. (25 U.S.) 40 (1827).

[26] Ezell, supra note 20, at 102.

[27] Id. at 108.

II. THE FORMATIVE ERA: 1831-1901

1831 brought the first congressional effort to establish comprehensive criminal laws for the District of Columbia. Among the provisions of the Penitentiary Act of 1831 was one forbidding "keeping a faro bank or other common gaming table." A penalty of imprisonment and labor for one to five years was prescribed, and offenders called to testify were granted immunity from prosecution.[28]

From the first, enforcement of the gambling table prohibition could not be called zealous. In 1835, the Circuit Court held that exhibition of a "sweat-cloth" (a device used in betting booths set up at horse races) for a single day's duration did not amount to a "keeping."[29] In a concurring opinion, Justice Thurston, though striking out at the destructive evils of continual gambling, disparaged the prosecution's efforts to literally, and hypocritically, construe the law so as to curtail this "poor man's" festival gambling:

> Congress has tolerated the principal vice, horse-racing. It is hardly presumable they would have left this higher quarry and struck at the humbler sweat-cloth . . . . Do you believe that Congress meant, under this short, but sure magic word "keeping," for magic it is indeed, if it has such wonderful efficacy to put down, so suddenly, this ancient usage, "more honored," it is true, "in the breach than the observance," this petty gambling, confined to the poor, the ignorant, during a few days, at most, of an annual celebration; when, from long habit, and the indulgence of the laws, until now, a general relaxation of manners have been permitted and tolerated during such celebration;

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[28] Act of March 2, 1831, ch. 37, §§ 1, 12; 4 Stat. 448.

[29] United States v. Smith, 27 F. Cas. 1155 (No. 16, 329) (C.C.D.C. 1835).

> like the Saturnalia at Rome . . . . Are we reformers, or are we judges, to administer the law as it is, and not as we think it ought to be, to the poor and rich with equal hand, and leave reformation to be worked out where alone it can and ought to be, by the wisdom of the laws, or the spread of knowledge and diffusion of learning, or by the influence of moral and religious instruction, by the minister of religion?[30]

The problem, however, was more pervasive than that one-shot, Saturnalian adventure assumed by Justice Thruston. With the demise of public lotteries, private lotteries, played predominantly by the poor, persisted in the District. Following the burning of the city by British troops in 1814, Congress authorized only niggardly appropriations for purposes of rebuilding, and the city continued to be underdeveloped and populated by the poor and the transient.

Taking aim at the private lotteries, an 1842 Act made it unlawful to keep a place of business for the sale of tickets or to offer for sale tickets or ticket shares. A penalty of not more than one year nor less than six months imprisonment and/or a fine of $100 to $1,000 (half to be retained by the informer) was prescribed.[31] Contracts for the sale of tickets were declared void, and the buyer was allowed to recover the price as money paid on a void consideration.[32]

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[30] Id. at 1156.

[31] Act of August 31, 1842, ch. 282, §§ 1, 2, 5. Stat. 578.

[32] Id., § 3.

Another statute which was used, but not vigorously, to suppress gambling in the District was the old Statute of Anne, which had been in effect in Maryland in 1801 and was thus received as part of its law by the District of Columbia.[33] All debts which arose from the "playing at any game whatsoever, or by betting on the sides or hands of persons who play" were declared void, as were those arising out of laws made for gambling purposes. The loser of ten pounds or more was given a cause of action against a winner already paid. If the loser failed to sue within three months, any person could do so. Such a plaintiff could recover treble damages, half for himself and half for support of the poor. Winning ten pounds or more by fraud was made a crime, punished by forfeiture of five times the amount won. Still other provisions prescribed a penalty for assault on account of gambling and limited the power of equity courts to decree payment of wagers.

The statute was recognized as applicable to billiard winnings[34] and gambling winnings generally,[35] but since it dealt with betting on "games" many kinds of wagers were enforced in accordance with the rule that fair wagers are recoverable unless offensive to public policy.[36]

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[33] 9 Anne c. 14 (1710), referred to in Emerson v. Townsend, 73 Md. 224, 20 A. 984 (1890). See also La Fontaine v. Wilson, 185 Md. 673, 45 A.2d 729, 162 A.L.R. 1218 (1945).

[34] Sardo v. Fongeres, 21 F. Cas. 490 (No. 12,358) (C.C.D.C. 1829).

[35] McGunnigle v. Simmes, 16 F. Cas. 145 (No. 8,817) (C.C.D.C. 1847).

[36] Fleming v. Foy, 9 F. Cas. 262 (No. 4,862) (C.C.D.C. 1834). One case, an exception to the general rule, held that a wager on an election, notwithstanding the fact that neither of the wagering parties was a qualified voter, could not be recovered since the bet was against public policy. Denney v. Elkins, 7 F. Cas. 464 (No. 3,790) (C.C.D.C. 1831).

With minor changes,[37] the Statute of Anne is still in the District's Civil Code today.

Popular as gambling was with the masses in the nineteenth century, it was not, as far as social Washington was concerned, exclusively a poor man's pastime. On the contrary, open gambling in fashionable gaming houses was widespread in the Capital through the middle years of the century. Many of the Nation's respected statesmen were acknowledged gamblers.[38] Perhaps the most famous gambling establishment in the District of Columbia was Edward Pendleton's Palace of Fortune which opened in 1837 and closed with his death in 1858. It was frequented by the most fashionable and powerful men of the Nation. "Lobbyists as well as politicians habituated the Palace of Fortune, and were always delighted at a chance to lend cash to a legislator, who went broke fighting the tiger. Such debts were conveniently forgotten as bills the lobbyists were promoting went to the floor of Congress."[39] Pendleton himself became one of the city's most prominent permanent residents.

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[37] $25 has been substituted for the ten pounds, and the assault provision has been removed to the penal section of the code. See D.C.C.E. §§ 16-1701-04 and 22-508 (1967). Another change came in 1899 with the Negotiable Instrument Act, Act of January 12, 1899, ch. 47, 30 Stat. 785. The law enabled bona fide purchasers without notice to enforce notes otherwise void under the Statute of Anne. The provision reversed the result of Lulley v. Morgan, 21 D.C. 88 (1892). See generally Wirt v. Stubblefield, 17 App. D.C. 283 (1900).

[38] "The highest officials of the nation were usually men willing to bet against the odds." H. Chafetz, Play the Devil, 179. Included in this category were men such as Henry Clay, Daniel Webster, General Winfield Scott, Humphrey Marshall, William Learned Marcy, and Andrew Jackson. Id., § 3, Chapter 1.

[39] Id. at 182.

"He gained impeccable connections in Washington society, was close to the rich and powerful who pulled the strings behind the political scene."[40] In fact, when he died, "several leading democrats were pallbearers at the funeral and the President [Buchanan] attended."[41]

Pendleton's death signalled an end to an era in Washington. With the advent of the Civil War and the insurgence of military personnel into the District of Columbia, General L. C. Baker, chief of the Secret Service, decided it was high time the long-ignored gambling statutes be enforced. It was in the interests of the war effort, he reasoned, to see that they were obeyed. His campaign caused quite an uproar among the more distinguished patrons, and President Lincoln sent for him and asked why he was stirring up such a tempest. Reports an historian of the period:

> General Baker pointed out the ruinous effect gambling was having on prominent civilians and military officials and asked for a free hand to smash this vice in Washington. Lincoln, a penny-ante card player from his flatboat days, had to agree and Baker left him with the understanding that the government would not meddle in his drive to clean up the city.[42]

This he accomplished in short order.

One of the reasons often cited for the early failure to enforce effectively the gambling provisions was that the stiff penalties prescribed prevented jury convictions. An early nineteenth century city ordinance, for example, (c. 1812) specified a very strict two-to-eight year prison sentence for running a gambling house. Consequently, juries

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[40] Id. at 181.

[41] Id. at 182.

[42] Id. at 255.

were reluctant to convict; and in the very few cases of conviction, presidential pardons were forthcoming.[43]

Thus it was not until 1878, when Congress lowered the prescribed penalties and eliminated the informer provision,[44] that the courts showed a willingness to treat the violation seriously.

The somewhat more lax treatment of gambling following General Baker's campaign coincided with a tremendous influx of new poor. During the Civil War the population of Washington had doubled as the city at once became the principal supply depot for the army of the Potomac, a great hospital center, and the source of sought-after government weapons contracts. After the Emancipation Proclamation towards the end of the war, about 40,000 former slaves from Maryland, Virginia, and points south poured into Washington bringing with them social and economic problems. Poorly educated, the new residents of Washington were particularly subject to the temptations of private gambling. In the later decades of the century, in response to new pressures, Congress acted to tighten the laws.

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[43]It is reported that this ordinance remained on the books thirty years before a conviction was obtained. In 1861, President Lincoln pardoned the sentenced offender, stating that the penalty was "far too severe for the offense." Likewise, President Grant opened the door for another offender a decade later. Legalized Numbers in Washington, supra note 19, at 15.

[44]Act of April 29, 1878, ch. 68, 20 Stat. 39.

An 1883 "Act more effectually to suppress gaming in the District of Columbia" made it unlawful to keep any table or device "designed for the purpose of playing any game of chance for money or property," or to permit or induce anyone to play at such a device. Violators were punished by imprisonment for up to five years. The Act also punished those in control of premises where gambling devices were kept (maximum: one year, $500) and the playing of three-card monte and other confidence games (maximum: five years hard labor, $1,000).[45]

Congress was making clear its intention that all forms of gambling were evil. The 1883 Act defined "gaming table" as any device at which money was wagered. The courts were directed to construe the law liberally, "so as to prevent the mischief intended to be guarded against."[46]

The courts obeyed the congressional mandate. In an 1895 case, Miller v. United States,[47] the court declared that a booth used for taking bets on horse races was a gambling device within the meaning of the Act:

> The definition of a gaming table under the statute does not involve the ordinary mechanical definition of a table . . .[48]

The finding that betting on horse racing is a game of chance was essential to the holding:

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[45] Act of January 31, 1883, ch. 40, §§ 1-3, 22 Stat. 411.

[46] Id., § 4.

[47] 6 App. D.C. 6 (D.C. Cir. 1895).

[48] Id. at 12.

> It has from an early time been held that a horse race is a game of chance, and so is a game of baseball, and so a foot race, where wagers have been made upon them. Goodburn v. Marley, Str. 1159; Blaxton v. Pye, 2 Wils. 309; Grace v. McElroy, 1 Allen 563; Lynall v. Longbottom, 2 Wils. 36; People v. Weithoff, 51 Mich. 203.[49]

In 1888, betting on races, elections, and athletic and other contests was made unlawful in the cities of Washington and Georgetown. A fine of $25 to $100, or imprisonment for up to ninety days, or both, was prescribed.[50] In 1891, the prohibition was extended to the area within one mile of the two cities' limits (but still within the District), and the maximum fine raised to $500.[51]

In the last decades of the nineteenth century, gambling in Washington had been severely curtailed. This phenomenon, however, was just a reflection of the nationwide trend of efforts to eliminate perceived social vices.[52] As Mr. Justice Hagner wrote of lotteries in 1890:

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[49] Id. at 14.

[50] Act of April 26, 1888, ch. 204, 25 Stat. 94.

[51] Act of March 2, 1891, ch. 494, 26 Stat. 824. The confusing congressional practice of legislating for specific areas of the District became obsolete with the repeal of the city charter and the adoption of a District-wide code at the turn of the century.

[52] The emerging alliance of business and religion at a time of rapid growth in the United States has been given credit by some commentators for the dramatic groundswell of vice legislation in the late nineteenth and early twentieth centuries. See Legalized Numbers in Washington, supra note 19, at 16-17.

> Although formerly permitted by law, and even encouraged, public opinion for nearly half a century almost everywhere in this and all civilized countries has recognized lotteries as fruitful sources of unmitigated mischief; as a cunning scheme by which crafty knaves plunder the silly and credulous; destructive of thrift and honest industry and pandering to idleness and vice . . . . The keeping of a shop within this District for the sale of lottery or policy tickets, is something affecting the entire country.[53]

A good illustration of the judicial thinking that dominated the formative era is the the story of the "gift-enterprise." In the closing decades of the century, the full weight of the law was brought to bear on this child of the lottery age, a species of sales promotion widely accepted today.

In 1871, the District of Columbia Legislative Assembly mandated the licensing of gift-enterprise businesses.[54] Congress repealed this scheme in 1873 and declared such businesses unlawful, operation thereof to be punished by a maximum $1,000 fine or imprisonment for six months to one year, or both.[55]

The Appeals Court, following Congress' lead, demonstrated uncharacteristic fervor in attacking this species of gambling. In 1899, Joseph A. Sperry, owner of a trading stamp company, came before the Court to appeal his conviction under the gift-enterprise law. Sperry and his co-defendant, a District of Columbia retailer, maintained that the law was an intolerable restraint on freedom of trade. Justice

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[53] United States v. Green, 8 Mackey (19 D.C.) 230, 241 (1890).

[54] Act of D.C. Leg. Ass., August 23, 1871.

[55] Act of February 17, 1873, ch. 148, 17 Stat. 464.

Shepard[56] "turned the tables" on Sperry, declaring that it was his business, not the statute, which was the intolerable restraint:

> With no stock in trade but . . . the necessary books and so-called premiums . . . they have intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either, but to prey upon both . . . . Other merchants and dealers who can not enter [the promotion] must run the risk of losing their trade or else devise some other scheme to counteract the adverse agency.[57]

In 1902, Justice Shepard declared unlawful a promotion involving the exchange of cereal box coupons for premiums.[58] In 1910, he resumed the battle against trading stamps:

> The whole country is now agitated by the increased cost of living that has grown to alarming proportions . . . . While there is difference of opinion as regards the chief source, all concur in the opinion that every introduction of superfluous middlemen, and consequently unnecessary charges between producer and consumer, undoubtedly contribute to swell the stream to overflowing.[59]

Dissenting, Justice Van Orsdel recalled that the evil perceived by Congress was gambling and not retail competition. A trading stamp operation, he argued, did not amount to gambling. The element of chance was absent: "Every stamp exchanged has a fixed value."[60]

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[56]Seth Shepard was a prominent member of the Texas bar before his appointment to the District of Columbia court in 1893. An active Democrat, he was a lifelong fighter against "paternalism in government." His beliefs led him to vigorously oppose the prohibition and free silver movements in Texas. 9 Dictionary of America Biography, 74.

[57]Lansburgh v. District of Columbia, 11 App. D.C. 512, 531 (D.C. Cir. 1897).

[58]Sheedy v. District of Columbia, 19 App. D.C. 280 (D.C. Cir. 1912).

[59]District of Columbia v. Kraft, 35 App. D.C. 253, 268, cert. denied, 218 U.S. 673 (1910).

[60]Id. at 270 (dissenting opinion).

Van Orsdel's arguments, however, were to no avail. Even the Supreme Court of the United States, in this age of antigambling feeling, agreed with the Shepard approach toward trading stamps.[61]

Gift-enterprise operators fared no better, even after the end of Justice Shepard's tenure on the bench. In 1918, in one of the last significant gift-enterprise cases, Chief Justice Smyth declared unlawful a newspaper contest involving the awarding of gift points to advertisers and their customers:

> It is urged that if the scheme is condemned, an athletic contest for a prize, or a contest for a Rhodes Scholarship, or one for the best breed of horses, or any like contest, must also be prohibited. Not at all. Such contests lack the vice which impel disapproval of an enterprise like the one in question. They have no tendency to "lure to improvidence;" they lack the seduction and evil of the other scheme. Instead they induce to efforts of great benefit and merit.[62]

Similar public policy arguments were used to suppress "bucket-shops." In 1883, Justice Hagner refused to enforce a bucket-shop transaction, holding it contrary to public policy:

> All observers agree that the inevitable effect of such dealings is to encourage wild speculations; to derange prices to the detriment of the community; to discourage the disposition to engage in steady business or labor, where the gains, though sure, are too slow to satisfy the thirst for gaining when once aroused; and to fill the cities with the bankrupt victims of such disasters as any "Black Friday" may develop.[63]

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[61] In re Gregory, 219 U.S. 210 (1911). Justice Charles Evan Hughes held for the Court that a trading stamp promotion was a gift-enterprise, citing a definition of "gift-enterprise" which included an element of chance.

[62] Corporate Organization and Audit Co. v. Hodges, 47 App. D.C. 460, 466 (D.C. Cir. 1918).

[63] Justh v. Holliday, 2 Mackey (13 D.C.) 346, 348-49 (D.C. Sup. Ct. 1883).

In 1909, Congress outlawed "bucketing" in the District. The offense was defined as the making of or offering to make any contract for sale of securities or commodities on credit or margin, in which at least the seller does not intend bona fide delivery. Stiff penalties were prescribed including, in the case of corporations, equitable proceedings to dissolve (if domestic) or restrain (if foreign) the corporation. Those who "communicate, receive, exhibit, or display" price quotations with intent to violate the law were also punished.[64] The evil perceived by Congress was described in the House debate on the bill:

> Mr. Campbell, Kan.: . . . . Thousands of industrious men, through no fault of theirs, have been thrown out of employment because other men gambled on the differences in the prices of the property they produced or worked with . . . Why, Mr. Speaker, to the actual investor and to the man who speculates on his best judgment, the dividends paid by a concern would largely control him in the price he would pay for its stocks or bonds, and yet it is actually true that on the stock exchanges in Wall Street and elsewhere in the country the prices of stocks and bonds are not controlled by this standard of value . . . . The influence of these gambling prices upon the business of the country can not be anything but bad.[65]

Washington had come far. In the 1850's the Nation's leaders were among the most prominent gamblers in town, but by the first decade of the twentieth century the margin buying of otherwise legitimate securities was vigorously denounced on the floors of Congress. On the surface, at least, a profound change had come over Washington during its formative era, but in reality the modern era was to tell the same story, just in different words.

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[64] Act of March 1, 1909, ch. 233, 35 Stat. 670; D.C.C.E. §§ 22-1509-1512 (1967).

[65] 43 Cong. Rec. 217-18 (1908).

III. THE MODERN ERA: 1901 TO 1974

By the turn of the century, gambling houses in Washington were only memories. The various prohibition groups had succeeded in driving the vice underground. There the many forces reorganized in less garrish fashion, catering mostly to the ghetto dwellers, who had become the majority of Washington's citizens. Numbers eventually emerged as the new game. All that was needed was a newspaper, a tablet, and a pocket full of money. It was practically impossible to suppress. In fact, the "runner" or "writer" was a local hero: generous, affable, and, most importantly, very successful.[66]

Thus, well into the twentieth century gambling in the District of Columbia had become a highly organized enterprise, popular especially among the lower classes of the urbanized populace. Like any other well-managed business, it had become adaptable, innovative, and hence more profitable. As a result, the courts in the District of Columbia and Congress had to transform District of Columbia lottery law into District of Columbia numbers law.

In 1936, the District of Columbia Appeals Court, in an opinion by Justice Van Orsdel, held the numbers game a lottery:

> The fundamental point is that in each case there is the offering of a prize, the giving of a consideration for an opportunity to win the prize, and the awarding of the prize by chance. 38 C.J. 289, § 2. [emphasis added][67]

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[66] Legalized Numbers in Washington, supra note 19, at 35.

[67] Forte v. United States, 65 App. D.C. 355, 359, 83 F.2d 612 (D.C. Cir. 1936).

In 1938, Congress took up the battle, declaring the knowing possession of number slips to be unlawful.[68] In 1953, possession was made prima facie evidence of knowing possession.[69] In addition, in 1953, a potential loophole[70] was closed with amendment of the statute to encompass possession of tickets "either current or not current," as well as of all other records, receipts, etc.[71] While consideration is an essential element of a lottery, it is clear that a prosecution for possession of numbers slips required no showing that a consideration was ever received.[72] Even the possession of "cut cards" (listing of numbers which "hit" more frequently than others and for which odds are reduced) is today unlawful.[73]

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[68]Act of April 5, 1938, ch. 72 § 2, 52 Stat. 198; D.C.C.E. § 22-1502 (1967).

[69]Act of June 29, 1953, ch. 159, § 206(a), 67 Stat. 95. Such a statute is constitutional. See Ferguson v. United States, 123 A.2d 615 (D.C. Mun. App. 1956); aff'd 99 App. D.C. 331, 239 F.2d 952 (D.C. Cir. 1956); cert. denied 353 U.S. 985 (1957).

[70]See Smith v. United States, 70 App. D.C. 255, 105 F.2d 778 (D.C. Cir. 1939).

[71]Act of June 29, 1953, supra note 69.

[72]Ferguson v. United States, supra note 69.

[73]Bailey v. United States, 223 A.2d 190 (D.C. App. 1966).

Under present law, lottery operation and ticket sales are punished by fines up to $1,000 and imprisonment up to three years, or both.[74] The keeping of premises used for ticket sales is punished by fines from $50 to $500 or imprisonment up to one year, or both.[75] All things of value (including money) used in conducting any lottery are subject to seizure and, in a libel action brought by the District, to forfeiture.[76]

Since the thrust of the District's gambling legislation has been primarily the concentration on banning gaming devices,[77] the focus of its court decisions has necessarily been on defining terms like "devices" and determing the extent of the prohibitions included in the statutes. The gambling table/device prohibition has been applied to a variety of instrumentalities. A gambling device, one court held, is an instrument which induces one to risk property "upon an event, chance or contingency in the hope of the realization of gain."[78] A mint vending machine randomly dispersing tokens exchangeable for "fortunes" is a gambling device;[79] so is a "claw machine" with which a player tries to pick up prizes enclosed in a glass cage since "on the whole . . . chance predominate[s] over skill or [is] present in such manner as to thwart

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[74] D.C.C.E. § 22-1501 (1967).

[75] D.C.C.E. § 22-1503 (1967).

[76] D.C.C.E. § 22-1505 (1970 Supp.).

[77] With the exception of one prohibition against bookmaking and poolmaking on the result of athletic contests. D.C.C.E. § 22-1508.

[78] Washington Coin Machine Association v. Callahan, 79 App. D.C. 41, 42, 142 F.2d 97 (D.C. Cir. 1944).

[79] White v. Hesse, 60 App. D.C. 106, 48 F.2d 1018 (D.C. Cir. 1931).

the exercise of skill."[80] A pinball machine awarding only "free plays" is not a gambling device, since it affords no real hope of financial gain.[81] Under present law, the keeping of any gambling table or device for gaming is punishable by up to five years imprisonment[82] and by forfeiture of the device.[83]

In the District of Columbia bookmaking on any athletic contest or sporting event is treated as only a misdemeanor, punishable by a maximum $1,000 fine and one year imprisonment.[84] On the other hand, the keeping of a gambling table or device has always been punished severely. As a result, bookmakers have often been prosecuted under the more severe gambling table statute. In 1951, however, in Plummer v. United States,[85] the Appeals Court in an opinion by Judge Prettyman established a limit on such prosecutions. The court held that the word "table" contemplates a physical device or contrivance:

> An accused cannot be guilty of keeping a gaming table if he merely took a bet; he cannot be convicted of a felony if the sum total of the evidence is that he committed a misdemeanor.[86]

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[80] Boosalis v. Crawford, 69 App. D.C. 141, 143, 99 F.2d 374 (D.C. Cir. 1938).

[81] Washington Coin Machine Association v. Callahan, supra note 78.

[82] D.C.C.E. § 22-1504 (1967).

[83] D.C.C.E. § 22-1505 (1970 Supp.).

[84] D.C.C.E. § 22-1508 (1967).

[85] Plummer v. United States, 88 App. D.C. 244, 248, 189 F.2d 19 (D.C. Cir. 1951).

[86] 88 U.S. App. D.C. at 248, 189 F.2d at 23.

Though bookmaking on sports events may be only a misdemeanor, corrupting sports by tampering with the participants or the outcome is a far more serious offense, punishable by a stiff one to five years and up to $10,000 in fines.[87]

Prosecution of bookmakers for keeping premises used for gambling (also a felony) continues. In 1906, the Appeals Court acknowledged that a defendant need not have had permanent possession of the premises; it is sufficient that he be a lessee, keeper, agent, servant, or anyone else with "some right of power over or in the premises."[88] Circumstantial evidence, if substantial, is viewed with favor. As Justice Groner remarked in Beard v. United States, a 1936 case:

> This is a case like that of men found at midnight at a blockade still in full operation, located in the depths of a swamp. Their presence at the place of the crime may be accidental and innocent, but the inference is that it is not, and calls for explanation; and, if they offer none and the jury convict, an appellate court would not be justified saying that the inference is not sufficient to sustain the conviction.[89]

The prosecution need not prove that betting took place or that money passed on the premises: "[T]he gravamen of this felony is furnishing the facilities for gaming activities."[90] Nor need the premises be open

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[87] D.C.C.E. § 22-1513 (1970 Supp.).

[88] Nelson v. United States, 28 App. D.C. 32, 36 F.2d (D.C. Cir. 1906).

[89] Beard v. United States, 65 App. D.C. 231, 238, 82 F.2d 837, (D.C. Cir. 1936).

[90] Sesso v. United States, 77 App. D.C. 35, 36; 133 F.2d 381, (D.C. Cir. 1942).

to the public. An office from which bookmaking is coordinated by telephone is construed as within the meaning of "gambling premises."[91]

In cases involving wagering transactions, the courts of the District have been presented with a problem of conflict of laws. In Hamilton v. Blankenship,[92] a 1963 case, the transaction involved was a loan made in Maryland for purposes of lawful betting. The Appeals Court affirmed a lower court holding that a District of Columbia court will not enforce a gambling transaction, regardless of its validity in the locus contractus, since it is opposed to the public policy against enforcement which finds expression in the District's Code.

Since persons such as number players, rare bettors, and others are mentioned with particularity in the District's Code, there is no need for the prosecution to rely on the law of conspiracy and complicity to obtain gambling convictions in the District of Columbia, as is the case in some states. Furthermore, the presence or employment of a person in a gambling establishment were themselves criminalized in 1953.[93] The law of complicity, however, is still significant for evidentiary purposes. In 1914, Justice Van Orsdel in the case of Paylor v. United States,[94] however, held that bettors are not accomplices of one another:

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[91] Silverman v. United States, 107 App. D.C. 144, 275 F.2d 173 (1960), rev'd on other grounds, 365 U.S. 505 (1961).

[92] 190 A.2d 904 (D.C. App. 1963).

[93] Act of June 29, 1953, ch. 159, § 208, 67 Stat. 97, codified as D.C.C.E. § 22-1515 (1967).

[94] 42 App. D.C. 428, cert. denied 235 U.S. 704 (1914).

> To establish the relation of accomplice, two or more persons must unite in a common purpose to do an unlawful act. When two persons wager on the result of a certain event, the purpose of each is diametrically opposed to that of the other . . . . It could be asserted with equal force that two persons engaged in fighting a duel are accomplices. While each is violating the same law, they are not engaged in a common purpose to kill a common antagonist, but in a distinct and separate purpose of killing each other.[95]

Thus, uncorroborated testimony of one party to a wager may be used to convict the other party.

Where the tool of conspiracy is used, such prosecutions in the District of Columbia prior to 1970 were brought under 18 U.S.C. § 371. Today, however, the District of Columbia Code punishes those who conspire to commit a criminal offense, provided an overt act pursuant to the conspiracy is committed.[96] A fine of up to $1,000 or five years imprisonment, or both, is prescribed except in cases where the object of the conspiracy is punishable by less than five years, in which case the punishment for the conspiracy cannot exceed that for the substantive crime itself.

The so-called Wharton rule appears to have no application in the District of Columbia gambling cases, at least not to cases involving lotteries. In 1956, the Court of Appeals, in an opinion by Judge (now Chief Justice) Burger, held that, "There is no logical necessity for a plurality of agents in order to violate the lottery laws."[97]

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[95] Id. at 429.

[96] D.C.C.E. § 22-105(a) (1970 Supp.).

[97] Woods v. United States, 99 App. D.C. 351, 355, 240 F.2d 37 (D.C. Cir. 1956), cert. denied, 353 U.S. 941 (1957).

The District's Code also provides some important aids for enforcing the gambling statutes. Specific provision is made for interception of wire and oral communications to provide evidence of gambling offenses.[98] There is also a provision for grants of immunity from prosecution for witnesses in gambling cases in which personally incriminating testimony is sought. Such grants are within the discretion of the United States Attorney "in the public interest."[99]

Likewise, the Code is explicit in authorizing search warrants, using the accepted judicial channels, if there is the belief or good cause to believe that gaming or lottery devices, apparatus, records, or money wagered are contained on the premises. In a 1957 case, the District Court defined the necessary probable cause for issuance of a warrant as something less than sufficient evidence to convict, but more than that established by regular visits of a renowned numbers writer to premises owned by an individual who had twice previously been arrested for a numbers operation.[100]

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[98] D.C.C.E. § 23-546 (1970 Supp.).

[99] D.C.C.E. § 22-1514 (1967).

[100] United States v. Price, 149 F.Supp. 707 (D.C.D.C. 1957).

In apparent conflict, however, an 1862 statute still on the books authorizes search and arrest, without the normal judicial approval, in cases involving gambling houses, houses of prostitution and premises used for the deposit or sale of lottery tickets.[101] The law stipulates merely that one member of the police force, or two members of the involved household, shall report in a signed statement that there are good grounds for believing that a house, room, or premises within the police district is kept or used for gambling, prostitution, or the deposit or sale of lottery tickets. Then, the major or superintendent of police can authorize a police entry and arrest of all persons offending the law and seizure of all the gaming implements (to be turned over to the Board of Commissioners for disposal).

Although there are no sentencing procedures whereby the distinction between syndicate and small time operators can be made with appropriate sentences to each, most of the penal provisions do separate first offenses from second and subsequent offenses, prescribing much harsher penalties for the recidivist.

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[101] D.C.C.E. § 4-145, from the Act of July 16, 1862, ch. 181, § 3, 12 Stat. 579. Though the constitutionality of this law has never been challenged, its effectiveness was sharply limited by dicta in a 1950 case:

> Any act of the Congress purporting to permit the invasion of homes by police officers without warrants except under the established exception of unavoidable crisis . . . would be wholly void.

District of Columbia v. Little, 85 App. D.C. 242, 248 (1950). The Act has been construed as defining the extent to which police offenses in 1862 could enter a house to arrest on probable cause. See Smith v. United States, 103 App. D.C. 48, 60-61 (1958).

CONCLUSION

The development of gambling and the gambling laws in the District of Columbia form a pattern similar to that which can be traced in most urban areas, except that the decriminalization movement has not gained even partial ground.[102] Historic changes have taken place both in the kinds of games played and in the types of persons who have been involved.

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[102] A comprehensive study of the numbers game and a proposal for legislation has been prepared by the Washington Lawyers' Committee for Civil Rights Under Law. Legalized Numbers in Washington, supra note 19.

APPENDIX Y

THE DEVELOPMENT OF THE LAW OF GAMBLING

Puerto Rico

M.J.H.

SUMMARY

The development of the law of gambling in Puerto Rico is a fascinating story. From its earliest days as an American territory, Puerto Rico has evidenced a fondness for gambling. The Puerto Rican government has partially decriminalized gambling with the hope of bolstering the island's large tourism business. Today, parimutuel racing, an official Puerto Rican lottery, bingo, raffles and casino gambling are the main forms of authorized public gambling. The popularity of gambling in Puerto Rico has led at least one commentator to conclude that gambling forms part of Puerto Rico's national character.[1]

PUERTO RICO

Puerto Rico, located in the northern Caribbean Sea, was discovered by Christopher Columbus in 1493. The island remained a Spanish colony until 1898, when it was ceded to the United States under the Treaty of Paris, which ended the Spanish-American War. Puerto Rico was an unincorporated territory of the United States until 1952, when it attained its present status as a commonwealth of the United States. Currently, the governor and bicameral legislature are popularly elected. Puerto Ricans became United States citizens under the 1917 Jones Act, and they now also have the right to vote in United States presidential elections; their representative in Congress also has the right to vote on legislative matters.

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[1]K. Wagenheim, Puerto Rico: A Profile 227 (1970).

Many of the Spanish laws regulating gambling in Puerto Rico were retained by the United States military government that conducted the island's affairs until 1900. This is not surprising in light of the natives' fondness for gambling. In 1899, Robert Hill observed:

> The people are very fond of amusements, principally gambling, in which they squander their substance. The gambling habit is common to all classes, from the rich planter and priest down to the lowest beggar.[2]

Conducting or playing at games of chance were forbidden and modest sanctions provided.[3] Persons who "in public places or establishments shall start or take part in any kind of games not for pure pastime and recreation" were deemed guilty of a "misdemeanor against public policy" and subject to a mild fine.[4] Further, any money or devices used for gambling were expressly subject to confiscation.[5]

The sale of tickets in unauthorized lotteries was also prohibited and modest fines were imposed.[6] Heavier penalties were provided for subsequent offenses. One of the more interesting provisions of the 1901 penal code was its treatment of bankruptcy. The bankrupt whose insolvency was due in whole or in part from (1) "hav[ing] lost in any kind of games sums in excess of what an orderly father of family should risk by way of recreation in that sort of entertainment" or (2) "hav[ing]

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[2] R. Hill, Cuba and Porto Rico 168 (1899).

[3] 1901 Cuba & Porto Rico Penal Code, Tit. VI, art. 354. Persons who conducted such games were subject to the penalty of arresto mayor and a fine of 625 to 6,250 pesetas. Persons convicted of playing at a game of chance were subject to the penalty of arresto mayor in its minimum degree and a fine of 325 to 3,250 pesetas.

[4] Id., art. 602.

[5] Id., art. 356.

[6] Id., art. 355. Violators were subject to the penalty of arresto mayor in its minimum and medium degrees and fines of 325 to 3,250 pesetas.

suffered losses in heavy bettings, fictitious purchases and sales, or in any other exchange transactions whose success depends exclusively on chance . . . ." was subject to imprisonment.[7] Merchants were, however, specifically exempted from this particular provision of the code.

In 1900, the Foraker Act instituted a civil government in Puerto Rico. In 1902, a new penal code was promulgated which comprehensively outlawed lotteries and prohibited certain games of chance.[8] In 1904, this prohibition of gambling was extended to all games of chance.[9]

The 1902 penal code has remained substantially unchanged over the years and provides the bases for Puerto Rico's present gambling law. The 1902 penal code provided that persons who conducted or played at games of chance[10] or who knowingly permitted such games to be conducted in their houses[11] were guilty of a misdemeanor and subject to sanctions. Any person summoned as a witness in a prosecution for gambling who failed to testify was guilty of a misdemeanor[12] as were prosecutors and

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[7] Id., art. 553. A violator incurred the penalty of arresto mayor in its maximum degree to prision correccional in its minimum degree.

[8] 1902 Porto Rico Penal Code, §§ 291-304.

[9] 1904 Laws of Porto Rico, Act Mar. 8, 1904. In order for a game to be classified as one of chance, the Supreme Court of Puerto Rico has declared that chance must be a dominant rather than subordinate element of the game. People v. Santana, 48 P.R.R. 790 (1935).

[10] 1902 Porto Rico Penal Code § 299. Violators were subject to a fine not exceeding $500 and/or imprisonment not exceeding 6 months. Today, 33 L.P.R.A. § 1241 provides the same sanction.

[11] 1902 Porto Rico Penal Code § 300. Today, this section is 33 L.P.R.A. § 1242. In People v. Avenau, 28 P.R.R. 215 (1920), the court stated that the word "house" is a generic term which includes almost every enclosure where men may assemble and sit down, especially if it has a roof over it.

[12] 1902 Porto Rico Penal Code § 301. This is currently governed by 33 L.P.R.A. § 1243.

police officers who failed to "diligently prosecute" violators of the gambling laws.[13] Further, public officials who accepted money in return for their aid in violating the gaming laws were guilty of a felony.[14]

The 1902 Penal Code also prohibited all lotteries and punished persons who set up, sold tickets in or advertised such lotteries.[15] Insuring against the drawing of a lottery was also expressly forbidden and similar penalties imposed.[16] All prizes offered in a lottery were subject to confiscation and forfeiture.[17]

The 1902 penal code considerably broadened the 1901 penal code by authorizing civil remedies for gambling-related matters. Neither actions for money allegedly won in a game of chance nor actions by a loser to recover money voluntarily paid to the winner of such a game were recognized.[18] A person who lost money in a bet which was not prohibited, however, was civilly liable.[19] The code provided, however, that when such an amount wagered was excessive, the court could refuse to admit the plaintiff's claim or could reduce the sum owed to the

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[13]1902 Porto Rico Penal Code § 303. This is currently governed by 33 L.P.R.A. § 1244.

[14]1902 Porto Rico Penal Code § 304. A violator was subject to a maximum five years imprisonment. This is currently governed by 33 L,P,R.A. § 1244.

[15]1902 Porto Rico Penal Code §§ 292-295. Such offenses were misdemeanors and violators were subject to a fine not exceeding $250 and/or imprisonment not exceeding two years. These sections are currently 33 L.P.R.A. §§ 1212-1215.

[16]1902 Porto Rico Penal Code § 296. This is currently 33 L.P.R.A. § 1216.

[17]1902 Porto Rico Penal Code § 297. This is currently 33 L.P.R.A. § 1217.

[18]1902 Porto Rico Civil Code §§ 1700, 1701. This is currently 31 L.P.R.A. § 4771.

[19]1902 Porto Rico Civil Code § 1703. This is currently 31 L.P.R.A. § 4774.

extent that it "exceed[ed] the customs of a good father of a family."[20] Further, earnings obtained by the husband or wife by gambling belonged to the conjugal partnership and were exempt from restitution.[21]

Although most of Puerto Rico's gambling law stems from statutory provisions, the Judiciary has played an important role in the development of the gambling law. Although the penal code prohibited persons from playing at games of chance,[22] the court, in People v. Benitez,[23] stated that the statute only applied to public or quasi-public games. A game of poker in a private residence was not, concluded the court, within the intent of the statute provided there was nobody who obtained a "rake-off."[24]

In Serra v. Salesian Society,[25] Judge Rigau presented what might be termed the classic definition of a lottery:

> [T]he three elements traditionally considered by the authorities as essential to a lottery or game of chance . . . are (1) the prize, (2) the chance of winning the prize, and (3) the "consideration" paid or promised to be paid in order to be entitled to participate . . . .[26]

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[20] 1902 Porto Rico Civil Code § 1703.

[21] Id. § 1321. This is currently 31 L.P.R.A. § 3646.

[22] See note 10 and accompanying text supra.

[23] 19 P.R.R. 235 (1913).

[24] Id. at 245.

[25] 84 P.R.R. 311 (1961).

[26] Id. at 317.

As noted above, the gambling and lottery laws of Puerto Rico have remained substantially intact to the present. Nevertheless, additions and modifications were made. In 1916, parimutuel betting on horse races was authorized.[27] Such betting was subject to the rules and regulations issued by the Insular Racing Commission[28] and was originally forbidden except within the grounds of a racetrack by a licensed person.[29]

Today, despite numerous amendments,[30] parimutuel betting on horse races remains lawful.[31] A three-member Racing Board[32] is empowered to regulate all matters concerning racing, including the manner in which bets are to be placed. The present statutes regulate the take of the licensee and the government[33] and declares that any person who alters a racing ticket for the purpose of defrauding the parimutuel pool is guilty of a felony.[34]

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[27] 1916 Laws of Porto Rico, Act Apr. 13, 1916, No. 42.

[28] The Insular Racing Commission was created in 1913. 1913 Laws of Porto Rico, Act. Mar. 13, 1913, No. 105. It consisted of three members, appointed by the Governor of Puerto Rico who serve without compensation. The Commission had the power to prescribe the rules and regulations under which races were to be conducted within Puerto Rico.

[29] 1916 Laws of Porto Rico, Act Apr. 13, 1916, No. 42, §§ 1, 3, 7.

[30] See 1923 Laws P.R., Act Aug. 11, 1923, No. 86; 1925 Laws P.R., Act June 2, 1925, No. 21; 1927 Laws P.R., Act May 4, 1927, No. 40; 1929 Laws P.R., Act Apr. 26, 1929, No. 44; 1929 Laws P.R., Act July 1, 1929, No. 9; 1932 Laws P.R., Act Apr. 18, 1932, No. 11; 1950 Laws P.R., Act May 14, 1950, No. 421; 1960 Laws P.R., Act July 22, 1960, No. 149.

[31] 15 L.P.R.A. §§ 181-197.

[32] Id. § 183.

[33] Id. § 192.

[34] Id. § 197.

In 1927, the legislature specified that certain games of chance[35] could lawfully be played on the occasion of fiestas of patron saints provided the respective municipalities authorize such games. In Irizarry v. Villaneuva,[36] Judge Marrero upheld the statute's validity, stating:

> It is unquestionable that the Legislature has full power to prohibit games of chance. It is likewise unquestionable that said Legislature is empowered to authorize certain games of chance and to permit that the same be established or operated after the compliance with certain requirements. It is also unquestionable that the Legislature in expressly prohibiting the establishment of some games of chance, may make exceptions and authorize that the same be established and operated, provided certain requisites are complied with.[37]

One of the more perplexing questions facing the Supreme Court of Puerto Rico in the 1930's was the legal status of slot machines. Prior to August 1931, the operation of slot machines was deemed a violation of the penal code.[38] In 1931, however, a law taxing automatic gaming machines operated by levers was enacted.[39] The 1931 law also authorized the issuance of a license for the operation of such machines and exacted from the licensee a tax for the privilege of carrying on that business. Although an earlier case[40] had concluded that the taxation of slot machines did not repeal the penal law, the court in Cosme v. Candelario[41] concluded otherwise:

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[35] A game of chance played by the drawing of balls was authorized in 1927. 1927 Laws of Porto Rico, Act Apr. 23, 1927, No, 25. In 1936, horse races operated by a crank were also authorized on such occasions. 1936 Laws of Puerto Rico, Act Apr. 23, 1936, No. 46.

[36] 70 P.R.R. 71 (1949). [37] Id. at 74.

[38] People v. Torres, 40 P.R.R. 241 (1929); People v. Rivera, 41 P.R.R. 256 (1930).

[39] 1931 P.R. Session Laws, p. 504.

[40] People v. Rodriguez, 43 P.R.R. 11 (1932).

[41] 44 P.R.R. 577 (1933).

> The obvious purpose of the Legislature was to legalize this particular form of gambling when carried on under specified conditions. We cannot assume that the framers of the law intended to license the business of using automatic gaming machines, to exact money from the licensee for the privilege of engaging in that business and at the same time to punish him by fine or imprisonment or both for so doing.[42]

Approximately five months later, much to Judge Hutchison's chagrin, the Legislature enacted a law declaring all slot machines illegal.[43]

In 1933, the Legislature did, however, except cockfighting from the general prohibition against gambling.[44] Parimutuel betting was authorized at licensed cockpits subject to regulations enacted by the Athletic Commission of Puerto Rico.[45] The statute, inter alia, regulated the take of the licensee and the government.[46] Today, betting at cockfights is prohibited except between the owners of the birds.[47] The government receives no percentage of the money so wagered.

The late 1920's and early 1930's were hard years for Puerto Rico. Two devastating hurricanes and the economic effects of world depression had catastrophic effects on the island's economy. At this time, the Legislature made several changes in the gambling law primarily for the purpose of improving the island's sagging economy.

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[42] Id. at 579.

[43] 1933 Laws of Puerto Rico, Act Aug. 22, 1933, No. 11.

[44] 1933 Laws of Puerto Rico (1st Spec. Sess.), Act Aug. 12, 1933, No. 1.

[45] Id. § 6. [46] Id.

[47] 15 L.P.R.A. § 294(d).

Lotteries had been part of Puerto Rico's heritage under the Spanish rule of the 19th century. The Royal Lottery, founded by Alejandro Ramírez, was established in 1814 and lasted until the start of American occupation in 1898.[48] In 1934, the Legislature decided to reestablish an official lottery. The preface of the act evidenced the government's interest in capitalizing on what it viewed as an inherent human weakness:

> Whereas, Hundreds of thousands of dollars leave the country annually, which are invested in the purchase of lottery tickets of other countries; Whereas, An official lottery existed in Puerto Rico which in no way affected the good customs of our people or the honesty or laboriousness of our forefathers; Whereas, At the present time many countries are reestablishing their national lotteries as an efficient means to raise the necessary funds for public services, as well as to prevent large sums of money from leaving the country; Whereas, Human nature is inclined to enjoy games of chance and our citizens cannot be prevented from spending their money on lottery tickets of other countries . . . . [emphasis added][49]

The official lottery efficiently achieved its pragmatic aims: the lottery made almost one million dollars available in 1938-39 to combat tuberculosis and to provide health and charitable services to various municipalities.[50]

The Puerto Rican Lottery remains viable today. Millions are spent yearly on the weekly lottery. Two thousand prizes ranging from $80 to $100,000 are awarded, with an occasional special prize of $400,000. The lottery is presently administered by a Bureau of the

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[48] R. Van Deusen, Porto Rico: A Caribbean Isle 87 (1931).

[49] 1934 Laws of Puerto Rico, Act May 14, 1934, J.R. No. 37.

[50] K. Wagenheim, Puerto Rico: A Profile 226 (1970).

Lottery,[51] although the number of drawings to be held in any one month is determined by the Secretary of the Treasury.[52] The current statute also regulates the licensing of lottery agents[53] and the sale of tickets.[54] The tickets in the Puerto Rico Lottery are considered securities of the government and forgery of such lottery tickets subjects the violator to a maximum 14 years imprisonment.[55] In Fuentes v. John Doe,[56] the court held that lottery tickets are non-negotiable instruments.[57]

In 1936, the Legislature authorized betting on dog races at licensed tracks for the specific purpose of "promoting the business of tourism in Puerto Rico."[58] The Public Amusements and Sports Commission was authorized to prepare regulations for the holding of such races.[59] The statute also regulated the take of the licensee[60] and declared that bets on dog races other than with an authorized licensee within the grounds of the racetrack were unlawful.[61]

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[51] 15 L.P.R.A. § 111.

[52] Id. § 113.

[53] Id. §§ 115, 115a, 116.

[54] Id. §§ 114, 117. Explicit rules and regulations governing the Puerto Rico Lottery have also been promulgated in 15 R.&R.P.R. §§ 126-1 - 126-215.

[55] 15 L.P.R.A. § 123. The penalty for forgery is provided in 33 L.P.R.A. § 1646.

[56] 84 P.R.R. 486 (1962).

[57] Id. at 495.

[58] 1936 Laws Puerto Rico, Act Apr. 20, 1936, No. 35, §§ 1, 5.

[59] Id. § 3. [60] Id. § 8. [61] Id. § 4.

In 1947, the Legislature legalized betting on "low-power motor vehicle races" for the express purpose of "promot[ing] tourism in Puerto Rico."[62] As in dog racing, any of the betting systems known in Puerto Rico could be used in connection with wagering on car races.[63] The 1947 law also regulated the take of the licensee[64] and the government[65] and authorized the Public Amusement and Sports Commission to promulgate regulations for the holding of such races.[66]

In 1957, the Legislature repealed the 1936 dog racing act and prohibited the holding of dog races as well as wagering on the results of such a race.[67] Further, the law authorizing betting on car races was also repealed.[68] Betting on dog or car races is currently prohibited in Puerto Rico.[69]

The trend towards decriminalization of gambling reached its apex in 1948 upon the legalization of casino gambling.[70] In a "Statement of Motives," the authors of this legislation stated the new law's twofold purpose: (1) to "contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world" and (2) to

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[62] 1947 Laws Puerto Rico, Act May 15, 1947, No. 484.

[63] Id. § 4. [64] Id. § 6.

[65] Id. § 8. [66] Id. § 4.

[67] 1957 Laws Puerto Rico, Act June 4, 1957, No. 10. See 15 L.P.R.A. § 231.

[68] Id. Act No. 12. [69] 15 L.P.R.A. § 231.

[70] 1948 Laws Puerto Rico, Act May 15, 1948, No. 221.

establish "regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income."[71]

Roulette, dice and card games of chance were authorized in licensed gambling rooms notwithstanding the provisions of the penal code prohibiting such activities.[72] The Tourism Advisory Board of the Puerto Rico Industrial Development Company was empowered to prescribe regulations governing legalized gambling casinos.[73] The regulations, however, do not have the force of law until approved by the Governor of Puerto Rico. Prominent among the general restrictions imposed by the 1948 act was the prohibition against gambling casinos offering their facilities to the public of Puerto Rico.[74]

A myriad of regulations have arisen regarding the operation of gambling casinos.[75] Thorough investigations are insisted upon before the issuance of a license. The law requires that all owners, stockholders, operators, and employees have untainted characters and reputations.[76] Gambling equipment must be of an approved type and casinos must adhere to standardized operating procedures.[77] Government inspectors are

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[71] Id. § 1. [72] Id. § 2. [73] Id. § 7.

[74] This is still prohibited today. 15 L.P.R.A. § 77.

[75] See 15 R.&R.P.R. §§ 76-1 - 76a-70 (1958); 15 L.P.R.A. §§ 71-84.

[76] 15 R.&R.P.R. § 76-2.

[77] E.g., 15 R.&R.P.R. §§ 76-19, 76a-31, 76a-42.

constantly present in the casinos to ensure the honesty of the games.[78] Alcoholic beverages are expressly forbidden in the casino[79] and persons in "shirt sleeves" are not permitted in gambling rooms.[80] The law requires the rules for all games to be prominently posted in both English and Spanish.[81] Gambling casinos are not permitted to advertise the casino in newspapers, magazines, radio or in any other form that will advertise their gambling casino directly to the public in Puerto Rico.[82]

The Puerto Rican casinos are widely renown as the Caribbean's most honest gambling establishments.[83] Nevertheless, there has been increased government concern over possible Mafia-infiltration. Kal Wagenheim noted:

> Government officials claim that some persons "with interests in hotels here maintain close friendships" with members of the Mafia and professional gamblers who "stay in the hotels, but are not registered." They have also criticized the practice of some large hotels, which fly in junkets of heavy gamblers from the United States, offering them free room and board if they buy $500 worth of chips in advance.[84]

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[78] Id. §§ 76-16, 76-19. [79] Id. § 76a-4.

[80] Id. [81] Id. § 76-15.

[82] Id. § 76a-1. See J. Scarne, Scarne's Complete Guide to Gambling 225-27 (1961).

[83] E. Hanson, Transformation: The Story of Modern Puerto Rico. 293-95 (1955); Scarne, supra note 82, at 348.

[84] K. Wagenheim, Puerto Rico: A Profile 111-12 (1970).

Approximately 90 percent of Puerto Rico's tourists come from the United States, predominantly the eastern States such as New York, New Jersey, Pennsylvania and Florida.[85] It is not surprising, then, to discover that major hotels in Puerto Rico derive almost one-half of their income from their gambling casinos.[86]

Although expanding the scope of decriminalized gambling in 1948, the Legislature also directed its attention to the more effective suppression of unlawful gambling. A smaller counterpart of the national lottery, "la bolita," and bookmaking were declared public nuisances and all devices and vehicles used in connection with these prohibited games were to be forfeited to the government.[87] The owner/manager of a "la bolita" game was guilty of a felony and subject to a maximum ten years imprisonment without the benefit of a suspended sentence.[88] Further, a special investigation force was established to investigate and enforce violations of the 1948 Act. The special force was empowered to enforce search warrants, make arrests, and to seize evidence.[89]

This law was in response to what government officials perceived as a serious threat to the Nation's social and economic well being. In People v. Luciano,[90] Judge Geyls observed:

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[85] Wagenheim, supra note 84, at 111.

[86] Wagenheim, supra note 84, at 112.

[87] 1948 Laws of Puerto Rico, Act May 15, 1948, No. 220, §§ 1, 5.

[88] Id. § 10.

[89] Id. § 7.

[90] 83 P.R.R. 551 (1961).

> We know that the illegal game of "bolita" causes serious social and economic evils in Puerto Rico. In that game large sums of money are spent which belong almost entirely to the economically weaker groups; it has facilitated the creation and consolidation of professional criminal organizations which plunge from that activity into others which are more dangerous for society, and which constitute an erosive element even for the police force, cf. People v. Adorno, 81 P.R.R. 504 (1959); the constant presence of such illegal game in our medium is a perpetual menace to our juridical system and to the respect which every citizen owes the officers charged with the public peace. [footnote omitted][91]

Decriminalization of gambling was further extended by the Legislature in 1950 to permit the holding of bingo games for charitable and educational purposes.[92] Licenses had to be secured from the Secretary of State of Puerto Rico[93] and games were to be held no more than once a week.[94] Licensees are required to report annually to the Department of State[95] and small fines are levied for violations of the bingo regulations.[96]

In 1950, betting at jai-alai games was also legalized[97] and placed under the jurisdiction of the newly formed Economic Development Administration, which had displaced the earlier Tourism Advisory Board of the Puerto Rico Industrial Development Co., pursuant to 1950 Reorganization Plan No. 10. Any of the betting systems authorized by law could be used at such games and the statute further regulated the take of the licensee and government.[98] The 1950 jai-alai Act was, however, subsequently repealed in 1961[99] and betting at jai-alai in Puerto Rico is currently prohibited.

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[91] Id. at 564.

[92] 1950 Laws of Puerto Rico, Act May 8, 1950, No. 242.

[93] Id. § 2. [94] Id. § 5. [95] Id. § 6. [96] Id. § 7.

[97] 1950 Laws Puerto Rico, Act May 12, 1950, No. 406.

[98] Id. § 3.

[99] 1961 Laws of Puerto Rico, Act June 14, 1961, No. 58.

Despite the numerous forms of legalized gambling permitted on the island, Puerto Ricans continue to be attracted to unlawful, clandestine games of chance. Kal Wagenheim has observed:

> Despite all this legal access to betting, Puerto Ricans love to play clandestine games of chance, such as "la bolita," the small-time version of the lottery; it is similar to the "numbers" game in the United States, with small wagers and prizes of a few hundred dollars. There are many regional bolita games throughout the island. In some northwest barrios of Puerto Rico, the winning number is determined by the last three numbers of the racing attendance at Santo Domingo's track, across the Mona Channel, which are announced on Dominican radio.
>
> [O]ne might assume that sports and gaming are so popular in Puerto Rico that they form part of the national character. It seems that this is a valid assumption.[100]

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[100] K. Wagenheim, Puerto Rico: A Profile, 226-27 (1970).

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