INDIAN &

FEDERAL GAMING LAW

Part 1

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The Federal Wire Act

Introduction

As described in Chapter 1, federal government and federal laws have generally not played a central role in regulating gambling activity. In general, gambling laws, enforcement and regulation have been the domain of the states, with few exceptions. Those exceptions include sports wagering, Native American gaming, and interstate horse race wagering.

For the purposes of this class, we will focus on the core federal statutes, and related court opinions, that regulate gambling.

The Federal Wire Act

The Federal Wire Act, along with several other laws, was a part of the 1961 federal legislative package designed to cut off those activities that profited organized crime and to assist the states in enforcing their gambling laws. The Federal Wire Act, codified as 18 U.S.C. §1084, generally prohibits the use of interstate electronic communications facilities for conducting gambling. There is some difference of opinion as to the types of gambling regulated by the Federal Wire Act, as the case materials and other resource materials will illustrate.

The Statute

18 U.S.C. §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 under this title 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 or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

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

(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.

(e) As used in this section, the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

Questions for Discussion

What does the Federal Wire Act prohibit?

Does it prohibit or regulate online casino game wagering such as online slots? (Why or why not)

Does it prohibit or regulate online sports wagering such as wagers on NFL games? (Why or why not)

Does it prohibit or regulate online poker sites? (Why or why not)

Elements

(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 under this title or imprisoned not more than two years, or both.

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528 F.Supp. 324, 9 Fed. R. Evid. Serv. 964
United States District Court, D. Rhode Island.

UNITED STATES of America
v.
Robert BABORIAN and Anthony Lauro.

C.R. No. 80-0018.
Nov. 25, 1981.

A bettor and a bookmaker were charged with the use of a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers. Though a jury was impanelled, it was subsequently excused, and the case was tried to the court by agreement of the parties. The District Court, Pettine, Chief Judge, held that: (1) the statute providing that whoever being engaged in business of betting or wagering knowingly uses wire communication facilities for transmission in interstate commerce of bets shall be fined not more than $10,000 or imprisoned not more than two years, or both, does not cover an individual bettor, even if the bettor wagered substantial sums and displayed sophistication of an expert in his knowledge of odds making, and (2) the bookmaker could be convicted under the statute after it was established that he had knowledge that certain telephone calls were being placed from Connecticut to Rhode Island.
Ordered accordingly.

OPINION

PETTINE, Chief Judge.

The defendants are accused of violating 18 U.S.C. ss 2 and 1084. [FN1] Though a jury was impanelled, it was subsequently excused, and the case was tried to the Court by agreement of the parties.

FN1. These defendants were charged in one count of a multicount indictment. This case was severed.

The major question presented is whether or not the activities of the defendant Baborian constituted the “business of betting or wagering.” 18 U.S.C. s 1084(a) reads as follows:

> (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.

The evidence in the case consisted of bookmaking records seized from defendant Anthony Lauro's apartment in Rhode Island, and intercepted telephone conversations between these defendants and others. Baborian is a lavish gambler; since at least the first week of March 1977 through December 1977 he wagered, with Lauro alone, an average of $800 to $1,000 a day, three to four times per week, on professional baseball, basketball, and football. In addition to betting, the intercepted phone conversations reveal that he received the line [FN2] on games, made up his own line, and gave Lauro his opinion on the best games on which to wager.

> *FN2. The "line" is simply the points added to an underdog, or subtracted from the favorite, to balance more evenly the teams for wagering purpose.*

In all, there were eight telephone conversations. Since they are the basis of the indictment, the substance of each conversation is set forth. The government accurately summarizes them in its memorandum as follows:

On December 9, 1977 at 6:58 p. m., Baborian placed six bets for a total of $800. He received the line on professional basketball, had already made up his own line, and gave Anthony Lauro his opinion on the best games to wager on.

On the following day at 11:13 a. m., he opened and closed a teaser,[FN3] mentioned that he was in a rush, asked for the afternoon games, asked Lauro if he had gotten him "three with Cincinnati," gave his opinion to Lauro on the best games to bet and asked what time Lauro would get the line on the college games.

FN3. A "teaser" is a single wager on two or more teams, all of which must win in order to collect. The bettor receives a more favorable point-spread than under the actual line, but collects a lesser payoff if he wins.

On December 11, 1977 at 11:50 a. m., Baborian told Falk that he played the whole card, that is, 23 games.

On the same day at 1:45 p. m., Baborian asked Falk to get him a line on a professional basketball game. (Falk is a defendant in other counts of the indictment.)

On December 12, 1977 at 6:35 p. m., Robert Baborian mentioned his own line, received the college line from Lauro, made four bets for a total of $600 and asked for the football line.

On December 17, 1977 at 6:20 p. m., Baborian placed 12 bets with Lauro for a total of $1,700.

On December 14, 1977 at 5:55 p. m., Robert Baborian called his father (in Rhode Island) from New York City. The conversation shows that Baborian came out of a Christmas party to get the line from his father and to place wagers... Baborian asked his father to relay the wagers to Anthony Lauro. The wagers totaled $800.

On December 16, 1977, there were a series of phone calls from Robert Baborian in Connecticut to (his father) in Providence who in turn relayed wagers to Anthony Lauro. At 6:15 p. m., Robert Baborian called his father, received the line from him and asked his father to place five bets for Baborian with Anthony Lauro. These wagers totaled $1,550.... (T)his call was placed from Fairfield, Connecticut. Twenty minutes later, (his father) relayed these wagers to Anthony Lauro and told Lauro that (his son) called him from New Haven and that "He's driving in." Fifteen minutes later, Robert Baborian again called his father, stated that he had just talked to "Pooch," made a mistake on one of his wagers and wanted to raise a $100 bet to $250. At 6:55 p. m., (the father) called Lauro and after Lauro confirmed that he had just spoken to Robert Baborian, (the father) relayed the wager made from Connecticut by (his son) to Anthony Lauro.... (T)his second call from Robert Baborian to (his father) was made from Milford, Connecticut.

The government concedes that Baborian only placed bets with Lauro and did so only for himself. It further concedes that all these calls, except those of December 14 and 16, were intrastate. The only other evidence presented was the records seized from Lauro's apartment which show that he was servicing a number of customers in addition to Baborian.

"Business" of Betting or Wagering-Defendant Baborian

The sine-qua non of conviction under this statute is proof that the defendant was in the "business" of betting or wagering. **When such a business exists is not easy to determine. There are no sharp contours in a general term such as "business," and the present state of the law is indeed amorphous.**

The legislative history does not help solve the problem at hand. I do not believe the legislators were thinking of a situation such as exists in this case when they enacted section 1084. They used words interchangeably, thus obfuscating the meaning of their various statements. Referring to "professional" gamblers, the legislative history of the Act contains the following observation:

Law enforcement is not interested in the casual dissemination of information with respect to football, baseball, or other sporting events between acquaintances. That is not the purpose of this legislation. However, it would not make sense for Congress to pass this bill and permit the professional gambler to frustrate any prosecution by saying, as one of the largest layoff bettors in the country has said, "I just like to bet. I just make social wagers." This man, incidentally, makes a profit in excess of a half-million dollars a year from layoff betting. Therefore, there is a broad prohibition in the bill against the use of wire communications for gambling purposes.

S.Rep.No.588, 87th Cong., 1st Sess. (1961) (emphasis added).

It is not too difficult to say from this legislative history that the bill does not encompass discussions between friends as to their opinions on the outcome of sporting events. On the other hand, one cannot say with certainty what was intended by the term "professional

gambler." However, "professional gambler" was used in connection with layoff betting, which has a clear meaning in the gambling world-it is nothing more than the process whereby a gambler accepts bets from bettors and then in turn places a portion of these bets with another gambler to balance his books. In other words, he bets with another gambler to minimize potential losses.[FN4] Whatever meaning the Congress had in mind, it certainly did not appear to include a mere bettor.

FN4. More precisely, a "lay off" is a bet placed by one bookmaker with another bookmaker in order to achieve a more favorable ratio of wagers and in order to reduce his financial risk when one bookmaker holds excess wagers on one team.

The Court notes that an additional term applicable to the business of gambling is "vigorish," the percentage a bettor must pay the bookmaker on a losing wager. The parties agreed to the incorporation and meaning of this word.

Other legislative history likewise is of little help. For example, when section 1084 was proposed, Senator Kefauver asked during the hearings, "What are you going to do about private social betting ... (,) any individual at home calling up to see how a horse race went.(?)" It was then suggested that the proposed bill be amended to have it apply to gambling activities in furtherance of a business enterprise. From this it may be argued that the Senator intended that a mere social bettor not be included within the provisions of the bill. The reader, however, can only wonder at what the Senator would have said if he were asked to define "social" betting.

Representative Celler said, "This bill only gets after the bookmaker, the gambler who makes it his business to take bets or to lay off bets." From this statement one could conclude that Representative Celler intended to cover only the typical bookmaker. However, he qualified his statement by adding, "It does not go after the casual gambler who bets $2 on a race. That type of transaction is not within the purvue of the statute." 107 Cong.Rec. 16,534 (1961) (emphasis added). What would Representative Celler have said of one who gambled approximately $200,000 a year with one other gambler?

Further review of the legislative history casts no clearer light on the meaning of "engaged in the business of betting or wagering." The House Report on the bill reads:

Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present the immediate receipt of information as to results of a horse race permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events.

The availability of wire communications facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a sporting event begins.

H.R.Rep.No.967, 87th Cong., 1st Sess. (1961), reprinted in (1961) U.S.Code Cong. & Ad.News 2631, 2631-32, (emphasis added).

This last quote does indicate that the business of gambling is a bookmaking operation entailing the acceptance of bets and laying off of bets. I conclude, after considering all of the foregoing legislative history, that Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets, and not mere betting. The provocative question is whether this is still the proper definition when the bettor wagers substantial sums and displays the sophistication of an expert in his knowledge of odds making. I conclude the statute simply does not cover such a situation. I find that Congress never intended to include a social bettor within the prohibition of the statute and that Congress did not contemplate prohibiting the activities of mere bettors, even where, as with Mr. Baborian, they bet large sums of money with a great deal of sophistication. Indeed, I do not see how the statute could be read otherwise. The government's interpretation of the statute would make the implication of criminality turn on the expertise of the bettor and the quantum of money wagered. I submit that these factors are not determinative of what constitutes a business.

As I see it, the legislative language indicates that “being engaged in the business of betting or wagering” requires the sale of a product or service for a fee involving third parties, i.e., customers and clients, or the performance of “a function which is an integral part of such business.” The defendant need not be exclusively engaged in such business. If he is an agent or employee of the business he need not share in the profits or losses of the business or receive compensation for his services, but “the function he performs must provide a regular and essential contribution to the (overall operation of) that business. If an individual performs only an occasional or nonessential service or is a mere bettor or customer, (regardless of the amount bet,) he cannot properly be said to engage in the business.” There must be a “continuing course of conduct,” and if associated with another, their joint conduct must be to achieve a common objective and purpose. U. S. v. Scavo, 593 F.2d 837, 842-43 (8th Cir. 1979).

The various decisions in this area are not to the contrary, but I could find no case truly on point. The government cites Sagansky v. United States, 358 F.2d 195, 200 (1st Cir.), cert. denied, 385 U.S. 816, 87 S.Ct. 36, 17 L.Ed.2d 55 (1966), for the proposition that section 1084 applies to a “bettor who is a professional gambler.” This statement is circular; neither does it not tell us when a bettor is a professional gambler, nor does it define “professional gambler.” Moreover, the government fails to note that, in Sagansky, the defendants were bookmakers, that is, they accepted bets and were clearly “engaged in the business.” As the court said,

s 1084(a) does not punish the mere transmission of bets or wagers, but rather the “use” of interstate wire communication facilities for their transmission. When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of the statute that he has “used” the facility for the transmission of bets or wagers. Id. at 200. (emphasis added).

Finally, the remainder of the opinion does not clarify the problem at stake in this case. The Court hypothesized:

Suppose a professional gambler used interstate wires on ten different days, but never to place more than one bet on a single day. Would he have never violated the statute? ... If a defendant

is professionally engaged in making bets and wagers, one single use of interstate facilities is an offense. Id. at 201. (emphasis added).

In this last passage the meaning of the phrase “professionally engaged” is not discussed. It is not at all clear from this case whether a mere bettor is or is not excluded under section 1084(a).

Another decision in this area, United States v. Anderson, 542 F.2d 428 (7th Cir. 1976), describes certain betting activities as follows:

Their conversations involved in depth discussions of the merits of betting one side of a particular game or the other and the comparison of line information. Crews placed substantial bets with Anderson when these discussions ended. Also, Crews had on occasion used Anderson's phone to collect line information. When asked to characterize the Anderson-Crews relationship, the expert witness ... stated it was “in the nature of a partnership, a cooperating relationship where they were valuing one another's opinions and more or less working together.” Id. at 435. (footnote omitted).

The government argued that this was enough to establish that they were partners. The court ruled to the contrary; it reversed Crews' conviction under 1084(a). It stated that, “In the instant case there was no evidence that Crews was in the ‘business of betting or wagering.’ ” Id. at 436. Crews, the defendant in this case, seems to be on a comparable footing with Baborian.

In United States v. Marder, 474 F.2d 1192 (5th Cir. 1973), witnesses testified, inter alia, that they had made numerous bets and wagers with the appellant over an extended period of time. The Fifth Circuit affirmed a s 1084 conviction with language that included the following:

There was sufficient evidence introduced by the government to prove that (appellant) committed the first element of the offense charged which forbids the use of a wire communication facility for the transmission in interstate commerce of wagering information. In addition the burden was on the government to establish that (appellant) was in the business of gambling or in common parlance, was a “bookie.” Id. at 1194. (emphasis added).

Finally, in a similar manner, while addressing the meaning of the term “transmission” under s 1084(a), the Tenth Circuit noted that “the statute deals with bookmakers-‘persons engaged in the business of betting or wagering.’ ” United States v. Tomeo, 459 F.2d 445, 447 (10th Cir.), cert. denied, 409 U.S. 914, 93 S.Ct. 232, 34 L.Ed.2d 175 (1972).

It must be acknowledged that these courts spoke in conclusory terms as to the “business” of gambling. However, the language does tend to indicate how they would address the issue in this case.

In United States v. Scavo, 593 F.2d 837 (8th Cir. 1979), the appellant was charged with a violation of s 1084(a). As proof that he was not in the gambling “business”, he relied on cases interpreting 18 U.S.C. s 1955, which provides in pertinent part:

(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.

The court rejected such an analogy stating:

We find appellant's argument unpersuasive. The issue in the cases decided under s 1955 is whether the person providing line information has such a close, ongoing, and substantial relationship to the person receiving the information as to make them both participants in a single gambling business. In enacting s 1955, Congress did not intend to make all gambling businesses subject to federal prosecution; rather the statute was ‘intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and substantial as to be of national concern.'

In regard to s 1084(a), however, there is nothing to indicate that Congress intended only to punish large-scale gambling businesses. The basis of federal jurisdiction underlying s 1084(a) is the use of interstate communications facilities, which is wholly distinct from the connection between large-scale gambling businesses and the flow of commerce, which provides the jurisdictional basis for s 1955. See United States v. Sacco, 491 F.2d 995, 999 (9th Cir. 1974). Thus, the necessary showing of interdependence between individuals involved in an illegal gambling business under s 1955 is not required under s 1084(a). Moreover, s 1084(a) is not limited to persons who are exclusively engaged in the business of betting or wagering and the statute does not distinguish between persons engaged in such business on their own behalf and those engaged in the business on behalf of others. See Truchinski v. United States, 393 F.2d 627, 630 (8th Cir.), cert. denied, 393 U.S. 831, 89 S.Ct. 104, 21 L.Ed.2d 103 (1968).

In Scavo, among the factors the court found pertinent to its conclusion that Scavo was engaged in the business of betting were the facts that Scavo furnished the bookmaker with line information on a regular basis; that such information was critical to the bookmaker's operation; and that there was a financial arrangement between the two. Id. at 842. Such facts are absent in the Baborian-Lauro relationship. (While Baborian discussed line information with Lauro, there was no evidence presented that showed Lauro ever relied upon Baborian to supply it.) Baborian was not a part of Lauro's business; rather, he was in the posture of a customer. Finally, I also note that the Scavo court, in its instructions to the jury defining the “business” of betting or wagering, pointed out that “a mere bettor or customer” cannot be said to be engaged in the business of betting or wagering. Id. at 842-843.

The government finds no greater support in the other cases it cites. Katz v. United States, 369 F.2d 130, 132 (9th Cir. 1966), rev'd on other grounds, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), involved a defendant who placed bets on behalf of other bettors and who was a handicapper as well. United States v. Swank, 441 F.2d 264, 265 (9th Cir. 1971), involved a

defendant who worked closely with the bookmakers in “laying off” bets to avoid an adverse effect on the horse track odds. Nothing in that opinion addresses the issue in this case.

In short, s 1084 does not sweep within its prohibition a mere bettor. Congress never intended that the federal government should thus invade the criminal jurisdiction that properly belongs to the states. I adopt defense counsels' argument that the interpretation of s 1084(a) proferred by the government would upset this balance between state and federal law enforcement functions by drastically expanding federal criminal jurisdiction. Section 1084(a) by reaching the customer of the business would become an anomaly in the federal matrix, intruding into an area that the individual states are perfectly able to fill. As a general rule, criminal statutes must be narrowly construed. Bell v. United States, 349 U.S. 81 (75 S.Ct. 620, 99 L.Ed. 905) (1955); United States v. Box, (530 F.2d 1258, 1266 (5th Cir. 1976)); United States v. Bergland, 209 F.Supp. 547 (D.Wis.1962), rev'd on other grounds, 318 F.2d 158 (159) (7th Cir.), cert. den., sub nom, Cantrell v. United States, 375 U.S. 861 (84 S.Ct. 129, 11 L.Ed.2d 88) (1963). This general rule applies with particular force where a broad construction would serve to push federal criminal jurisdiction into areas previously reserved to the states. Post Trial memorandum, p. 6.

Thus, I find that, on the record of this case, the defendant Robert Baborian was not engaged in the business of betting or wagering and, therefore, is not guilty of violating 18 U.S.C. s 1084.

Defendant Lauro and 18 U.S.C. s 1084(a)

There is no question that defendant Lauro accepted wagers from Baborian as a bookmaker during the period in question, and therefore was in the business of betting or wagering. The only issue as to him is whether he knowingly used or caused to be used a telephone for the transmission in interstate commerce of bets or wagers as stated in the statute. The Court need not decide whether knowledge by the defendant of the interstate nature of a betting communication is required for a conviction under s 1084(a). See United States v. Feola, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). The Court is persuaded beyond a reasonable doubt that Lauro knew that the bets he accepted from Baborian on December 16 originated from out of state.

A conviction of Lauro must rest on the events of December 16, 1977. An evaluation of the December 16th phone calls begins with a monitored call between Baborian and his father on December 14 at 5:55 p. m. In this conversation, Baborian, who was out of state, called his father in Rhode Island and asked him to place certain wagers with Lauro who was also in Rhode Island. At 6:34 p. m. of the same date, the father phoned Lauro and placed the bets. Unquestionably Lauro knew these wagers were being placed for Baborian; in the course of the conversation Lauro said “Well, I'm gonna call him back anyway. I might change. Those are the games he likes.” The government argues from this last statement that it may be inferred that Lauro knew at that time that Baborian was out of state. I agree.

On December 16 the following four telephone calls were monitored. First, there was a 6:15 p. m. monitored conversation between father (Brian) and son (Baborian). There is no question that this call was placed by Baborian, who was out of state, to his father in Rhode Island. Baborian clearly told his father he was 10 or 15 minutes from New Haven, Connecticut. He asked his father to phone Lauro in Rhode Island and place certain bets.

Second, there was a 6:36 p. m. monitored conversation between father and Lauro. The father placed his son's bets with Lauro and, in the course of the conversation, told Lauro that his son had called him from New Haven. Lauro knew the bets placed were from Baborian.

Third, there was a 6:51 p. m. monitored conversation between father and son Baborian. Baborian told his father that he had just talked to Lauro (about bets) and had made a mistake. He asked his father to call Lauro back to verify his wagers.

Fourth, there was a 6:55 p. m. monitored conversation between father and Lauro. Lauro verified that Baborian had phoned him.

The 6:15 p. m. call clearly was from Baborian in Connecticut to his father in Rhode Island. The 6:36 p. m. call certainly alerted Lauro that the bets came from Baborian while he was out of state, i.e., in New Haven. The 6:51 p. m. call shows that, between 6:36 p. m. and 6:51 p. m., Baborian had called Lauro to place certain wagers. At this time, Lauro knew Baborian had been in New Haven at 6:36 p. m. Thus, he certainly knew that Baborian was out of state between 6:36 and 6:51 p. m. when Baborian phoned him. The 6:51 p. m. call verifies that Baborian had phoned Lauro; in the 6:55 p. m. call Lauro acknowledges as much. The interstate nature of these calls is further established by the telephone records. (Government exhibit 6).

Notes I need not dwell on whether or not the indirect relay of Baborian's out-of-state bets through his father are violative of s 1084(a), because I am convinced beyond a reasonable doubt that Lauro knew his conversation on December 16 with Baborian was interstate. In my opinion, to interpret the evidence in any other way is to strain to a fragile, meaningless filament the factual premise of this case. I take judicial notice that no one could possibly drive from New Haven, Connecticut to the Rhode Island line in the 15-minute interval between the telephone calls of 6:36 p. m. and 6:51 p. m. See Fed.R.Evid. 201.

I find that the government has proved Mr. Lauro's guilt beyond a reasonable doubt. It has shown that Lauro accepted wagers knowing that such wagers originated outside of Rhode Island, and that he was in the business of betting or wagering, as proven by the records seized from his apartment as well as by the intercepted phone conversations. Thus, I find the defendant Anthony Lauro guilty as charged.

So Ordered.

Questions for Discussion

What does it mean to be in the business of betting wagering?

Does the federal wire act prohibit us from placing online wagers?

Does the federal wire act prohibit us from offering online sports book services from Nevada?

WIRE COMMUNICATIONS FACILITY

(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 under this title or imprisoned not more than two years, or both.

593 F.2d 837, 4 Fed. R. Evid. Serv. 62

United States Court of Appeals,
Eighth Circuit.
UNITED STATES of America, Appellee,
v.
Frank SCAVO, Appellant.

Decided March 13, 1979.

Defendant was convicted in the United States District Court for the District of Minnesota, Harry H. MacLaughlin, J., of being engaged in the business of betting or wagering and knowingly using wire communication facilities for transmission in interstate commerce of information assisting in placing of bets or wagers. Defendant appealed. The Court of Appeals, Henley, Circuit Judge, held that: (1) evidence established that defendant was "engaged in the business of betting or wagering" within the meaning of the statute; (2) no error was shown in instructions to the jury; (3) defendant waived indictment; (4) a special agent was properly allowed, as an expert, to testify about defendant's role in bookmaking operation and knowledge of, and assistance to, the operation, and (5) failure to move to suppress intercepted communications prior to trial amounted to waiver of a claim that, because the court order authorizing the wiretap referred only to possible violations of one statute and not to possible violations of the statute under which defendant was prosecuted, the Government should have sought subsequent judicial approval prior to utilizing such evidence at trial.
Affirmed.

HENLEY, Circuit Judge.

Frank Scavo appeals from his conviction of being engaged in the business of betting or wagering and knowingly using wire communication facilities for the transmission in interstate commerce of information assisting in the placing of bets or wagers, in violation of 18 U.S.C. s 1084(a). We affirm.

On December 20, 1976 Chief Judge Devitt of the District of Minnesota signed an order authorizing interception of communications conducted on telephones which were suspected of being used in connection with an illegal gambling business being conducted in violation of 18 U.S.C. s 1955. The investigation centered on one Dwight Mezo, who operated a substantial bookmaking business in the Minneapolis area. As a result of this investigation, appellant, along with nine others, was indicted by a grand jury and charged with conducting an illegal gambling business in violation of 18 U.S.C. s 1955. Eight of appellant's co-defendants, including Mezo, pleaded guilty and charges against a ninth codefendant were dropped.

On March 8, 1978 appellant was charged by information with use of a communications facility to transmit wagering information in violation of 18 U.S.C. s 1084(a). As a result of plea negotiations, appellant consented to having his case transferred to the District of Nevada (where he resided) for plea and sentence pursuant to Rule 20 of the Federal Rules of Criminal Procedure. There, appellant waived indictment and tendered a plea of guilty. For reasons not appearing of record, the Nevada district court rejected the plea of guilty and appellant then entered a plea of nolo contendere, which was accepted by the court. Thereafter, appellant successfully moved to withdraw his plea of nolo contendere and the case was transferred back to the District of Minnesota for trial.

At trial the government's evidence consisted principally of playing recordings of telephone conversations obtained from the court-authorized wiretaps on the telephones of Dwight Mezo. In addition, F.B.I. Special Agent William Holmes was qualified as an expert in gambling and testified about the nature of gambling operations, gambling terminology, and his opinion as to appellant's role in Mezo's bookmaking operation. He testified that appellant, then a resident of Las Vegas, provided Mezo with much-needed “line” information I. e., the odds or point spread established to equalize or induce betting on sporting events.

Appellant offered two exhibits for the purpose of showing the ready availability of line information from other sources, but introduced no other evidence. The jury returned a verdict of guilty and the district court [FN1] sentenced appellant to one year on probation. This timely appeal ensued.

FN1. The Honorable Harry H. MacLaughlin, United States District Judge for the District of Minnesota.

Appellant challenges his conviction on six grounds: (1) the evidence was insufficient to show a violation of 18 U.S.C. s 1084(a); (2) the court erred in its instructions to the jury; (3) the court erred in finding that appellant had waived his right to trial by indictment; (4) the court erred in admitting certain opinion testimony of Agent Holmes; (5) the court erred in denying appellant's motion to dismiss the information for noncompliance with 18 U.S.C. s 2517(5); and (6) the court erred in admitting certain hearsay testimony. We examine these claims individually.

A. Sufficiency of the Evidence.

Appellant first contends that the evidence was insufficient to support a conviction under 18 U.S.C. s 1084(a). The statute provides:

> (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.
>
> Appellant concedes that he used a wire communication facility (the telephone) to transmit information assisting in the placing of bets or wagers. Appellant argues, however, that a person who merely provides line information is not "engaged in the business of betting or wagering."
>
> Appellant relies on a series of cases interpreting 18 U.S.C. s 1955. This statute provides in relevant part:
>
> (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.

A number of cases decided under this statute have held that the mere occasional exchange of line information between two individuals is insufficient to show that they are so interdependent as to be part of a single "illegal gambling business." For example, in United States v. Guzek, 527 F.2d 552, 557-58 (8th Cir. 1975), we said:

(T)he mere placing of bets by one bookmaker with another or the mere furnishing of line information in and of itself may not be sufficient to establish the interdependence of the bookmakers so as to fuse them into one single business for the purpose of counting each of these participants toward the five persons necessary to establish a violation of s 1955.

See also United States v. Todaro, 550 F.2d 1300, 1302 (2d Cir.), Cert. denied, 433 U.S. 909, 97 S.Ct. 2975, 53 L.Ed.2d 1093 (1977); United States v. McCoy, 539 F.2d 1050, 1062 (5th Cir. 1976), Cert. denied, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977); United States v. Leon, 534 F.2d 667, 677 (6th Cir. 1976); United States v. Thomas, 508 F.2d 1200, 1206 (8th Cir.), Cert. denied sub nom. Schullo v. United States, 421 U.S. 947, 95 S.Ct. 1677, 44 L.Ed.2d 100 (1975). But cf. United States v. Campagnuolo, 556 F.2d 1209, 1211 (5th Cir. 1977). Appellant contends that the phrase "conduct(ing) . . . an illegal gambling business" used in s 1955 is synonymous with the phrase "being engaged in the business of a betting or wagering" used in s 1084(a) and thus the cases decided under s 1955 should also apply to alleged violations of s 1084(a).

We find appellant's argument unpersuasive. The issue in the cases decided under s 1955 is whether the person providing line information has such a close, ongoing, and substantial relationship to the person receiving the information as to make them both participants in a single gambling business. In enacting s 1955, Congress did not intend to make all gambling businesses subject to federal prosecution; rather the statute was "intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern . . . ." H.R.Rep.No.1549, 91st Cong. 2d Sess. (1970), Reprinted in (1970) U.S.Code Cong. & Admin.News, pp. 4007, 4029. See also United States v. Box, 530 F.2d 1258, 1264-65 (5th Cir. 1976). The cases relied upon by appellant merely reflect a judicial sensitivity to the limited purpose of Congress in enacting s 1955.

In regard to s 1084(a), however, there is nothing to indicate that Congress intended only to punish large-scale gambling businesses. The basis of federal jurisdiction underlying s 1084(a) is the use of interstate communications facilities, which is wholly distinct from the connection between large-scale gambling businesses and the flow of commerce, which provides the jurisdictional basis for s 1955. See United States v. Sacco, 491 F.2d 995, 999 (9th Cir. 1974). Thus, the necessary showing of interdependence between individuals involved in an illegal

gambling business under s 1955 is not required under s 1084(a). Moreover, s 1084(a) is not limited to persons who are exclusively engaged in the business of betting or wagering and the statute does not distinguish between persons engaged in such business on their own behalf and those engaged in the business on behalf of others. See Truchinski v. United States, 393 F.2d 627, 630 (8th Cir.), Cert. denied, 393 U.S. 831, 89 S.Ct. 104, 21 L.Ed.2d 103 (1968).

Although we reject appellant's blanket assertion that suppliers of line information are outside the scope of s 1084(a), we must nevertheless determine whether the government introduced evidence sufficient to show that appellant was "engaged in the business of betting and wagering." At trial, the government proceeded on the theory that appellant was part of Mezo's bookmaking business and on this aspect of the case the authorities relied upon by appellant are relevant to a prosecution under s 1084(a). They are not controlling, however, because the evidence adduced showed more than a mere occasional exchange of line information between appellant and Mezo.

Viewed in the light most favorable to the government, the evidence showed that appellant furnished line information to Mezo on a regular basis; that Mezo relied on this information; that some sort of financial arrangement existed between appellant and Mezo; [FN2] that appellant was fully aware of Mezo's bookmaking operation; [FN3] and that accurate and up-to-date line information is of critical importance to any bookmaking operation.

FN2. In a telephone conversation of December 21, 1976 Mezo told appellant that "Rodney" (apparently co-defendant Rodney Scott Smith) would be going to Las Vegas and would bring appellant "the money." In a telephone conversation of December 24, 1976 Mezo told appellant that he would give appellant "the money" when appellant arrived at Minneapolis.

FN3. On one occasion, appellant flew from Las Vegas to Minneapolis. During that time, he was present at the place where Mezo conducted the bookmaking operation. Appellant answered the phone at this place, and he used Mezo's phone to contact an associate in Las Vegas in an attempt to procure line information for Mezo's use.

Given this evidence, we conclude that the government has shown that appellant was an important part of the Mezo bookmaking operation and that appellant was indeed "engaged in the business of betting or wagering" within the meaning of s 1084(a).

B. The Court's Instructions.
Appellant contends that the court made two errors in instructing the jury. First, he claims that the court erred in refusing to give the following instruction in relation to the elements of the offense under s 1084(a):

That defendant must have been aware of the statute in question; that he must have known that he was violating the law in providing the line information before he can be found guilty of the offense charged.

Appellant contends that such a specific intent instruction is mandated by Cohen v. United States, 378 F.2d 751 (9th Cir.), Cert. denied, 389 U.S. 897, 88 S.Ct. 217, 19 L.Ed.2d 215 (1967). In Cohen, the court held that Congress intended knowledge of the statutory prohibition to be an element of the offense under s 1084(a), but also held that there is a rebuttable presumption that the accused in fact had knowledge of the law. 378 F.2d at 757.

The parties have not cited, nor has our independent research disclosed, any other case which has accepted the Cohen rationale. Indeed, in a subsequent case, the Ninth Circuit, in a brief per curiam opinion, upheld a conviction under s 1084 against a challenge that the defendant had no intent to commit a violation of federal law. See United States v. Swank, 441 F.2d 264, 265 (9th Cir. 1971).

Given the facts of this case, we have no occasion to decide whether Cohen correctly states the law. In Cohen, the court approved the following instruction:

Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids and what the law requires to be done.

378 F.2d at 756 n.5. In the instant case, the record is devoid of any evidence from which it could be inferred that appellant acted because of ignorance of the law. Thus, there was nothing to rebut the presumption approved in Cohen, and failure to give a specific intent instruction, if error at all, was harmless.

Appellant's second contention relates to the instruction defining the phrase “engaged in the business of betting or wagering.” Appellant offered, and the court rejected, an instruction limiting application of this phrase to “bookmakers” I. e., persons who accept, exchange, or lay off bets. Instead, the court instructed the jury as follows:

The first of these essential elements that the government must prove is that the defendant engaged in the business of betting or wagering if and when he used the wire communications facility. The term “business” is to be applied according to its usual and ordinary meaning.

An individual engages in the business of betting or wagering if he regularly performs a function which is an integral part of such business. The individual need not be exclusively engaged in the business nor must he share in the profits or losses of the business. He may be an agent or employee for another person's business, but the function he performs must provide a regular and essential contribution to that business. If an individual performs only an

occasional or nonessential service or is a mere bettor or customer, he cannot properly be said to engage in the business.

A business enterprise usually involves a continuing course of conduct by persons associated together for a common purpose.

We find no error in the court's instruction, which is in accord with the law in this circuit. See Truchinski v. United States, supra, 393 F.2d at 630.

C. Waiver of Indictment.

Appellant claims that the trial court erred in overruling his motion to dismiss the information made just prior to the selection of the jury. The crux of appellant's argument is that his waiver of indictment filed in the Nevada district court was not knowingly made because he was unaware that his waiver of indictment was effective even though the plea agreement between himself and the United States was not accepted by the district court. In other words, appellant appears to contend that his waiver of indictment was part and parcel of the rejected plea agreement and that the failure of the plea agreement voided his waiver of indictment.

We reject appellant's contention. We begin by noting that we have serious doubts whether this claim was properly raised below. Appellant did not move to withdraw his waiver of indictment prior to trial. He made no objection to proceeding by way of information until just before the jury was selected and, even then, the question now presented on appeal was only obliquely suggested.

Even assuming that appellant adequately preserved his objection, however, we find his claim to be without merit. The record is entirely barren of any suggestion that the waiver of indictment was conditioned upon the acceptance of the plea agreement by the district court. The waiver, signed by appellant and his former counsel in open court, is unequivocal on its face. The memorandum of the plea agreement submitted to the Nevada district court by the Las Vegas Strike Force Office does not indicate that the waiver was a part of the plea agreement. In addition, appellant's motion to withdraw his nolo contendere plea in Nevada contained no mention of his waiver of indictment. Indeed, the motion affirmatively indicated that, if the court allowed the plea to be withdrawn, the case should be transferred back to the District of Minnesota for trial.

Finally, we note that the mere fact that a district court allows a guilty plea (or in this case a plea of nolo contendere) to be withdrawn does not compel the withdrawal of a waiver of indictment entered in conjunction with that plea. Bartlett v. United States, 354 F.2d 745, 749 (8th Cir.), Cert. denied, 384 U.S. 945, 86 S.Ct. 1471, 16 L.Ed.2d 542 (1966). Cf. United States v. Hammerman, 528 F.2d 326, 332 (4th Cir. 1975). In addition, a waiver of indictment entered in conjunction with a

Rule 20 transfer in a district other than the district where the offense occurred is nonetheless effective in the latter district. Boyes v. United States, 298 F.2d 828, 830 (8th Cir.), Cert. denied, 370 U.S. 948, 82 S.Ct. 1595, 8 L.Ed.2d 814 (1962).

In view of all these considerations, we hold that the district court properly concluded that appellant effectively waived his right to indictment.

D. Expert Testimony.

Appellant next contends that the district court erred in allowing Special Agent Holmes to give certain opinion testimony. Appellant does not contest Agent Holmes' qualifications as an expert in the field of gambling; rather, he contends that Agent Holmes' testimony "invaded the province of the jury." Specifically, he objects to Holmes' testimony about his role in Mezo's bookmaking operation and his knowledge of, and assistance to, Mezo's operation.

We reject appellant's contention of error. Rule 704 of the Federal Rules of Evidence provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

One purpose of the Federal Rules of Evidence was to make opinion evidence admissible if it would be of assistance to the trier of fact. Rule 704 is consistent with this purpose by doing away with the "ultimate issue" rule, a rule which Professor Wigmore aptly characterized as "empty rhetoric." 7 J. Wigmore, Evidence s 1920 at 17 (3d ed. 1940).

Rule 704 does not, of course, render all expert testimony admissible. Expert testimony must still meet the criterion of helpfulness expressed in Rule 702 and is also subject to exclusion under Rule 403 if its probative value is substantially outweighed by the risks of unfair prejudice, confusion or waste of time. 3 J. Weinstein & M. Berger, Weinstein's Evidence P 704(01) at 704-9 (1978).

Judged under these standards, Agent Holmes' testimony was properly admitted. The structure of a gambling enterprise is not something with which most jurors are familiar. In addition, the business employs a jargon foreign to all those who are not connected with the business. The latter consideration assumes particular importance in a case, such as this one, where the prosecution's evidence consists largely of tape recorded conversations. These conversations, which are at times virtually incomprehensible to the layman, are fraught with meaning to a person familiar with gambling enterprises.

Accordingly, we conclude that Agent Holmes' concededly relevant expert opinion would be helpful to the jury and was thus admissible under Rule 702. Any possibility of undue prejudice

was removed by the trial court's careful instructions regarding the juror's role in deciding the facts and weighing the credibility of witnesses, including expert witnesses.

E. Noncompliance with 18 U.S.C. s 2517(5).

Appellant next contends that the trial court erred in allowing the jury to hear the tape recordings of telephone conversations obtained through the wiretap of Mezo's telephone. Specifically, appellant contends that the court order authorizing the wiretap referred only to possible violations of18 U.S.C. s 1955 and not to possible violations of 18 U.S.C. s 1084(a). Thus, because the wiretap authorization referred to a separate and distinct offense from that on which appellant was tried, he contends that 18 U.S.C. s 2517(5) required the government to seek subsequent judicial approval prior to utilizing this evidence at trial. Because no such authorization was sought, appellant contends that the information charging a s 1084(a) violation should have been dismissed.

Appellant did not raise the issue of noncompliance with s 2517(5) until after the parties had rested at trial. Section 2518(10) of Title 18, which governs motions to suppress intercepted communications, provides that "(s)uch motion(s) shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." Appellant does not contend that he lacked the opportunity to move to suppress prior to trial, nor does he allege ignorance of the grounds of the motion. Accordingly, his failure to move to suppress the conversations prior to trial amounts to a waiver of the claim of noncompliance with s 2517(5). See, e. g., United States v. Johnson, 176 U.S.App.D.C. 179, 188, 539 F.2d 181, 190 (1976), Cert. denied, 429 U.S. 1061, 97 S.Ct. 784, 50 L.Ed.2d 776 (1977); United States v. Sisca, 503 F.2d 1337, 1349 (2d Cir.), Cert. denied, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974).

F. Co-Conspirator Testimony.
Appellant's final ground for reversal is that the trial court erred in allowing the jury to hear tape recordings of conversations between Mezo and other bookmakers, customers, etc. Appellant contends that this evidence was inadmissible hearsay. The government responds that the statements were admissions of co-conspirators and thus admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence.

We agree with the government. The district court made the appropriate findings regarding the existence of a conspiracy required by United States v. Bell, 573 F.2d 1040 (8th Cir. 1978), and our examination of the record shows that the finding has abundant support. Accordingly, the evidence was properly admitted.[FN4]

FN4. The co-conspirator admission exception embodied in Rule 801(d)(2)(E) applies to cases, like the one at bar, in which the defendant is not formally charged with conspiracy. United States v. Richardson, 477 F.2d 1280, 1283 (8th Cir.), Cert. denied, 414 U.S. 843, 94 S.Ct. 104, 38 L.Ed.2d 82 (1973). See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence P 801(d)(2)(E)(01) at 801-141 & n.3 (1978).

The judgment of conviction is affirmed.

Interstate or Foreign Transmission

(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 under this title or imprisoned not more than two years, or both.

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UNITED STATES of America, Plaintiff, v. Carl YAQUINTA, Philip Joseph Hankish, Howard Oscar Allen, Albert Downing, Nick Vukovich, and Louis Gresko, Defendants.

No. 7340.

United States District Court N. D. West Virginia, at Wheeling.

May 1, 1962.

Robert E. Maxwell, U. S. Atty., John H. Kamlowsky, Asst. U. S. Atty., John P. Diuguid, Sp. Counsel, Department of Justice, for plaintiff.

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Gilbert S. Bachmann, Wheeling, W. Va., for defendants Vukovich and Gresko.

Arch W. Riley, Riley & Riley, James A. Byrum, Wheeling, W. Va., for defendants Yaquinta, Hankish, Allen and Downing.

CHARLES F. PAUL, District Judge.

Count One of the indictment charges all six defendants with conspiracy to violate Title 18, United States Code § 1084. Counts Two and Three of the indictment charge all of the defendants, as principals and accessories, with the substantive offenses of violating said § 1084 on December 4, 1961, and December 6, 1961, respectively. All defendants have moved to dismiss the indictment with respect to the charged offenses.

Language contained in the indictment, supplemented by the bills of particulars filed by the Government, reveals the following claimed state of facts:

The defendants Allen and Downing conducted a book-making shop for off-track wagering on horse races, in Wheeling, West Virginia. The defendants Vukovich and Gresko conducted a similar and related book-making shop in Weirton, West Virginia. Part of the business of the two shops was taking bets and wagers on the results of horse races run at Waterford Park, near Chester, West Virginia. The defendant Hankish attended the races at the track, and, by means of a portable radio transmitter or walkie-talkie, broadcast the results of the races. The defendant Yaquinta was stationed in a housetrailer at Arroyo, West Virginia, a short distance from the track, where he received the information broadcast by Hankish on a radio receiving set. Immediately after reception of the information, Yaquinta relayed the information, by long-distance telephone, to the bookie shops in Weirton and Wheeling. To the knowledge of all defendants, the lines of the Telephone Company crossed the river, which is the border between West Virginia and Ohio, to the East Liverpool, Ohio, exchange of the Telephone Company. On the calls, the connection with the receiving ends was made by the operator at East Liverpool, through circuits connecting with Weirton and Wheeling.

The pertinent portions of § 1084, which was enacted September 13, 1961, are as follows:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate * * * commerce of * * * information assisting in the placing of bets or wagers on any sporting event * * *, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

The defendants contend that the congressional intent expressed in the statute was not to make criminal the use of an interstate wire transmission facility to carry messages emanating from a point in West Virginia to receiving points, also in West Virginia, no matter how many other States the electrical impulses, carried by the wires, traversed.

Parimutuel betting at licensed race tracks, of which Waterford Park is one, is legal in West Virginia; off-track betting is not. The statute, as far as is known, has not yet been construed. The "purpose" of the statute is succinctly stated in Report No. 588 of the Senate Judiciary Committee of the 87th Congress, on July 24, 1961, as "* * * 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." Both in oral argument and on brief, defendants' counsel have stated that "unquestionably Congress has the power to regulate all traffic in interstate commerce, and in recent years has shown little hesitancy to exercise such power. Thus, defendants concede that Congress could, if it wished, enact legislation sufficiently broad to cover the facts of the instant case. The question is whether § 1084 is so designed." The problem then is that often encountered but still

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esoteric one of "discovering" the congressional intent.

Counsel have endeavored to be helpful by drawing analogies between the question presented by § 1084 and other Acts of Congress in cases both criminal and civil, where transportation, travel or transmission between two points in the same State crossed, enroute, the borders of another State, including the following:

(1) The provisions of Title 18 § 1951, in which, in sub-section (b) (3), the Hobbs Act defines commerce, for the purposes of the anti-racketeering objectives of the Act, to include "all commerce between points within the

same State through any place outside such State * * *."

(2) United States v. Winkler, W.D. Tex.1924, 299 F. 832 (interstate transportation of stolen vehicle).

(3) United States v. Erie R. Co., N.J. 1909, 166 F. 352 (penalties of the Safety Appliance Act).

(4) Western Union Telegraph Co. v. Speight, 254 U.S. 17, 41 S.Ct. 11, 65 L.Ed. 104 (telegram from point to point in the same State, passing through another). To the same effect a long list of decisions of State courts under The Communications Act (Title 47 U.S.C.A.) are cited, beginning with Western Union Telegraph Co. v. Mahone, 1917, 120 Va. 422, 91 S.E. 157.**1**

(5) Cornell Steamboat Co. v. United States, 1944, 321 U.S. 634, 64 S.Ct. 768, 88 L.Ed. 978 (water transportation between points in a single State, passing through territorial waters of another).

(6) Yohn v. United States, 2 Cir., 1922, 280 F. 511 (theft from interstate railroad shipment).

(7) Michael v. United States, 7 Cir., 1925, 7 F.2d 865 (rail shipment).

(8) United States v. Delaware Lackawanna R. Co., S.D.N.Y.1907, 152 F. 269 (rebates on rail shipments).

Although § 1084 does not attempt federal preemption of the crime of gambling, some analogies can be drawn from the following cases which deny State jurisdiction where the State lines have been crossed: Roundtree v. Terrell, N.D.Tex. 1938, 22 F.Supp. 297; Central Greyhound Lines v. Mealey, 1948, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633; Missouri Pacific R. R. Co. v. Stroud, 1925, 267 U.S. 404, 45 S.Ct. 243, 69 L.Ed. 683.

As against the above cases, defense counsel have cited United States v. Wilson, D.C.Tenn.1920, 266 F. 712. This case involved a Mann Act charge in which the transportation was from Nashville to another point in Tennessee, on a train which passed through a portion of the State of Alabama. The District Court sustained a motion to dismiss the indictment, pointing out that the Act defined interstate commerce by the words "shall `include transportation from any State or Territory * * * to any other State or Territory.'" and held that that definition did not fit the charge in the indictment. No such restrictive definition applies to § 1084.

While the cases, construing different statutes and under differing circumstances, are not particularly helpful, they do make it abundantly clear that the intermediate crossing of a State line provides enough of a peg of interstate commerce to serve as a resting place for the congressional hat, if that will serve the congressional purpose. The congressional purpose here is very frankly elucidated in the Attorney General's letter to the branches of the Congress, dated April 6, 1961, in which he says,

"The purpose of this legislation is to assist the various States * * * 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 certain gambling information in interstate * * * commerce. * * *"

"Modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present the immediate receipt of information as to the results of a horserace permits a bettor to place a wager on a succeeding race."

> Both the congressional committees which reported this legislation favorably and the Attorney General's office which sponsored it have made it abundantly clear that the evil under attack is illegal gambling, and that the legislative purpose is to assist the States in the enforcement of their laws. The use of the commerce clause is the occasion rather than the reason for invoking federal jurisdiction. West Virginia needs just as much help in the enforcement of its anti-gambling statutes when the information which assists their violation comes from another point in West Virginia, as it does when that information comes from an adjoining or distant State. Admittedly, the federal government is without power to render such assistance unless an instrumentality of interstate commerce is employed, but, also admittedly, it has the power when such an instrumentality is employed. I find no evidence of the spirit of abnegation on the part of the Congress in the legislative history surrounding this enactment. The defendants urge that the evil attacked is "multi-state" organizational and professional gambling, but I cannot read into the Act a limitation which would so restrict its effect.
>
> Defendants' counsel call attention to the following paragraph in the House Judiciary Report, explaining the exemption in sub-section (b) with regard to the transmission of gambling information from a State where the placing of bets and wagers on a sport is legal, to a State where betting (such as off-track betting) on the event is legal:

"For example, in New York State parimutuel betting at a racetrack is authorized by State law. Only in Nevada is it lawful to make and accept bets on the race held in the State of New York where parimutuel betting at a racetrack is authorized by law. Therefore, the exemption will permit the transmission of information assisting in the placing of bets and wagers from

New York to Nevada. On the other hand, it is unlawful to make and accept bets in New York State on a race being run in Nevada. Therefore, the transmission of information assisting in the placing of bets and wagers from Nevada to New York would be contrary to the provisions of the bill."

Defendants' counsel argue that since, in the transmission of the messages from New York to Nevada, the transmission lines traverse many States where off-track betting is illegal, and must pass through telephone exchanges in those States, the framers of the Act did not intend to make the incident of the locations of the telephone exchanges of legal significance. The argument loses sight of the fact that the objective of the Act is not to assist in enforcing the laws of the States through which the electrical impulses traversing the telephone wires pass, but the laws of the State where the communication is received. To mix a metaphor, the telephone wire may seem a slender thread on which to hang the federal crime, but it is a substantial part of the web in which these defendants seem to be caught.

The motions to dismiss are denied.

Notes:

1 These cases, while civil in nature, have some pertinency because they make use of the definition of "wire communication" or "communication by wire", as contained in § 153 of Title 47, U.S.C.A. — The Communications Act. In referring to the amendment of § 1081 of Title 18, defining "wire communication facility", as used in § 1084, Report No. 967 of the House Judiciary Committee of the 87th Congress, dated August 17, 1961, in the "Sectional Analysis". is as follows:

"The first section of the bill amends § 1081 of Title 18, United States Code, by adding to that section of the chapter on gambling a new definition. The definition is that of `wire communication facility', and as defined, is similar to the definition of `wire

communication' or `communication by wire', as defined in § 153 of Title 47, United States Code 47 U.S. C.A. § 153 — The Communications Act."