THE WIRE ACT AND THE INTERSTATE HORSE RACING ACT: HOW DID WE GET HERE?

THE INTERSTATE HORSE RACING ACT 15 USC SECTIONS 3001 ET SEQ WHICH WAS PASSED IN 1978 STATES AT ITS OUTSET THAT THE STATES SHOULD HAVE THE PRIMARY RESPONSIBILITY FOR DETERMINING WHAT FORMS OF GAMBLING MAY LEGALLY TAKE PLACE WITHIN THEIR BORDERS. BUT THE NOTION THAT THE FEDERAL GOVERNMENT PLAYS A SECONDARY ROLE IN GAMING ENFORCEMENT MISSES THE POINT.

BUT FOR PURPOSES OF THESE REMARKS, YOU NEED NOT THINK BACK 100 YEARS.


MAYBE SOMEWHAT LIKE TODAY AN ERA THAT SEEMED TO BE DOMINATED BY TELEVISED CONGRESSIONAL HEARINGS WHICH PLAYED ON ALL 3 TV NETWORKS THROUGHOUT THE DAY.

1. THE KEFAUVER HEARINGS BRINGING THE NOTION OF ORGANIZED CRIME INTO PUBLIC CONSCIOUSNESS IN THE EARLY 1950’S. IN FACT, AS A RESULT OF THE KEFAUVER HEARINGS THERE WERE ANTI-WIRED GAMBLING BILLS INTRODUCED IN CONGRESS.

2. THE ARMY MCCARTHY HEARINGS –NOT ON GAMBLING - BUT WITNESSES BY THE ENTIRE NATION.

3. THE MCCLELLAN COMMITTEE ANTI-RACKETEERING HEARINGS OF THE LATE 1950’S.

ALSO THERE WAS THE DISCLOSURE OF THE MASSIVE ORGANIZED CRIME CONVENTION FOLLOWED BY THE
SUBSEQUENT ARRESTS THAT TOOK PLACE IN APALACHIN, NEW YORK IN 1957.

SO WITH SO MUCH FOCUS ON RACKETEERING IN THE 1950’S, IT’S ONLY NATURAL THAT THE FEDERAL GOVERNMENT WOULD GET INVOLVED.

SOME OF THAT INVOLVEMENT STARTS WITH THE TRUMAN ADMINISTRATION, WHICH IN 1950 INTRODUCED LEGISLATION TO BAN INTERSTATE TRANSMISSION OF GAMBLING INFORMATION. IT CONTINUED WITH THE EISENHOWER ADMINISTRATION WITH THE INTRODUCTION OF LEGISLATION AT THE REQUEST OF THEN ATTORNEY GENERAL WILLIAM ROGERS. IN 1960, ROGERS ADVOCATED FOR A DIRECT PREDECESSOR OF THE WIRE ACT. THE ROGERS’ LEGISLATION WAS DIRECTED AT THE COMMON CARRIERS - THE TELEPHONE COMPANIES AND WESTERN UNION THAT WERE AUTHORIZING SERVICES TO THE GROUPS OR INDIVIDUALS SUPPLYING GAMBLING INFORMATION.

WHILE THE ROGERS BILL DID NOT PASS IN 1960, IT WAS PART OF AN OVERALL CRIME PACKAGE OF EIGHT BILLS THAT WAS SUPPORTED BY NEW ATTORNEY GENERAL ROBERT KENNEDY IN 1961. IF YOU’RE AS OLD AS I AM, YOU WILL RECALL THAT ROBERT KENNEDY HAD BEEN THE COUNSEL TO THE MCCLELLAN COMMITTEE. THE MOST IMPORTANT OF THESE BILLS WAS A BILL TO PROHIBIT INTERSTATE TRAVEL IN
SUPPORT OF ILLEGAL ACTIVITIES. KENNEDY BELIEVED THAT ILLEGAL GAMBLING WAS A $7 BILLION INDUSTRY WITH 70,000 PEOPLE ENGAGED IN ILLEGAL GAMBLING ACTIVITIES. THIS BILL BECAME THE TRAVEL ACT WHICH IS CURRENTLY 18 USC SECTION 1952. AMONG THE 8 BILLS WERE 5 BILLS INTRODUCED ON BEHALF OF ATTORNEY GENERAL ROGERS INCLUDING WAS WHAT WE NOW REFER TO AS THE WIRE ACT. INCIDENTALLY, I CAN FIND NO REFERENCE TO THIS PROVISION AS THE WIRE ACT UNTIL THE ADVENT OF THE INTERNET IN THE MID 1990’S.

THE WIRE LEGISLATION ACTUALLY MOVED THROUGH CONGRESS WITH REMARKABLY LITTLE DEBATE OR ORGANIZED OPPOSITION.

THE BASIC THUST OF THE BILL WAS TO BLOCK THE WIRES THAT WERE SERVICING ILLEGAL BOOKMAKERS. THAT WOULD BE THE WIRES WE TEND TO ASSOCIATE WITH MOSES ANNENBERG WHICH PROVIDED THROUGH WESTERN UNION AND TELEPHONE LINES SWIFT DIRECT RACE RESULTS, ODDS, AND SCRATCHES TO BOOKMAKERS AND THEIR CUSTOMERS. AGAIN, GOING BACK TO THE MOVIES, THINK ABOUT THE WIRE SHOP OPERATED BY ROBERT REDFORD AND PAUL NEWMAN IN THE STING. THIS WAS THE BILL THAT WAS GOING TO BLOCK THE USE OF THE WIRES TO SERVICE BOOKMAKERS. AT A CONGRESSIONAL HEARING IN 1950, IT WAS ASSERTED THAT WESTERN UNION RECEIVED OVER $1 MILLION ANNUALLY FOR WIRE LEASES FOR RACE HORSE GAMBLING. IN INTRODUCING
ITS LEGISLATION IN 1951, THE KEFAUVER COMMITTEE PEOPLE SAID “RACE WIRE SERVICES WERE THE VERY LIFE BLOOD OF ILLEGAL GAMING.” THE CONCEPT WAS THAT IF YOU DENIED BETTORS THE KNOWLEDGE OF HOW THEIR PREVIOUS BETS MADE OUT OR WHAT THE ODDS WERE ON THE HORSES THEY WANTED TO BET, THEY WOULD BET FAR LESS. IF YOU DENIED BOOKMAKERS ACCESS TO THE ODDS, THEY WOULDN’T BE ABLE TO LAYOFF THEIR BETS. SO THIS WAS A BILL DESIGNED TO GO AFTER THE WIRES.

EMANUEL CELLAR THE HOUSE SPONSOR OF THE BILL SAID “THE OBJECTIVE IS TO STRIKE A STUNNING BLOW A DEADLY BLOW AGAINST THE SYNDICATED RACKETS WHICH ENABLE THESE GAMBLERS TO REACH RICH HARVESTS BECAUSE OF THEIR USE OF THE TELEPHONE, WESTERN UNION, IN GETTING BETTING INFORMATION. THAT IS AN EVIL THAT MUST BE STAMPED OUT.”

THE ORIGINAL KENNEDY BILL PROVIDED PENALTIES FOR COMMON CARRIERS. THAT BILL WAS AMENDED TO REMOVE THOSE PENALTIES WITH A PROVISO THAT LAW ENFORCEMENT AGENCIES COULD DIRECT THE PHONE COMPANIES AND WESTERN UNION TO STOP PROVIDING SERVICES TO THE SO-CALLED WIRE OUTFITS. SO HOW DID THIS BILL WORK? - THE BILL WHICH BECAME 18 USC SECTION 1084 CONTAINED FOUR SUBSECTIONS.
1. UNDER SUBSECTION A YOU NEEDED TO KNOWINGLY OPERATE A WIRE COMMUNICATIONS FACILITY – DEFINED VERY BROADLY – BUT OBVIOUSLY WITH NO NOTION IN 1961 THAT THERE WOULD BE AN INTERNET. YOU HAD TO BE IN THE BUSINESS OF BETTING OR WAGERING – SO MERE BETTORS COULD NOT BE PROSECUTED, AND YOU HAD TO TRANSMIT IN INTERSTATE OR FOREIGN COMMERCE:

   a. BETS OR WAGERS,
   b. INFORMATION ASSISTING IN THE PLACEMENT OF BETS OR WAGERS, OR
   c. A COMMUNICATION THAT ENTITLED THE RECIPIENT TO RECEIVE MONEY OR CREDIT AS A RESULT OF A BET OR WAGER

SUBSECTION (B) OF THE ACT CREATED A SAFE HARBOR FOR TWO TYPES OF COMMUNICATIONS:

ONE WAS FOR “BONA FIDE NEWS REPORTING OF SPORTING EVENTS OR CONTESTS” WHICH WAS BASICALLY AN ASSURANCE TO THE LEGITIMATE PRESS WIRE SERVICES AND BROADCASTERS THAT THEY WERE NOT VIOLATING THE LAW WHEN THEY REPORTED RACE RESULTS.

THE SECOND WAS CREATED FOR THE PURPOSE OF PERMITTING THE TRANSMISSION OF INFORMATION RELATING TO BETTING ON PARTICULAR SPORTS WHERE SUCH BETTING WAS LEGAL IN
BOTH THE STATE FROM WHICH THE INFORMATION WAS SENT AND THE STATE IN WHICH IT WAS RECEIVED.

SUBSECTION C PROVIDED THAT FEDERAL LAW DID NOT PREEMPT STATE LAWS AND THERE IS A FURTHER PROVISION IN SUBSECTION (D) DEALING WITH HOW A PHONE COMPANY OR WESTERN UNION DEALS WITH LAW ENFORCEMENT REQUESTS TO STOP SERVICE TO AN OPERATION USING GAMBLING INFORMATION.

ONE OF THE OVERRIDING ISSUES ON THIS BILL HAS BEEN THE REACH OF THE SAFE HARBOR EXEMPTION FOR INFORMATION RELATING TO BETTING WHERE THE BETTING WAS LEGAL IN BOTH STATES. THIS REALISTICALLY IN 1961 WAS A SOP TO THE STATE OF NEVADA.

IN THE HOUSE REPORT ON THIS ISSUE, IT WAS EXPLAINED THAT THERE WAS LEGAL OFF-COURSE BETTING IN NEVADA, AND THERE WAS LEGAL PARI-MUTUEL RACING ON HORSES AT TRACKS IN NEW YORK. ACCORDINGLY, YOU COULD TRANSMIT INFO ABOUT NY RACING TO NEVADA BUT SINCE NY ONLY ALLOWED BETTING ON ITS OWN RACES AT ITS OWN TRACKS, TRANSMITTING INFO ABOUT NEVADA RACES (OR ANYONE ELSE’S RACES) INTO NY WOULD BE CRIMINAL.

MORE IMPORTANTLY, THE HOUSE REPORT SPECIFICALLY STATED “NOTHING IN THIS EXEMPTION HOWEVER WILL PERMIT
THE TRANSMISSION OF BETS AND WAGERS OR MONEY BY WIRE AS A RESULT OF A BET OR WAGER FROM OR TO ANY STATE WHETHER BETING IS LEGAL IN THAT STATE OR NOT.” SO IF I’M IN NEW YORK IN 1962 OR 1972 AND CALL UP AND PLACE A BET ON A HORSE RACE WITH MY SPORTS BOOK IN NEVADA, I’M VIOLATING THE LAW EVEN THOUGH WAGERING ON HORSES IS LEGAL IN BOTH NEW YORK AND NEVADA.

THE EARLY ACTIONS AFTER THIS BECAME LAW WERE BASICALLY TO BLOCK BOOKMAKERS FROM RETAINING ACCESS TO THE WIRES BY BLOCKING THEM FROM PHONE AND WESTERN UNION SERVICE. THERE WAS A MAJOR ATTEMPT TO GO AFTER TOUTS WHO WERE UTILIZING THE PHONES TO REACH THEIR CUSTOMERS. 27 WARRANTS WERE ISSUED FOR TOUTS AS PART OF A MASSIVE FEDERAL RAID IN 1964. IN THE ONE DECIDED CASE ON THIS ISSUE, IT WAS DETERMINED THAT A PARTICULAR TURF ADVISOR WAS NOT ENGAGED IN THE BUSINESS OF BETTING OR WAGERING.


WITHOUT GOING INTO THE ISSUE IN DEPTH, THERE HAVE BEEN NUMEROUS QUESTIONS ABOUT THE REACH OF THE ACT AND
NOT MERELY THE ISSUE OF THE MEANING OF BETTING INFORMATION. DOES IT APPLY TO INTERNET TRANSMISSIONS? IS A TIP SHEET ENGAGING IN BONA FIDE NEWS REPORTING? DOES IT ONLY APPLY TO SPORTS? THE OPERATIVE LANGUAGE APPLIES TO “SPORTING EVENTS AND CONTESTS.” DOES THE WORD “CONTEST” STAND ALONE OR IS IT MODIFIED BY “SPORTING?” WHAT IT MEANT BY TRANSMISSION SINCE THE TEXT ONLY MAKES CRIMINAL TRANSMISSION OF BETS AND BETTING INFORMATION? IN SHORT, SAY YOU’RE A BOOKIE IN 1962 AND ALL YOU DO IS RECEIVE INFO ON WIRES ABOUT ODDS, SCRATCHES, AND RESULTS. HAVE YOU VIOLATED THE LAW BY MERELY RECEIVING BETTING INFORMATION? IF A STATE LIKE TEXAS ALLOWS ON COURSE BETS ON LIVE RACING, AND BETTING AT ITS RACETRACKS ON OUT-OF-STATE RACES, DOES THAT MEAN THAT A PERSON CAN SEND BETTING INFORMATION FROM LOUISIANA ON A HORSE RACE IN LOUISIANA TO SOMEONE’S HOME IN TEXAS?

THAT’S A PEEK AT THE WIRE ACT. THE INTERSTATE HORSE RACING ACT WHICH WAS PASSED IN 1978, ALSO HAS A TON OF AMBIGUITIES, BUT AT LEAST IT’S ALWAYS BEEN KNOWN AS THE INTERSTATE HORSE RACING ACT.

IT ARISES AFTER NY STATE PASSES OTB LEGISLATION IN 1970, AND OTB STARTS IN NEW YORK CITY IN 1971. AT THAT TIME, THERE WAS NO THOROUGHBRED RACING IN NEW YORK STATE IN THE WINTER AND OTB TOOK RACING FROM BOWIE AND
FLORIDA DURING THE WINTER. THE CONTROVERSY BEGINS WITH THE KENTUCKY DERBY. CHURCHILL DOWNS REFUSES TO MAKE A DEAL WITH CITY OTB. CITY OTB TAKES WAGERS ON THE DERBY ANYWAY. CHURCHILL CLAIMS MISAPPROPRIATION. OTB SAYS THAT THE DERBY IS IN THE PUBLIC DOMAIN.

ADDITIONALLY, CONNECTICUT OTB GETS STARTED. THERE’S NO HORSE RACING IN CONNECTICUT, AND THEIR PLAN IS TO SIMULCAST RACES FROM NEW YORK INTO PUBLIC THEATERS IN CONNECTICUT. SINCE THIS OTB PLAN MAKES IT EXTREMELY UNLIKELY THAT WE’RE GOING TO SEE A LIVE HORSE TRACK IN CONNECTICUT, EVEN MORE PEOPLE START COMPLAINING. THERE IS THE WIDELY SHARED BELIEF THAT INTERSTATE HORSE RACING WILL HARM LIVE RACING OVERALL AND BE THE DEATH OF THE SMALL RACETRACKS. AFTER ALL, HOW ARE YOU GOING TO KEEP THEM BETTING AT A CRAPPY TRACK IN NEBRASKA IF THEY CAN BET ON KEENELAND OR BELMONT?

SO THE ANTI-OTB PEOPLE TRY IN 1976 TO PASS A BILL OUTLAWING INTERSTATE OTB WHICH WOULD MEAN THAT A NEW YORK OTB COULD NOT TAKE WAGERS ON ANY EVENT NOT RUN IN NEW YORK STATE. THEY ALMOST SUCCEED. THERE’S A MAJOR HEARING IN THE HOUSE AND IN 1976 THE HOUSES BY A LARGE VOTE OF 315-86 WITH MUCH OF THE OPPOSITION COMING FROM NY AND CONN REPRESENTATIVES.

ADDITIONALLY, THERE IS A FURTHER EXTRAORDINARILY CONVOLUTED SYSTEM WHERE THE GUEST OTB SITE WILL IN MOST CASES NEED APPROVAL OF CERTAIN TRACKS THAT ARE OPERATING IN ITS MARKET AREA. THE MARKET AREA CAN BE DEFINED EXTREMELY BROADLY SO THERE ARE PROBABLY TIMES WHEN IN ORDER TO TAKE A HARRNESS HORSE BET AT NIGHT, AT SAY SUFFOLK DOWNS NEAR BOSTON, YOU MIGHT TECHNICALLY NEED THE APPROVAL OF THE NEAREST NIGHT
OPERATING HARNESS TRACK IN AN ADJACENT STATE WHICH COULD BE BUFFALO RACEWAY IN NEW YORK WHICH IS A SHORT 450 MILES AWAY.

THERE ARE TONS OF PROBLEMS WITH THE IHA LANGUAGE. HOW DO YOU COUNT THE HORSEMEN? WHAT CONSTITUTES THE MAJORITY OF THE HORSEMEN ON ANY RACING DAY? EVEN IF YOU CAN FIND THE TERM “HORSEMEN” TO BE EXTREMELY IMPRECISE BUT NOT UNCONSTITUTIONALLY VAGUE, IS IT PERMISSIBLE TO DELEGATE THIS VETO POWER TO HORSEMEN? WHY ARE THERE NO STANDARDS FOR COMMISSION APPROVALS? HOW DO YOU ENFORCE THE MARKET AREA APPROVALS?

EVERY WAGERING REQUEST UNDER THE IHA, WHICH HAS LARGELY MADE THE ENORMOUS GROWTH OF SIMULCASTING POSSIBLE.

IT SHOULD BE POINTED OUT THAT ALTHOUGH THE SUBJECT IS NOT BROACHED IN THE CONGRESSIONAL REPORTS AND DEBATES, NEW YORK CITY OTB WAS TAKING TELEPHONE BETS FROM ITS 2ND DAY OF OPERATION IN 1971 – AND CLEARLY SOME OF THESE BETS WERE PLACED FROM OUTSIDE NEW YORK STATE. THE QUESTION OF THE LEGALITY OF SUCH INTERSTATE BETS IS NOW THE CENTRAL LEGAL ISSUE IN HORSE RACING.

THE QUESTIONS THAT NEED TO BE ADDRESS INCLUDE:

1. WHAT IS THE RELATIONSHIP BETWEEN THE INTERSTATE HORSE RACING ACT – ESPECIALLY AS AMENDED IN 2000 TO AUTHORIZE AND REFLECT THE REALITY OF WAGERS PLACED ELECTRONICALLY BY A CUSTOMER IN ONE STATE WITH AN OTB SYSTEM IN ANOTHER STATE – AND THE WIRE ACT?

2. HOW DOES THIS IN TURN AFFECT THE TREATY OBLIGATIONS OF THE UNITED STATES UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE [GATT] AS DETERMINED BY THE WORLD TRADE ORGANIZATION, AND

3. WHAT EFFECT DOES THE UNLAWFUL INTERNET GAMING ENFORCEMENT ACT HAVE ON THIS OVERALL ISSUE?