University of Michigan Journal of Law Reform

Volume 4

1971

Title VIII - Gambling and Organized Crime

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TITLE VIII—GAMBLING AND ORGANIZED CRIME

I. INTRODUCTION

> Today organized crime has deeply penetrated broad segments of American life. . . . Its economic base is principally derived from its virtual monopoly of illegal gambling, the numbers racket, and importation of narcotics . . . .[1]

With these words, President Richard Nixon underscored the dangers presented by organized crime's use of gambling. The proceeds of such syndicated gambling activities are universally acknowledged to be the financial lifeblood of organized crime.[2] With the capital initially obtained from illicit gambling, organized crime operatives are able to bribe government officals, make political contributions, engage in loan sharking operations, infiltrate and contaminate legitimate businesses,[3] and hire the vast number of attorneys, accountants and other professionals necessary to the success of the operation.[4]

In an effort to launch a frontal attack on syndicated gambling throughout the United States, Congress enacted title VIII of the Organized Crime Control Act of 1970.[5]

II. ENFORCEMENT INADEQUACIES OF THE FORMER LAW

Title VIII is designed to eliminate two deficiencies of the former law which had crippled effective law enforcement in the area of organized crime. The first inadequacy resulted from the division of criminal law enforcement responsibility between various federal, state and local authorities. Such fragmentation made a unified attack on organized crime difficult, and resulted in a lack of sufficient funds to provide adequate manpower for local law

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[1] H.R. Doc. No. 105, 91st Cong., 1st Sess. 1 (1969).

[2] *Id.* The scope of such gambling activities is indeed impressive. The President's Commission on Law Enforcement and the Administration of Justice estimated that organized crime reaps up to fifty billion dollars annually from illegal gambling activities. In contrast, the total amount of money bet legally in the United States at racetracks is five billion dollars. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 189 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

[3] *Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., Ser. 27 at 105 (1970) [hereinafter cited as *House Hearings*] (statement of Senator John L. McClellan).

[4] H.R. Doc. No. 105, 91st Cong., 1st Sess. 6 (1969).

[5] Organized Crime Control Act of 1970 [hereinafter cited as O.C.C.A.] 18 U.S.C.A. §§ 1511, 1955 (Supp. 1971).

enforcement agencies to cope successfully with illegal gambling activities.[6] Under prior federal legislation dealing with illegal gambling, interstate travel or use of an interstate facility had to be proved as part of each case.[7] Although many federal cases demonstrate the dependency of gambling operations on the facilities of interstate commerce, it had become increasingly obvious that existing federal statutes were not broad enough to reach all major gambling activities which were of legitimate concern to the Government. It has been repeatedly shown that the professionals who run illegal gambling operations were well aware that federal investigative jurisdiction required the establishment of a specific interstate link to their operations. Therefore, they were usually careful to avoid creating such a link.[8] Title VIII is designed to permit federal law enforcement authorities to deal with illegal gambling activities previously insulated from federal attack.

The second deficiency of former law regarding illegal gambling stems from recent Supreme Court invalidation of certain *Internal Revenue Code* provisions which facilitated federal, state and local law enforcement in the illicit gambling area. Prior to 1969, the wagering tax and registration sections of the *Internal Revenue Code* were utilized effectively to combat syndicated crime.[9] These provisions created an occupational tax on wagers,[10] and required those liable for this tax to register with the Internal Revenue Service and to supply detailed information of their operation in addition to this registration.[11] Since many forms of gambling are illegal in all states except Nevada, the natural result and probable objective of this law was either (1) to force gamblers or operators to register with the Service and in so doing admit their guilt (after which they could be prosecuted under appropriate statutes),[12] or (2) to enable the Government to prosecute for tax evasion and non-registration those operatives who did not cooperate. Challenged on fifth amendment self-incrimination grounds, the Supreme Court initially upheld these sections in *United States v. Kahriger*,[13] on the ground that the required registration was pros-

[6] 116 CONG. REC. S349 (daily ed. Jan. 21, 1970).

[7] 18 U.S.C. §§ 1084, 1952, 1953 (1964). *E.g.*, under § 1084, which prohibits the transmission of gambling information in interstate commerce, the great difficulty has been proof of the conversation and the availability of wiretaps. *See* Katz v. United States. 389 U.S. 347 (1967).

[8] In one instance a court-authorized interception of a telephone located in a gambling headquarters disclosed that bets from persons outside the state were routinely being declined. *House Hearings* 169.

[9] 26 U.S.C. §§ 4411, 4412 (1964).

[10] *Id.* § 4411.

[11] *Id.* § 4412.

[12] Such prosecution would be under appropriate state and local gambling laws.

[13] 345 U.S. 22, 32 (1953).

pective in effect, and consequently within the mandate of the fifth amendment which protects only past and present acts.

The *Kahriger* decision was overruled in the *Marchetti* and *Grosso* cases.[14] Speaking for the Court, Mr. Justice Harlan explained that the obligations to register imposed by the *Internal Revenue Code* presented a "real and appreciable" hazard of self-incrimination.

> The central standard for the privilege's [fifth amendment] application has been whether the claimant is confronted by substantial and real not merely trifling or imaginary hazards of incrimination. . . . This principle does not permit the rigid chronological distinction adopted in *Kahriger*.[15]

The inevitable result of these decisions was to destroy the effectiveness of the tax and registration requirements. Title VIII is constructed to fill the void left by the Court's decision.[16]

Congress' attempt to remedy these inadequacies by enactment of title VIII is based on its authority to regulate interstate commerce.[17] In pointing out the justification and need for extensive federal jurisdiction to deal effectively with syndicated gambling, Congress cites the detrimental effects of organized crime activities on the nation's economic system, the domestic security, and the general welfare of the nation and its citizens.[18]

As early as 1903, the Supreme Court upheld federal legislation regulating gambling on the grounds that lottery tickets were a "subject of commerce" which could be restricted by Congress pursuant to its authority under the commerce clause.[19] Despite the fact that the regulated acts take place entirely within state lines, Congress may control that activity so long as it has even a remote impact on interstate commerce.[20]

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

[15] 390 U.S. 39, 53 (1968).

[16] *Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1962, 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. 113 (1969) [hereinafter cited as *Senate Hearings*] (statement by John N. Mitchell, U.S. Attorney General).

[17] Title VIII begins with the statement that Congress "finds that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof." O.C.C.A. § 801.

[18] O.C.C.A., Statement of Findings and Purpose.

[19] Lottery Case, 188 U.S. 321 (1903).

[20] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942), in which petitioner had consumed on his premises all wheat grown in excess of Agricultural Adjustment Act of 1938 quotas. The Court upheld his penalty on grounds that Congress could regulate any activity that has a substantial effect on interstate commerce, regardless of how local the activity might be. *See also* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upheld the constitutionality of certain public accommodations sections of the Civil Rights Act of 1964). It held that the commerce power of Congress also includes the power to regulate the local activities, which might have a harmful effect upon that (interstate) commerce. 379

III. TITLE VIII'S SUBSTANTIVE PROVISIONS

The criminal prohibitions of title VIII are contained in two sections. The first makes it a federal crime to conspire to interfere with state or local law enforcement "with the intent to facilitate an illegal gambling business."[21] Before any liability may be imposed under this section of the Act, three requirements must be fulfilled: (1) there must be an overt act of conspiracy; (2) one of the conspirators must be an elected or appointed governmental official or employee; and (3) one or more of the participants must conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business.[22] Legal gambling operations such as bingo, lottery, or similar games of chance conducted by a tax exempt organization as defined in the *Internal Revenue Code* are specifically exempted from the provisions of the Act.

The other substantive section of title VIII directly prohibits the operation of gambling businesses which (a) are prohibited by state or local law, (b) involve five or more persons, and (c) have been in operation for thirty days, or gross more than two thousand dollars in any single day.[23]

Questions may arise concerning the propriety and constitutionality of the Act's definition of "illegal gambling businesses." The first element of the definition in the federal Act is an adoption of the state law definition of illegal gambling. This provision is, of course, designed to leave those types of gambling permitted by the laws of various states unaffected by the Act in those respective states. Apart from this single all or nothing distinction, however, the Act fails to take into account a state's determination of the severity of a particular proscribed gambling offense. The gambling laws of several states vary tremendously,

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U.S. at 258; Katzenbach v. McClung, 379 U.S. 294 (1964) in which the operation of a restaurant whose sole contact with interstate commerce was the receipt of seventy thousand dollars worth of food was held to be a sufficient exercise of interstate commerce to justify application of the Civil Rights Act. The Court founded its decision on its conclusion that Congress had a rational basis for finding that discrimination in restaurants had a direct and adverse effect on interstate commerce.

[21] 18 U.S.C.A. § 1511(a) (Supp. 1971). Examples of such interference include bribery and corruption of police and other local officials. *See* SENATE REPORT 71.

[22] 18 U.S.C.A. § 1511(a) (Supp. 1971).

[23] 18 U.S.C.A. § 1955(6)(1)(i) (Supp. 1971) defines illegal gambling business in terms of violation of "the law of a State or political sub-division in which it is conducted." Thus § 1955 would apply only in instances where the gambling violated state or local laws and in those instances federal penalties may be levied.

The criminal sanctions for violating either of the above proscriptive sections of the Act are in part identical. Both authorize fines up to twenty thousand dollars or imprisonment for up to five years, or both. In addition, the section prohibiting illegal gambling businesses includes a criminal forfeiture provision which applies to "any property, including money used in violation of this section [1955]." 18 U.S.C.A. § 1955(d) (Supp. 1971).

providing for fines as low as fifty to one hundred dollars for violation of the state's criminal gambling laws.[24] The magnitude of these fines essentially reflects the moral judgment of the state legislature concerning the turpitude of the crime committed. In this respect, the difference between the state with no gambling restrictions and the state with offenses calling for varying sanctions is one of degree. Yet, the provisions of title VIII make no distinction in regard to the seriousness of a gambling offense except for the initial illegality under state law.[25]

Nevertheless, it is well established that Congress may define the content of proscribed conduct by adoption of state law. In *Clark Distilling Co. v. Western Maryland R.R.*,[26] the Supreme Court upheld a federal law prohibiting the interstate shipment into any state of liquor intended to be sold in violation of the law of that state. The defendant argued that the federal law entailed an unconstitutional delegation of congressional authority to the states, since liquor regulation was left to the control of each state. Because state law varied widely throughout the United States, this delegation resulted in a non-uniform treatment of liquor sales. In rejecting the defendant's contention, the Court held that there was no constitutional requirement that federal regulation of interstate commerce be uniform throughout the nation. The decision to permit state law to govern was clearly within the discretion of Congress.

There is strong precedent for the rule that Congress may adopt state criminal legislation, so that an act made criminal by state law is a federal offense punishable as provided by state law.[27] In 1969, the Suprme Court upheld legislation prohibiting travel in interstate commerce with intent to commit "extortion" as defined by state law.[28] The Court stated that the congressional decision to leave the definition of "extortion" to state law reflected the legislature's judgment that "certain activities of organized crime which were violative of state law had become a national problem."[29] The congressional determination in title VIII to leave the definition of "illegal gambling" to state law is clearly analogous and would

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[24] *House Hearings* 192.

[25] 18 U.S.C.A. §§ 1955(a), (b)(1) (Supp. 1971).

[26] 242 U.S. 311 (1917).

[27] *See* United States v. Sharpnack, 355 U.S. 286 (1958), where the Court, upholding federal legislation adopting state law as the definition of federal crime, ruled that a sexual offense committed on an airbase which was made criminal by state law was an indictable federal offense. Such federal legislation was not an undue delegation of congressional authority, but a "practical accommodation of the mechanics of the legislative function of State and Nation in the field of police power. . . ." *Id.* at 294.

[28] United States v. Nardello, 393 U.S. 286 (1969).

[29] *Id.* at 292.

therefore seem to fall within the legislature's authority to establish means adequate to cope with the problem of organized crime.

The remaining two elements of the definition of an "illegal gambling business"—that it involves five or more persons, and has been in continuous operation for thirty days or has gross revenue of two thousand dollars in any single day—are, on their face, much less troublesome. These provisions reflect a congressional intent not to preempt local law enforcement but merely to expand available forces to fight organized crime.[30] The congressional feeling is that the definition of "illegal gambling business" provides a standard that will insure that the federal effort is directed only at the major gambling operations—those involving five or more persons *and* grossing at least two thousand dollars in a single day. It was pointed out that as a practical matter the statute will not apply to sporadic or insignificant operations because it is usually possible to prove only a relatively small proportion of the total gross of a gambling enterprise.[31]

A more unique aspect of this section is the presumption it creates with regard to probable cause. For purposes of obtaining arrest or search warrants, if it can be proved that the gambling business involves five or more management personnel or that the "business operates for two or more successive days," then as a matter of law there is probable cause to believe that "the business receives gross revenue in excess of $2,000 in any single day."[32] Such a finding thus brings the operation within the purview of the Act.

A constitutional problem may be involved in the provision for a statutory presumption establishing probable cause for purposes of issuing arrest and search warrants.[33] In effect, this provision permits warrants to issue for a search or arrest if there is probable cause to believe that a gambling operation exists consisting of five men without regard to the two thousand dollar minimum. Consequently, this provision of the Act will apply to any gambling operation, illegal under state law, regardless of the amount of money involved so long as it consists of five men. The constitutionality of the use of statutory presumptions in criminal cases arose in *Tot v. United States*.[34] In this case, the Supreme Court invalidated a federal statutory presumption which provided that the possession of a firearm or ammunition by a convict or

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[30] *Senate Hearings* at 381.
[31] 116 CONG. REC. S348 (daily ed. Jan. 21, 1970).
[32] 18 U.S.C.A. § 1955(c) (Supp. 1971).
[33] *Id.*
[34] 319 U.S. 463 (1943).

fugitive from justice created a presumption that such firearm or ammunition was shipped in violation of the statute. Since there was no rational connection between the fact proved (possession) and the ultimate fact presumed (illegal shipment), the presumption violated the due process clause of the fifth amendment. However, the Court indicated that Congress could create such presumptions when the inference of the ultimate fact was founded in "common experience" and had a "reasonable relation to the circumstances of life as we know them . . . ."[35]

In the 1965 case of *United States v. Gainey*,[36] the Court upheld a statutory inference which authorized the jury to infer guilt of illegal distillation of liquor from the accused's unexplained presence at an illegal still. This inference was held rational, given the circumstances surrounding the operation of an illegal distillery. Thus if the fact of five or more persons operating a gambling business for two or more days bears a reasonable connection with the presumption of probable cause that the business grosses two thousand dollars a day, then the presumption would not be unwarranted since it is founded on a reasonable relationship of the two events.

However, it is unclear how the Government will establish this reasonable connection. There is neither data nor discussion in either the Senate or House proceedings which would tend to support the probable cause inference made in this section. Because no testimony or evidence was presented in the matter, there is no legislative history to provide an empirical basis to permit a court to conclude that the presumption bears a reasonable relation to common experience of gambling syndicates. The absence of empirical support was not, however, fatal to the presumption in the *Gainey* case. The Court upheld the inference, although unsubstantiated, as reasonable in light of the "practical impossibility of proving . . . actual participation in the illegal activities except by inference drawn from [the defendant's] presence when the illegal acts were committed . . . ."[37] Thus it is not essential that empirical data exist to support title VIII's presumption, provided that the court is convinced of the need for the presumption in the context of the offense it is designed to curtail.

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[35] *Id.* at 467–68. An example of an irrational presumption was given in Manley v. Georgia, 279 U.S. 1 (1929). In this case, the Court invalidated a state statute providing that a bank's insolvency was deemed fraudulent for purposes of imposing criminal liability on the bank directors. The Court found that this presumption violated the due process clause of the fourteenth amendment because the connection between the fact of bank insolvency and the presumed fraud was insufficient, arbitrary, and unreasonable.

[36] 380 U.S. 63 (1965).

[37] *Id.* at 65.

In the more recent case of *Leary v. United States*,[38] the Supreme Court may have established a more difficult standard for constitutionality of legislative presumptions. In this case, possession of marijuana was made prima facie evidence of illegal importation, and of defendant's knowledge of such illegal importation. The Court stated that criminal statutory presumptions could be upheld only when "the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[39] Examining the empirical data regarding importation of marijuana, the Court concluded that although most of the drug was imported, it was impossible to derive from this fact the conclusion that marijuana users were aware of such importation.[40] Under the *Leary* test, title VIII's presumption of a two thousand dollar daily profit could be held constitutional only if the court were convinced that such a conclusion was more likely than not to result from a gambling operation by five or more persons for two or more days.

IV. CONCLUSION

The inadequacies of present attempts to deal with the problem of organized gambling has prompted title VIII. Under this title a substantive federal gambling law is created by incorporating state prohibitions against gambling and increasing the penalties involved. The legislative presumption of title VIII facilitating the issuance of search and arrest warrants will require a judicial determination of constitutionality before its usefulness can be ascertained.

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[38] 395 U.S. 6 (1969).

[39] *Id.* at 36.

[40] *Id.* at 46. *See also* Turner v. United States, 396 U.S. 398 (1970), in which the Court used the *Leary* test to uphold a similar legislative presumption regarding heroin and to void the presumption regarding cocaine.