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[Introduction] Kennedy's War Continues

Jay Cohen's defiant hope, Bobby Kennedy's first crusade, and the relevance of a 1961 anti-mob statute to Internet gaming today.

February 24, 2002. Southern District Court, New York City. Honorable Thomas P. Griesa presiding.

Until the judge started giving the jury its instructions, Jay Cohen felt pretty confident that he'd be back at his desk at the World Sports Exchange in a week or two. Sure, the prosecutors had shown the jury lots of evidence proving that his company had accepted bets from undercover agents over the phone and on the web. But they never proved that he intended to break the law, defraud anyone, or do anything but run a legal, licensed business.

Throughout the trial, Cohen's attorney, Benjamin Brafman, had conceded that his client had been the president of the World Sports Exchange. He couldn't have denied it if he had wanted to—Cohen had appeared in *Sports Illustrated* and the *Wall Street Journal*, and had even testified before Congress. That he was a founder of one of the most reputable, innovative sports betting websites wasn't at issue, Cohen thought. The trial was about whether he broke the law. And Cohen was sure he had not. After all, taking bets online was legal in Antigua, and it didn't seem to be illegal in New York. He'd consciously patterned the WSE on Capital OTB, an off-track betting concern that paid millions in taxes each year. As he watched Brafman deliver his closing argument to the jury, Cohen felt good about his chances.

Judge Griesa had started out innocently enough, telling the jurors the importance of weighing the evidence, and of the credibility. Cohen knew he couldn't have been more credible; he took the stand in his own defense and laid out his case for the jurors, plain and simple. He'd studied this new business, sought the best legal and financial advice, and acted accordingly. Moving to Antigua while still paying for a condo in the Bay Area wasn't a move he made lightly. He missed the little things that everyone living in the U.S. takes for granted—cheeseburgers, for God's sake. His family, too, for that matter. He'd followed all of the rules. The jury would have to see that and acquit him.

But as the judge continued, Cohen felt his heart start to beat faster; even Brafman started to look a little nervous. When Greisa said, "I want to start by discussing with you the law that is applicable, and that is a statute which we refer to as Title 18 United States Code Section 1084," Cohen's day in court turned into a nightmare. He listened, speechless, as the judge told the jury that it didn't matter whether Cohen's business was licensed in Antigua, or that off-track betting was legal in New York. The judge then instructed the jury that to find Cohen guilty, they only had to conclude that Cohen was in the business of accepting bets and that his service had provided betting information to undercover officers—something that Brafman had conceded at the start of his case. Suddenly, coming back to New York to fight charges of violating the Wire Act didn't seem like such a good idea.

So Jay Cohen wasn't that optimistic when, four days later, after fruitless objections by his attorneys, the jury filed back into the courtroom and he stood awaiting their verdict.

As the deputy court clerk asked them how they found in the case of U.S. vs. Cohen 98Cr. 434, count 1, the foreman answered "guilty." On each of eight counts, for every possible clause, the response was the same: guilty.

As Joseph DeMarco, the lead assistant United States attorney presenting the government's case, started to smile, Cohen remembered a fragment of his opening statement: “a federal law known as Title 18 United States Code Section 1084 makes it a crime for bookies like Cohen to take bets using the phone lines.”

How am I a bookie? Cohen wondered. And where did this Section 1084 come from, anyway? How, if Congress was still debating an Internet Gambling Prohibition, was a law passed in 1961 being used to put him in prison?

Cohen's questions have answers. Section 1084 (the Wire Act) became law as the result of a convergence of public anxiety, political opportunity, and personal opprobrium, and it remains law because of America's habitual ambivalence over gambling, an ambivalence that has only become more striking in a generation when states have parlayed gaming legalization into increasingly large fiscal stakes. Though § 1084 can trace its lineage to the turn of the 20th century, it only became law thanks to the energetic advocacy of one of the most charismatic figures of the turbulent 1960s—Robert F. Kennedy.

Profiles in prosecution

Bobby Kennedy hated gamblers. Not your \$2-a-horse bettors, or guys who played poker once a week to unwind—they were just real men looking to let off some steam. For Kennedy, a “gambler” meant boss gamblers, the shadowy men who controlled the action, running illegal numbers games or taking off-the-books bets on legal horse racing. These men didn't really gamble. They set the odds, always unfairly, and rode the foolish hopes of anyone naïve enough to play all the way to the bank. The big gamblers were infesting America, and hiding behind layers of insulation and laughing at the efforts of reformers to drive them out. They were

parasites who leeches off of working people and gave nothing back to society. With their goons and guns, they acted like tough guys, but, he thought, they weren't really tough. These gamblers might threaten and intimidate, and they could scare most people, but they weren't tough in the quiet, confident way of the NYPD detectives who fought to break up the rackets.

After his brother convinced him to become attorney general, Kennedy decided that the rackets would be his top target. He'd made some inroads in the fight against the rackets with the McClellan Committee. Serving as chief counsel, he'd made even fake-tough Jimmy Hoffa squirm—but he hadn't put him in jail. Even if he had, another would have stepped into his place at the union, all too eager to take the crooked money of the racketeers. To beat the rackets once and for all, Kennedy thought, he'd have to hit them where it really hurt—in the wallet. If he could take their gambling profits away, he just might smash the rackets once and for all.

Kennedy was helped by a pliant Congress, who passed five pieces of anti-crime legislation in 1961 to help the new attorney general fight organized crime and racketeering. The laws were a mixed lot. Two of them had no real connection to the actual business of organized crime but fit under the vague rubric of “anti-crime legislation.” These statutes enlarged the Fugitive Felon Act and amended the Federal Firearms Act to prohibit felons from trafficking in firearms.¹

The remaining three bills took more direct action against those who profited from crime. In sum, they made it a crime to use interstate travel or facilities to conduct an illegal gambling, liquor, narcotics, or prostitution business, to transport betting paraphernalia across state lines, and to use interstate wire communications facilities to transmit bets or information that assisted in the placing of bets. The Senate passed this final law, S 1656, known as the “Wire Act” or “Wire Wager Act,” on July 28. The House followed suit on August 21, and on September 13,

1961, President Kennedy signed it and its companion anti-gambling/anti-racketeering statutes into law.² In his brief remarks upon signing the bills, the President noted that the three new laws were “the culmination...of years of effort by the Federal Government and the Congress to place more effective tools in the hands of local, State, and national police.”³

The Wire Act made several changes in federal law. First, it amended § 1081 of title 18 of the United States Code to better describe the term “wire communication facility” as:

Any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.⁴

After this prelude, the statute added a new section, 1084. Section 1084 in turn had four paragraphs. The first paragraph levied no more than a \$10,000 fine or two years imprisonment for anyone who knowingly used a wire communication facility to transmit bets or wagers on sporting events, or information assisting in the placing of such wagers. In addition, a final provision made it clear that gambling for either money or credit was illegal.⁵

The other paragraphs of § 1084 further clarified the new prohibition. The second paragraph specifically exempted news reporting of sports events and bets sent between two states where such wagers were legal, thus making the world safe for ESPN and horserace simulcasting, respectively. The third ensured that § 1084 could not be used to prevent prosecution under any state law. The final paragraph of the new section obligated “common carriers” (i.e., telecommunications companies) to “discontinue or refuse” service to a subject after notification in writing by a law enforcement agency “acting within its jurisdiction.” In addition to compelling the halt of service, this paragraph indemnified the carrier from civil or criminal

penalty for not doing so and allowed for the right of the subject to “secure an appropriate determination” as to whether service should be discontinued or restored.⁶

How did law enforcement use § 1084? Federal investigators and police used the Wire Act to effectively disrupt interstate illegal gaming networks, and they managed to ensnare a handful of those involved in legal Nevada sports books in Wire Act prosecutions. But by and large, the original premise of the Wire Act, that it be used to smash organized crime, did not long outlive Robert Kennedy's tenure as Attorney General. The Racketeer-Influenced Corrupt Organization Act (RICO), passed in 1970, provided a far more flexible tool for targeting organized crime. Successful prosecutions of illegal and offshore bookmakers certainly satisfied the letter of the law, but they strayed far from its original spirit.

Though in retrospect the Wire Act seems to have been a specific outgrowth of the Kennedy Administration, it represented a long desire to involve the federal government in the suppression of gambling. To understand why the Wire Act passed, one must consider more than a century's worth of antigambling panic and Kennedy's urgent personal need to fight the mob. And to appreciate the role of this law in the Internet age, one has to better understand just how it has been used to fight against illegal bookmaking and organized crime, two areas that are often—but not always—linked.

An uneasy obsession with gambling

In fighting against gambling, Robert Kennedy was swimming upstream. From Virginia cavaliers “bowling in the streets” to Mississippi River roustabouts rolling the dice to stock traders buying futures contracts on the O.J. Simpson verdict, it is clear that gambling is an integral part of many Americans' identities. Historians, philosophers, and self-appointed authors

of virtue have agreed that Americans seemingly cannot escape their desire to gamble, but few said it as perfectly as Frank Costello when he remarked that “ninety-nine percent of a human being is gamble-minded,” and that, even if the law prohibited a person from gambling, “he’ll find some trick to do it.”⁷

Therein lay the rub. For although gambling was enjoyable, by its very nature it had a lucky winner and a downcast loser. When gamblers remained personal acquaintances linked by social ties this was no great problem as there was a fair chance today’s loser would become tomorrow’s winner. But the rise of professional gamblers meant that most people would inevitably lose. This realization triggered the rage against American lotteries that resulted in their demise during the Jacksonian era.

The original Puritan strictures against gambling condemned it more as idleness than as economic folly, and in any event few colonists were likely to forfeit much of their wealth playing backgammon at the local tavern. But gamblers soon began playing for dangerously high stakes. The rise of the cash economy in the early 19th century—a development historians have termed the Market Revolution—removed much of the net of the “moral economy” of early America. Merchants now charged what the traffic could bear, rather than what was socially acceptable; banks stood ready to foreclose on homes and farms; and itinerant gamblers sauntered about the nation’s rivers and railroads, ready to cheat their marks before slipping off into the anonymous night.

In this world, the professional gambler emerged as the scourge of an honest society whose victims were the hopeful souls seduced into placing foolhardy bets. Opponents of gambling into the Progressive era lamented the fates of those tempted to try their luck and ended up penniless. As the nation became more economically polarized during the late 19th century

and the political corruption that nourished ostensibly illegal gaming operations became increasingly noisome to reformers and their constituents, a new backlash against gaming commenced. The first Congressional action against gaming ended the interstate transportation of lottery materials in a successful attempt to strike down the Louisiana lottery. Throughout the nation, legislators struck down existing schemes of state-sponsored betting. Legalized gaming contracted nearly to extinction.

Still, Americans continued to gamble and many of them began to believe that legalizing and taxing gaming might help states navigate their way out of straitened economic circumstances without imposing additional taxes. So the American embrace of gaming entered a new phase, as states turned to pari-mutuel betting as a kind of wagering in the public interest. At the same time, charitable gaming—certainly a cruel oxymoron to anti-gaming moralists like Anthony Comstock—also gained in credibility, as Americans began frequenting Monte Carlo nights and church bingo. Gambling could, just maybe, be socially beneficial.

Yet, though society now sanctioned this public interest gambling, there were those who sought to profit from it. Much like pirates lurking near trade routes and plundering cargo at their pleasure, “organized gamblers” sent runners to racetracks (and, when denied racetracks, to trees and other vantage points around them) to obtain race information and results. These results fed a national telegraph network known as the race wire which terminated in thousands of illegal, untaxed betting dens and bookie stands.

The race wire outraged defenders of the public order because it subverted the entire scheme of public interest gaming. Its operators took information and profited from it, denying the state a cut of the proceeds. Bettors frequenting horse rooms were not at racetracks, and the dollars bet in the illicit outlets fed by the race wire were denied to the racetracks and, in turn, to

the state, which garnered a share of each dollar bet. An information monopoly maintained on violence and intimidation, the race wire was all the more sinister because it siphoned profits from state-sponsored gaming, mocking the premise that gaming could be channeled to the social good.

Local and state police might arrest bookmakers and district attorneys might even hope to indict the leaders of citywide gambling rings, but as long as the race wire existed, no one would lose money betting that, before long, someone would be taking bets again. Powerless against the national reach of the race wire, local law enforcement turned to the national level.

This action did not take place until 1961, after the race wire's use had already begun to decline, the victim of the shift from race betting to sports betting. Robert Kennedy believed that in dismantling the race wire he might fight a decisive battle in his war on organized crime, and he successfully pressed Congress for such a law. The Wire Act was, on its surface, an attempt to make criminal the transmission of race information, but it spoke to a deeper desire to deny criminals access to the American information and communications infrastructure. Facing an enemy within, Kennedy vowed that he would not let it gain power from the same wires that linked Americans in pursuit of economic gain. Telegraphs and telephones might have brought Americans closer, but they would no longer help professional gamblers take bets.

Kennedy's statute did not criminalize placing bets, ostensibly because of potential nightmares over enforcement, but also because of an enduring American belief that gaming is, in and of itself, no crime. But the Wire Act did purport to give prosecutors a weapon against those who profited from gaming. The framers of the 1961 law realized that information is, essentially, power, and they hoped that without access to information organized gambling would die, taking with it organized crime.

But organized gambling did not die; instead, states and eventually the federal government (through its sanction of tribal government gaming) wrested control of most gaming from organized and disorganized criminal elements. Licensing and taxing casinos, establishing lottery monopolies, taking a cut of pari-mutuel wagering and permitting charitable gaming, American governments became increasingly dependent on gaming for revenue in the final thirty years of the 20th century. Derailing Internet gaming, the cynical say, is not about protecting Americans from the scourge of fraud or compulsive gambling but about governments eliminating an untaxed competitor.

Kennedy's Law in Bush's America

Legislation changes far slower than society. Any enterprising middle-schooler could run a quick Internet search of state and federal statutes to find laws on the books that are hopelessly archaic. The United States Congress, for example, still has the legal authority to authorize piracy, as the eleventh clause of section eight of the Constitution gives that body the power to grant letters of marque and reprisal. The Wire Act, originally meant to fight mobsters who enriched themselves by running bookmaking organizations that used telegraphs and telephones to send horserace information across state lines, remains the law of the land. Changes in technology have pushed that law into places that Robert Kennedy could never have foreseen.

Technology continuously advances and gaming operators have usually been quick to seize on technical innovations in order to facilitate their wagering businesses. The operators of horse rooms in the 1920s, for example, used telephone and telegraph transmissions of the latest odds and racing results to stimulate play. By the 1940s, law enforcement observers considered control of the race wire tantamount to control of organized crime: the master of racing

information could use his position to take control of illicit gaming and, ultimately, other racketeering sectors (usually, however, it was the other way around—the most powerful underworld presence would seize the most lucrative racket). With the growing popularity of the Internet in the early 1990s, smart offshore sports books saw a new way to take bets. In May 1995, Interactive Gaming, previously an offshore telephone sportsbook operating out of Grenada, began taking online wagers. Online bets quickly grew to become forty percent of Interactive Gaming's total handle, or an estimated \$35.4 million in 1996.⁸

By 1997, about two hundred gambling sites existed, though many of these featured free play games that merely simulated casino action using imaginary chips. A few live betting sites that accepted real money wagers opened in Antigua, chiefly because the government there had taken the initiative and begun issuing online gambling licenses. The Caribbean island also had a technical edge over competing jurisdictions, with an undersea fiber optic link to the United States that guaranteed American net gamblers continuous telecommunications access, even in the event of a hurricane.⁹

Media coverage of this new phenomenon—the online bookie—usually afforded cautious praise to those who sought to pioneer in this new medium. Jay Cohen and Steve Schillinger, founders of the World Sports Exchange, emerged as articulate, engaging advocates for their chosen trade in an April 1997 *Wall Street Journal* article about online sportbooks. The two met while working as stock traders in San Francisco, and Cohen recommended that Schillinger transfer a burgeoning “office pool” of betting on the floor of the Pacific Stock Exchange to the web. Armed with \$600,000 in start-up capital, the two opened the World Sports Exchange in January of 1997.¹⁰

By May of that year cyberbooks like the World Sports Exchange had attracted the attention of major sports leagues, who demanded that the sites stop accepting bets from the United States and that they refrain from using league and team trademarks. Cohen and Schillinger refused to shut down but changed their practices by naming only cities and not teams. Removing the league and team insignia, they thought, would insulate them from any trademark suits. As they were running a legal, licensed business, they imagined that the sports leagues would have nothing further to say.¹¹

At this point, Cohen's supporters allege, the National Football League (through its law firm Debevoise and Plimpton) investigated Cohen and others and asked the Justice Department to bring charges against operators of Caribbean books.¹² These requests culminated in the "March Madness" prosecutions. In March 1998 federal prosecutors charged twenty-two defendants with conspiracy to violate the Wire Act and several substantive violations of the law. Of those charged, ten pled guilty to conspiracy charges, three pled guilty to misdemeanor counts, and seven, including Cohen's partners in the World Sports Exchange, remained technically fugitives from the law and continued their businesses in the Caribbean.¹³ Cohen himself, who wanted to clear his name and felt that he had solid legal standing, returned to the United States to face trial. After a two-week trial, Cohen was convicted in Manhattan federal court on February 28, 2000. He ultimately served seventeen months at Federal Prison Camp Nellis, within sight of the Las Vegas Strip, before his release in March 2004. To date, Cohen is the only American to have been found guilty of running an illegal betting business online under § 1084 while operating a licensed Internet sports book in another country.

The Cohen verdict did little to stop online wagering. By 2004, the annual revenue from online casinos and sportsbooks was estimated at \$5 to \$7 billion, with about 50 percent coming

from Americans.¹⁴ Cohen appealed his case and failed to get the verdict overturned. In 2003 the government of Antigua successfully brought suit against the United States in the World Trade Organization, charging that federal prosecutions of Antigua-based sites had violated trade statutes guaranteeing cross-market access.¹⁵ The United States has appealed, and it seems that continuing cross-border legal squabbles over Internet gaming are inevitable. Thus, the Cohen case is a distillation of the collision of gaming, technology, and international commerce brought about by two simple facts—that Americans love to bet on sports, and that in most of the United States they are barred from doing so legally. A people unsure of their convictions *vis a vis* gaming have produced a world in which a gaming entrepreneur can be transformed from the toast of the *Wall Street Journal* to a federal inmate by offering the public what it wants.

A long way from Camelot

The Wire Act is more than an artifact of the Kennedy years—it is a living piece of legislation that is, to date, the preeminent tool the federal government is using to curtail Internet gambling. It is necessary to thoroughly re-examine this law, both to better understand the world that created it and to comprehend the world that we have created around ourselves.

Americans in the Kennedy years were just waking up, it seems, to the realization that organized crime was a mammoth part of American life. Within a few years anxieties about organized crime would be displaced by far more pressing issues, as fissures of race, gender, age, and politics threatened to sunder the nation during the Johnson and Nixon years. Today, in a nation grappling with drug abuse, street violence, war, and economic anxiety, to say nothing of the specter of terrorism, legislation cracking down on the interstate transportation of wagering paraphernalia seems quaint. Yet Americans in 1961 had good reason to believe that to strike

against gaming was to take the first necessary stab at organized crime, a menacing national threat.

Considering the conditions attendant to the passage of the Wire Act, it is important to remember where America once stood and now stands on the question of legalized gaming. In 1950, when similar legislation was proposed to Congress, the Attorney General of the United States could tell civic leaders without hesitation that, despite several states permitting legal pari-mutuel betting and one allowing virtually unrestricted gaming, "throughout the United States there is, and has existed for many years, a public policy that condemns organized gambling and makes its activities criminal."¹⁶ In 1961, the legislative situation remained much the same. But by 1998, when the Wire Act was turned against Antigua's Internet sports books, gaming inextricably had become part of the social and fiscal policies of every state in the nation except two, Utah and Hawaii. When state governments actively encourage citizens to buy lottery tickets, it is difficult to argue that a national public policy justifying the use of federal resources to fight illegal gaming truly exists.

The Wire Act can teach us a few things about our own approach to gaming and crime. Public officials should translate the lessons learned by reflecting on the Wire Act into a more rational approach to both gambling and the challenges of new technology. Today, perhaps, is not that much different from the days when Attorney General Kennedy vowed to throttle organized crime. Now, as then, we face domestic problems set against an ominous backdrop of simmering, uncertain foreign aggression. Now, as then, Americans are about a decade removed from defeating a menacing adversary and in the midst of a confrontation with a seemingly more insidious one. And, of course, now, as then, Americans love to gamble and hate to think about what that means.

¹ "Congress Enacts Five Anti-Crime Bills." *Congressional Quarterly Almanac*. 87th Congress, 1st Session, Volume 17, Washington: Congressional Quarterly Inc., 1961. 381.

² "Congress Enacts Five Anti-Crime Bills." 383.

³ Public Papers of the Presidents of the United States. *John F. Kennedy: Containing the Public Messages, Speeches, and Statements of the President*. January 20 to December 31, 1961. Washington: United States Government Printing Office, 1962. 600.

⁴ 18 U.S.C.A §1081.

⁵ 18 U.S.C.A §1084.

⁶ 18 U.S.C.A §1084.

⁷ Testimony before Kefauver Committee, quoted in *Time*. Volume 55, no. 19. May 8, 1950. 16.

⁸ Jeff Peline and Courtney Macavinta. "Virtual Casinos Bet Big." *CNET News.com*, July 11, 1997.

⁹ Rebecca Quick. "Entrepreneurs Roll the Dice on a New Site." *The Wall Street Journal*, April 10, 1997.

¹⁰ Rebecca Quick. "Entrepreneurs Roll the Dice on a New Site." *The Wall Street Journal*, April 10, 1997.

¹¹ Steve Kanigher. "Caught in a Web: Future of Online Casinos Debated." *Las Vegas Sun*, March 7, 2003.

¹² <http://www.freejaycohen.com> .

¹³ "Jay Cohen Convicted of Operating an Off-Shore Sports Betting Business." United States Justice Department press release, February 28, 2000.

¹⁴ Steve Kanigher. "Caught in a Web: Future of Online Casinos Debated." *Las Vegas Sun*, March 7, 2003.

¹⁵ Brian Krebs. "U.S. Internet Gambling Crackdown Sparks WTO Complaint." *Washington Post*, July 21, 2003.

¹⁶ Howard McGrath, address at *The Attorney General's Conference on Organized Crime, February 15, 1950*. Washington: Department of Justice, 1950. 7.