The Implied Partial Repeal of the Wire Act

By Ben Hayes

Legal pari-mutuel[1] betting was available at approximately 184 horse racing venues in 37 state jurisdictions throughout the United States in 2005.[2] Between 1989 and 2003, the number of thoroughbred races declined from approximately 74,000 in 1989 to about 54,000 in 2003, yet the amounts wagered on thoroughbred races increased from approximately $14 billion to approximately $16 billion during the same period.[3]

"Account Wagering," or advanced deposit wagering[4] (ADW), "is the fastest-growing part of the business by a significant margin," Greg Avioli, Executive Vice President of the National Thoroughbred Racing Association, said. Avioli predicted ADW to hit $3 billion in 2005.[5]

Wagering by bettors in person at horse tracks has declined from approximately $9 billion in 1989 to approximately $2.5 billion in 2002, while wagers placed by bettors in person at other race tracks and off-track betting shops (commonly known as "simulcasting"), and wagers placed by bettors remotely via telephone or Internet (i.e., account wagering) increased from approximately $5 billion in 1989 to $13.5 billion in 2002.[6]

Account wagering on horse racing via telephonic means has been conducted in the United States for over 30 years. On April 8, 1971, the New York City Off Track Betting (OTB) opened its Telephone Betting Center with approximately 3,000 ADW accounts.[7]

Account wagering via the Internet is a more recent phenomenon. Oregon was the first U.S. state to legalize ADW hubs. Under Oregon law, "[a]ccount holders may communicate instructions concerning account wagers to the [ADW] hub in person, by mail, telephone, or electronic means."[8]

Oregon issued its first ADW hub license in 1999 to a joint venture involving the National Thoroughbred Racing Association and a subsidiary of GemStar-TV Guide International, Inc. Total wagers accepted by Oregon ADW hubs have grown from approximately $20 million in 2000 to almost $1 billion in 2005. Currently, three of the six Oregon ADW hubs are owned and operated by entities publicly traded on U.S. stock exchanges.[9]

In December 2000, concurrent with rapid growth in account wagering on horse races utilizing cellular phones and other electronic means, Congress amended the definition of "interstate off-track wager" in the Interstate Horse Racing Act of 1978[10] (the "IHA") – despite strong opposition by the U.S. Justice Department – so that IHA expressly includes placement or transmission of pari-mutuel wagers via electronic media (i.e., via the Internet) as a permitted means of placing or transmitting bets and wagers on horse races in the United States.[11]

The language of IHA, as amended, is clear: betting on horse racing via Internet is permissible. The legislative history of IHA amendment supports the conclusion. Congressman Frank R. Wolf (R-VA) stated the IHA amendment would "codify the legality of placing wagers over the telephone or other electronic media like the Internet."[12]

By expressly permitting bets and wagers placed or transmitted via the telephone and other electronic media under IHA, Congress created an irreconcilable conflict between IHA, a civil statute, and the 1961 Wire Communications Act[13] (the "Wire Act"), a criminal statute.

The Wire Act clearly prohibits use of wire communications by persons "engaged in the business of betting or wagering" in the transmission or placement of "bets or wagers or information assisting in placing bets or wagers on any sporting event or contest."[14]

When President Bill Clinton signed the IHA amendment into law, he acknowledged the view taken by the U.S. Department of Justice (the DOJ) in regards to the conflict between the two federal statutes:

1 For purposes of this article, the terms "pari-mutuel wager" or "pari-mutuel wagering" means: any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator.

See 15 U.S.C. 3002(13).

2 American Horse Council, 2005 Horse Industry Directory: Pari-Mutuel Racetracks, at p. 54-59 (2005).

3 NTRA Wagering Systems Task Force, Declining Purses and Track Commissions in Thoroughbred Racing: Causes and Solutions, at Exhibit 1 - Total Number of U.S. Thoroughbred Races (1980-2003) (2004).

4 ADW is a form of pari-mutuel wagering that enables an account holder to utilize all or a portion of the balance in an ADW account to fund the placement of a pari-mutuel wager.

5 William Spain, "Plan Could Cripple Net Horse Betting," MarketWatch, May 24, 2005, at http://www.marketwatch.com/news/yhoo/stoy.asp?source=blq/yhoo&siteid=yhoo&dist=yhoo&guid=%7B8EC9ED82%2DFBEE%2D431D%D9681%2D2F474A49BD71%7D.

6 NTRA Wagering Systems Task Force at Exhibit 7a.

7 New York City OTB web site at http://www.nycotb.com/viewPage.cfm?pageId=18 (2005).

8 Oregon Administrative Rule 462-220-0060(2).

9 The publicly-traded ADW hubs are as follows:

Magna Entertainment Corp., traded on NASDAQ under the acronym MECA, operates two ADW hubs. One is a "United States national account wagering business known as XpressBet®, which permits customers to place wagers by telephone and over the Internet on horse races at over 100 North American racetracks and internationally on races in Australia, South Africa and Dubai" and the other is a European ADW hub known as "MagnaBet™." Magna Entertainment Corp., SEC Form 10-Q (Commission File No. 003-30578), May 10, 2005, at 17. Magna's ADW nub, XpressBet®, is currently licensed by the State of Pennsylvania.

Youbet.com, Inc., traded on NASDAQ under the acronym UBET, has "focused on the United States Pari-Mutuel horse race wagering market through its main product, Youbet Express™, which features online wagering, simulcast viewing, and in-depth, up-to-the minute information on horse racing. Youbet's customers receive interactive, real-time audio/video broadcasts, access to a comprehensive database of handicapping information, and in most states, the ability to wager on a wide selection of horse races in the United States, Canada, Australia, South Africa, Hong Kong, and the United Kingdom." Youbet.com, Inc., SEC Form 10-Q (Commission File NO. 0-26015), May 4, 2005, at p. 10-11. Youbet's ADW hub is currently licensed by the State of California, State of Oregon and the State of Washington.

GemStar-TV Guide International, Inc., traded on NASDAQ under the acronym GMST, states that it "derives a substantial portion of its revenue from Pari-Mutuel wagering...[through] TVG Network's Internet-based horse race [account] wagering operations..." GemStar-TV Guide International, Inc., SEC Form 10-Q (Commission File No. 0-24218), May 5, 2005, at p. 31. The GemStar ADW hub is known as TVG™, which is licensed by the State of Oregon.

10 Interstate Horseracing Act of 1978, Pub. L. 95-515, § 2, 92 Stat. 1811, codified at 15 U.S.C. §§ 3001-3007.

11 District of Columbia Appropriations Act of 2000, Pub. L. No. 106-553 § 629, 114 Stat. 2762, 2762A-108 (codified at 15 U.S.C. § 3002(3)).

12 146 Cong. Rec. H 11230, 11232, 106th Cong. 2nd Sess. (2000).

13 18 U.S.C. § 1084.

14 Id.

The Department of Justice, however, does not view this provision as codifying the legality of common pool wagering and interstate account wagering even where such wagering is legal in the various States involved for horseracing, nor does the Department view the provision as repealing or amending existing criminal statutes that may be applicable to such activity, in particular, [the Wire Act] . . . .[15]

This article examines the issue of whether IHA, as amended, conflicts irreconcilably with the Wire Act, in that by enacting IHA and its amendment, Congress clearly manifested an intent to specifically permit transmission, placement, and acceptance of bets and wagers telephonically and via other electronic means.

This article also examines whether IHA, contrary to the view taken by the DOJ, implicitly repeals the Wire Act with respect to the limited area of pari-mutuel betting and wagering on horse races via telephonic and electronic means.

The Wire Act

Subsection (a) of the Wire Act says: 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 no more than two years, or both.[16]

The term "wire communication facility," as used in the Wire Act, is defined 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.[17]

Subsection (b) of the Wire Act contains two exceptions, also known as the "safe harbor" clause: Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for the 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 the sporting event or contest is legal into a State or foreign country in which such betting is legal.[18]

Subsection (c) of the Wire Act provides that nothing contained in the provisions of the Wire Act shall create immunity from criminal prosecution under any state laws.

Interstate Horseracing Act (IHA)

Congress enacted IHA "to further the horse racing and legal off-track betting industries in the United States."[19] Generally speaking, IHA provides an interstate off-track wager[20] may be accepted by an off-track betting system only: with the consent of the appropriate host racing association,[21] the host racing commission,[22] the off-track racing commission,[23] and nearby race tracks.[24]

Originally, an "interstate off-track wager" was defined as "a legal wager placed or accepted in one state with respect to the outcome of a horse race taking place in another State."[25] Congress amended the definition of "interstate off-track wager" in December 2000 to expressly include the Internet (i.e. other electronic media) as a means of transmitting "pari-mutuel wagers."

The 2000 amendment provides that the definition of "interstate off-track wager" now includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools.[26]

Because IHA is not a criminal statute, neither DOJ nor any other jurisdiction or agency may bring a criminal action against an ADW hub for violation of IHA.[27] IHA permits only civil remedies brought by the host State, the host racing association or the applicable horseman's group with respect to violations of the Act.[28]

The first question regarding the federal Wire Act examines whether or not horse racing constitutes a "sporting event or contest." The 1961 House Report, with respect to the Wire Act, provides that, [I]n Nevada [it is] lawful to make and accept bets on the race held in the state of New York where pari-mutuel 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.[29]

The fact that the legislative history specifically addresses horse racing indicates Congress considered horse racing to be a "sporting event or contest" within the meaning of the Act.

Second, one must question whether the EOT's activities fall within the Wire Act's "safe harbor" provision. The language of the Wire Act contains an exemption which provides that: Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce ... 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.[30]

When interpreting a statute, a court looks first to the language of the statute itself.[31] For example, "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language."[32] Or, "Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language."[33]

Therefore, to qualify for the above-referenced exemption, it must be established that betting on the particular horse race is legal in the jurisdictions from which and into which the transmission is made; and the transmission involves

15 5 U.S. Code & Cong. News, 106th Cong. 2nd Sess. 2457-2458 (2000). *See also* William Clinton, Statement on Signing H.R. 4942, 2001, http://www.mediaacess.org/programs/1pfm/wh2.html. (December 21, 2000).

16 18 U.S.C. 1084(a).

17 18 U.S.C. 1081.

18 18 U.S.C. 1084(b).

19 15 U.S.C. 3001(b).

20 15 U.S.C. 3003.

21 15 U.S.C. 3004(a)(1).

22 15 U.S.C. 3004(a)(2).

23 15 U.S.C. 3004(a)(3).

24 15 U.S.C. 3004(b)(1).

25 15 U.S.C. 3002(3) (1978).

26 District of Columbia Appropriations Act of 2000, Pub. L. No. 106-553 § 629, 114 Stat. 2762, 2762A-108 (codified at 15 U.S.C. § 3002(3)).

27 GAO-03-89 Internet Gambling Overview at 43.

28 15 U.S.C. 3005 and 3006.

29 H.R. Report No. 967, 87th Cong., 1st Sess., (1961) reprinted in 1961 U.S.C.C.A.N. 2631, 2632-33.

30 18 U.S.C. 1084(b).

31 Richardson v. United States, 526 U.S. 813, 818 (1999).

32 Salinas v. United States, 522 U.S. 52, 57 (1997).

33 *Ibid.*

information assisting in the placing of bets or wagers on that subject matter.

Considering the Wire Act, another issue is whether betting on a particular horse race is legal in all applicable jurisdictions.

For purposes of this article, we assume placing wagers would comply with the following requirements of 18 U.S.C. § 1084(b): "from a State or foreign country where betting on that sporting event or content is legal into a State or foreign country in which such betting is legal."

We note in passing at least one court has ruled that if the betting or wagering activities are legal in each of the applicable jurisdictions, then the activities fall "under the safe-harbor provision in § 1084(b)."[34] However, because of the particular nature of that case, it is difficult to generalize.

Also, it is important to understand whether or not the Wire Act accepts that ADW involves "transmissions of information assisting in the placement of bets or wagers." The Wire Act itself does not define what constitutes "transmissions of information assisting in the placement of bets or wagers."

Thus, a critical issue is whether activities of the ADW hub involve (1) transmission of bets or wagers or (2) transmission of information assisting in the placing of bets or wagers. A plain reading of the statutory language clearly includes an exception for the latter, but not for the former.

From a practical standpoint, in the conduct of account wagering, the bettor or "account holder" transmits his or her wagering instructions to the ADW hub (e.g. the bettor's account number, the bettor's password or PIN, the name of the track where the race is being performed [the "host track"], the race, the horse, the type of bet, and the amount of the bet).

The ADW hub, in turn, records the wagering instructions it receives from the account holder and then enters the wagering instructions into a totalized communications network, which provides the wagering instructions to the host track.

Upon receiving wagering instructions, the host track places wagering information into its pari-mutuel wagering pool, and recalculates and republishes odds for each bet type for that particular horse race. The account holder will then be deemed to have placed a pari-mutuel wager in the host track's pari-mutuel wagering pool.

In a certain sense, therefore, the activities of ADW hubs can be distinguished from other Internet wagering operations such as "bookmakers," sports books,[35] and online casinos because ADW hubs do not directly make or "book" the bet.

Furthermore, ADW hubs do not "hold themselves out as being willing to make bets or wagers."[36] Rather, ADW hubs act as an agent, intermediary, a middle man, or "facilitator" of or for the transmission of wagering information between the bettor and the host track.[37]

In essence, ADW hubs receive a transmission of wagering information from their account holders, and ADW hubs in turn retransmit the wagering information to the host track.[38] Depending on circumstances, the host track may accept or reject the transmission of the wagering information from the ADW hub and, as a result, the bet or wager of the account holder may or may not be placed in the host track's pari-mutuel wagering pool.

Thus, it certainly could be argued that the ADW hubs merely act as "middle man" or agent of the bettor by merely assisting the account holder in the placement of bets and wagers through the ADW hub's reception and retransmission of wagering information, rather than actual transmission of bets and wagers themselves.

The difficulty in making this argument, however, is that there is only one reported case which purports to interpret the phrase "information assisting in the placement of bets or wagers."[39] In that case, the court distinguished between transmissions "necessary to effect a particular bet or wager," which do not fall within the 1084(b) exception, and "information that merely assists a potential bettor or bookmaker," which does fall within the exception.[40] The court determined that information of the type which falls within the latter category includes: knowledge that may influence whether, with whom, and on what terms to make a bet... [such as] transmissions reporting the results of sporting events, the odds placed on particular contests by odds-makers, or the identities of persons seeking to make bets.[41]

In the author's view, it is more likely that a court would find the kind of wagering information transmitted by an account holder to the ADW hub constitutes information necessary to effect a bet or wager rather than information merely assisting a bettor or bookmaker.

Moreover, one must take into consideration whether or not the Interstate Horseracing Act repeals the Wire Act's stance on Off-Track Wagering.

Even if ADW hub's activities could be deemed to be the "transmissions of bets or wagers," and, thus, a technical violation of the Wire Act, there is a question as to whether the Wire Act even applies in the first instance to interstate off-track pari-mutuel wagers on horse races.

To begin this discussion, it is helpful to first address, in brief detail, the legislative history of the Wire Act, the IHA, particularly the recent amendment to the IHA, and other related legislation and activities.

Congress enacted the Wire Act in 1961 as part of a package of bills aimed at preventing illegal gambling, racketeering and organized crime. In furtherance of that goal, the stated purpose of § 1084 was to: assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.[42]

34 Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n, 989 F.2d 1266, 1273 (1st Cir. 1993) ("The legislative history of section 1084 shows beyond peradventure that Congress enacted section 1084(b) for the express purpose of allowing off-track betting in venues where states chose to legalize such activity.").

35 United States v. Cohen, 260 F.3d 68 (2d Cir. 2001); Also see Martin v. United States, 389 F.2d 895, 898 (5th Cir), cert. denied, 393 U.S. 831 (1968).

36 See United States v. Ross, 1999 U.S. Dist. Lexis 22351, 13 (S.D.N.Y. 1999) citing Sagansky v. United States, 358 F.2d 195, 200 (1st Cir. 1966).

37 In United States v. Alpirn, 307 F. Supp. 452, 454 (S.D.N.Y. 1969), the court held that "Betting or wagering" involves "situations where the defendant was himself making or accepting bets directly." See also State ex rel. Reading v. Western Union Tel. Co., 57 N.W.2d 537, 539 (Mich. 1953) (finding that no "gambling" transpired at a business that accepted money for bets and then placed bets with out-of-state bookmakers); Lescallett v. Commonwealth, 17 S.E. 546, 548 (Va. 1893) (an order for an intermediary to place bets is not itself betting because the relationship was governed by a set fee); Chavis v. Commonwealth of Virginia, 1994 WL 43334 (Va. Ct. App. 1994) (order for an agent to purchase lottery tickets is not a bet or wager because no element of chance governs the relationship).

38 Several legal opinions regarding the legality of Account Wagering assert that ADW activities merely involve the transmission of "information assisting in the placing of bets and wagers" rather than the actual transmission of bets and wagers. See Memorandum of Law, Department of Justice, General Counsel Division, State of Oregon (December 21, 2000) at p. 4-6; and Legal Memorandum, National Thoroughbred Racing Association (1999) at p. 14-17.

39 United States v. Ross, __ F. Supp. 2d __, 1999 WL 782749 (S.D.N.Y. 1999).

40 *Ibid.* at 5.

41 *Ibid.*

42 H.R. Rep. No. 87-967, 1961 U.S.C.C.A.N. 2631.

Although the DOJ has used the Wire Act to prosecute individuals accused of using wire facilities to place bets on sporting events,[43] the author is unaware of any reported decision in which the Wire Act has been enforced with respect to pari-mutuel wagering on horse races.[44]

Seventeen years after the passage of the Wire Act, Congress passed the IHA. IHA explicitly states, "It is the policy of Congress in this chapter to regulate interstate commerce with respect to wagering on horse racing, in order to further the horse racing and legal off-track betting industries in the United States."[45]

To that end, IHA provides "an interstate off-track wager" on a horse race may be accepted. Originally, IHA defined an instate off-track wager as "a legal wager placed or accepted in one State with respect to the outcome of a horse race taking place in another State."[46] In December 2000, however, Congress amended IHA and expanded the definition of "an interstate off-track wager" to include: [A] Pari-Mutuel wager, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any Pari-Mutuel wagering pools."[47]

When Congress amended IHA to expand the definition of "interstate off-track wager," DOJ did not comment directly on the proposed amendment. Nonetheless, Congress had previously received notice that DOJ had strong objections to any such amendment.[48]

For the three years prior to the amendment of IHA and during the five years following its enactment, Congress considered a number of bills to prohibit Internet gambling. Representatives of DOJ frequently testified before Congress and expressed DOJ's belief that, in spite of IHA, businesses which facilitated betting on horse races over the Internet were violating the Wire Act.[49] A DOJ official explicitly stated as much in a congressional hearing in March 2000.[50]

Nevertheless, nine months later, Congress passed the amendment to IHA, which explicitly permitted off-track wagers on horse racing to be placed via telephone or other electronic media.

The amendment to IHA should further be considered against the backdrop of the earlier proposed legislation seeking to prohibit Internet gambling. Over the course of the three years preceding the amendment to IHA, several bills were considered, the most significant of which were House Resolution 3125 and Senate Resolution 692 (both entitled the "Internet Gambling Prohibition Act of 1999").

Both of those bills would have added a new section to Title 18 of the United States Code, 18 U.S.C. § 1085 that would have prohibited Internet gambling. Significantly, however, both the House and Senate versions of the bill contained exceptions stating that the prohibition on Internet gambling would not be applicable to "any otherwise lawful bet or wager" on a live horse race made in accordance with IHA.[51]

The Internet Gambling Prohibition Act of 1999 passed 90-10 in the Senate, but failed to pass in the House. Subsequent efforts to prohibit Internet gambling have also not been successful. At the time Congress amended IHA, it was fully aware of the tension between IHA and the Wire Act and nevertheless intended to promote its policy of furthering the off-track betting industry by permitting electronic and Internet off-track wagering on horse racing under the conditions of IHA, as amended.

Implied Repeal

Although implied repeals of statutes are not favored, a well-recognized instance of implied repeal occurs where provisions of a later act irreconcilably conflict with provisions of an earlier act.[52]

Statutory provisions will not be considered to be in irreconcilable conflict unless there is a "positive repugnancy" between them and they "cannot mutually coexist."[53] The legislature's intent to repeal an earlier statute "must be 'clear and manifest.'"[54]

Another principle of statutory construction involves conflicts between general and specific laws. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, 'regardless of the priority of enactment.'"[55] A contrary intent will be found only where a construction that overrules the more specific enactment is "absolutely necessary" to give the later, general enactment effect.[56]

Here, IHA is not only the most recently enacted of the applicable federal statutes at issue, it is more specific than the Wire Act, and, thus, should control over the more general criminal provisions found in the Wire Act with respect to horse racing. Once again, the ultimate issue is whether IHA and the Wire Act irreconcilably conflict.

When IHA and the Wire Act are read together, it appears they clearly conflict with each other. The Wire Act prohibits the use of a wire communication facility for the "transmission in interstate or foreign commerce of bets or wagers"[57] on any sporting event or contest even in two States where such betting is legal.[58]

IHA, on the other hand, permits the placement and acceptance of wagers "placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State."[59]

Thus, assuming all other requirements of IHA are satisfied, the placement of a pari-mutuel wager by an individual in State A through an off-track betting system located in State B via either telephone or the Internet would be legal pursuant to IHA, but illegal under the Wire Act.

Clearly, then, the statutes are in direct conflict with each other, at least as they relate to the placement of "interstate off-track wagers" on horse races provided that the requirements of IHA are not violated. Accordingly, the Wire Act should be viewed as partially repealed to the extent it prohibits conduct IHA clearly authorizes.[60]

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43 United States v. Jay Cohen, 260 F.3d 68 (2nd Cir. 2001).

44 Also, see Internet Gambling Prohibition Act of 1999: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary, 106th Cong. (Prepared Statement of Steven S. Walters, Chair, Oregon Racing Commission).

45 15 U.S.C. § 3001(b).

46 15 U.S.C. § 3002(3) (1994).

47 15 U.S.C. § 3002(3) (2000).

48 Internet Gambling Prohibition Act of 1999: Hearing on H.R. 3125 Before the Subcommittee on Crime of the House Committee on the Judiciary, 106th Cong. 59 (March 9, 2000) (Testimony of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division).

49 *Ibid.*

50 *Ibid.*

51 S. 692, Senate Report 106-121, The Internet Gambling Prohibition Act.

52 Branch v. Smith, 538 U.S. 254, 274 (2003); Randall v. Loftsgaarden, 478 U.S. 647, 661 (1985).

53 United States v. Mitchell, 39 F.3d 465, 472 (4th Cir. 1994) (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976)).

54 Watt v. Alaska, 451 U.S. 259, 267 (1981) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939).

55 Radzanower, 426 U.S. at 153 (quoting Morton v. Mancari, 417 U.S. 535, 550- 51 (1974)).

56 *Ibid.*

57 18 U.S.C. § 1084(a).

58 18 U.S.C. § 1084(b).

59 15 U.S.C. § 3002(3).

60 *E.g.*, Greenless v. Almond, 277 F.3d 601, 608-09 & n.8 (1st Cir. 2002) (standard Medicaid reimbursement procedures irreconcilably conflict with subsequent enactment permitting states to use tobacco settlements for any appropriate expenditure); Granite State Chapter v. Federal Labor Relations Auth., 173 F.3d 25, 27-28 (1st Cir. 1999) (anti-lobbying restrictions in appropriations act irreconcilably conflicted with other provisions permitting such lobbying).

As such, the statutes cannot mutually exist, and "where provisions in two acts are in irreconcilable conflict, the later act, regarding the extent of the conflict, constitutes an implied repeal of the earlier one."[61] This seems especially evident here with respect to IHA and the Wire Act.

Congress, through its passage of the Wire Act and other anti-gambling acts, obviously declared an important national policy to suppress organized gambling activities.[62] In passing IHA, however, Congress also declared their policy "to regulate interstate commerce with respect to wagering on horse racing, in order to further the horse racing and legal off-track betting industries in the United States."[63]

Moreover, Congress found "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders,"[64] the federal government should "act to protect identifiable national interests,"[65] and "in the limited area of interstate off-track wagering on horse races, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers."[66]

All of these findings suggest Congress specifically intended to carve out a very narrow exception to its general anti-gambling policy, and that, with respect to the limited area of off-track pari-mutuel wagering on horse races, it wishes to promote and further, rather than inhibit and restrict, legal off-track interstate pari-mutuel wagering on horse races.

Furthermore, Congress amended IHA to define interstate off-track wagers as specifically including wagers placed "via telephone or other electronic media." To the extent that the Wire Act prevents the furtherance of that stated policy and conflicts with such amended language, it would appear IHA implicitly repeals the Wire Act as it relates to "interstate off-track wagers."

One further indication that Congress intended to permit wagering on horse races through electronic means can be seen in a recent amendment to the U.S. Tax Code. In October 2004, as a result of lobbying efforts by the National Thoroughbred Racing Association, Congress eliminated a 30 percent income tax withholding requirement on income derived from gambling winnings by foreign nonresident aliens in certain, limited circumstances.

In enacting the American Jobs Creation Act of 2004,[67] Congress amended the income tax portion (Subtitle A) of the Internal Revenue Code by providing an exclusion for:

Gross income derived by a nonresident alien individual from a *legal* wagering transaction initiated outside the United States in a pari-mutuel pool with respect to a live horse race...in the United States.[68] [Emphasis added.]

It would seem that a wagering transaction initiated outside the United States with respect to a live horse race in the United States would, from a practical standpoint, necessarily need to be placed by telephone or the Internet.

Furthermore, this amendment of the Internal Revenue Code is meaningful because Congress explicitly recognizes that a wagering transaction initiated outside the United States with respect to a live horse race in the United States may, in fact, be legal.

If all wagering transactions were made illegal by the Wire Act, the reference to "legal wagering transaction" in the Internal Revenue Code amendment would be superfluous. Furthermore, the Internal Revenue Code, as a general rule, taxes income derived from all sources including illegal activities.

It seems quite odd that if Congress believed that such wagering transactions are illegal, it would cause winnings from such wagering transactions to move from being included in income to being excluded from income for federal income tax purposes.

Despite the apparent irreconcilable conflict between the Wire Act and IHA, the U.S. Trade Representatives have also argued that IHA does not "repeal" the Wire Act (or the Travel Act or the Illegal Gambling Business Act) in a recent World Trade Organization (WTO) dispute brought by Antigua and Barbuda over the cross-border supply of gambling and betting services.[69]

Like DOJ, the U.S. Trade Representatives' arguments relied upon the fact that the Wire Act is a criminal statute, and IHA is a civil statute. The U.S. Trade Representatives argued that criminal statutes can only be repealed if done explicitly rather than implicitly.[70] Unfortunately, the author has found no rules of statutory construction or case law to support the U.S. Representatives' argument.

IHA appears to conflict irreconcilably with the Wire Act. In enacting IHA, and its amendment, Congress clearly manifested an intent to specifically permit the transmission, placement and acceptance of interstate pari-mutuel wagers, something the Wire Act clearly prohibits.

Of the two Acts, IHA was enacted later in time and is more specific with respect to the subject matter of transmitting or placing pari-mutuel bets or wagers on horse races. The application of rules of statutory construction lead to the conclusion that IHA implicitly repeals the Wire Act with respect to the placement or transmission of pari-mutuel bets or wagers on horse racing.

The foregoing conclusion is bolstered by Congress' most recent enactment, in the American Jobs Creation Act of 2004, of an exclusion from U.S. income tax. This income tax exclusion expressly recognizes legal bets can be placed or transmitted from outside the United States by foreign nationals on horse races conducted inside the United States.

61 Posadas v. Nat'l City Bank of New York, 296 U.S. 497, 503 (1936).

62 Stephen S. Walters, Chair, Oregon Racing Commission, testified that the Wire Act's prohibitions simply did not apply to bets and wagers placed through licensed ADW hubs because Congress never intended to prohibit legalized off-track betting; but rather enacted the Wire Act to prohibit illegal gambling conducted by organized crime. See Internet Gambling Prohibition Act of 1999: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary, 106th Cong.

63 15 U.S.C. § 3001(b).

64 15 U.S.C. § 3001(a)(1).

65 15 U.S.C. § 3001(a)(2).

66 15 U.S.C. § 3001(a)(3).

67 American Jobs Creation Act of 2004, H.R. 4520, P.L. 108-357, Title IV, § 419(a), 118 Stat. 1513, 108th Cong. (September 22, 2004) (codified at 26 U.S.C. § 883).

68 26 U.S.C. 872(b)(5).

69 Interestingly, on June 13, 2003, Antigua and Barbuda (hereinafter "Antigua") requested the Dispute Settlement Body of the World Trade Organization (WTO) to establish a panel for the resolution of a dispute about state and federal laws of the United States affecting cross-border supply of gambling and betting services. On November 10, 2004, the WTO panel held that the United States had made specific commitments under the GATS to provide unlimited market access with respect to gambling and betting services. The United States appealed the report of the panel and, on appeal, the WTO's Appellate Body upheld, albeit for different reasons, many of the WTO panel's findings on April 7, 2005. Most interestingly, the United States did not expressly challenge, refer to, or request that the WTO Appellate Body reverse the WTO panel's finding that the United States had made specific commitments under the GATS to provide unlimited market access with respect to gambling and betting services. While the decision of the WTO Appellate Body is interesting, a decision of the WTO Appellate Body cannot affect the vitality of a federal criminal statute.

70 *Ibid*, para. 362, p. 119.