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Federal Jurisdiction—INCIDENTAL USE OF FACILITIES IN INTERSTATE COMMERCE HELD SUFFICIENT TO INVOKE TRAVEL ACT—*United States v. LeFavre*, 507 F.2d 1288 (4th Cir. 1974).

18 U.S.C. § 1952, commonly known as the Travel Act, prohibits travel or the use of facilities in interstate commerce in aid of racketeering.¹ An examination of the statute's history shows that it was passed to enable federal prosecution of those who remained immune from state prosecution by residing outside the state wherein the illegality transpired.² However, the Act's scope is not limited to this target,³ and prosecution is permitted for the same offense under applicable state law.⁴ The statute, which has

1. *As amended*, 18 U.S.C. § 1952 (1971) reads:

Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling

Act of Sept. 13, 1961, Pub. L. No. 87-228, § 1(a), 75 Stat. 498.

"Unlawful activity" as defined in paragraph (b) actually exceeds the scope of racketeering activities. *United States v. Archer*, 486 F.2d 670, 678 (2d Cir. 1973).

For a detailed analysis of 18 U.S.C. § 1952, see Annot., 1 A.L.R. FED. 838 (1969).

2. H.R. REP. NO. 966, 87th Cong., 1st Sess. (1961), *reprinted in U.S. CODE CONG. & AD. NEWS* 2664 (1961). The House Report shows congressional concern over ". . . racketeers living in one State and controlling the rackets and reaping the profits from those rackets located in another State. The racketeer would be beyond the control of the police in the State of operation and living as a respected citizen in the State of his abode." *Id.* at 2665.

3. In *United States v. Barrow*, 212 F. Supp. 837, 840 (E.D. Pa. 1962), *rev'd in part on other grounds*, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967), the defendants traveled interstate with intent to operate an illegal dice game. The district court rejected the argument that the Travel Act was not intended to apply where individuals are arrested at the scene of an illegal operation and are therefore subject to local prosecution. The court stated that "[t]he clear, unmistakable language reaches those who travel in interstate commerce intending to facilitate the illegal business activity"

The Seventh Circuit, in *United States v. Miller*, 379 F.2d 483, 488 (7th Cir. 1967) held the statute applicable where Indiana law enforcement authorities had been tolerating a local baseball pool which used a facility in interstate commerce:

4. The House Report states: "Nothing in this bill is to be construed as immunizing any violator of State law from State prosecution." U.S. CODE CONG. & AD. NEWS, *supra* note 2, at 2665.

withstood several constitutional attacks,⁵ was designed to assist the states in controlling criminality crossing state boundaries.⁶

*United States v. LeFavre*⁷ involved a gambling operation⁸ conducted entirely within the State of Maryland and primarily within the City of Baltimore.⁹ The clearing process through interstate banking channels of fourteen out-of-state checks and other negotiable instruments received in satisfaction of bets constituted the only use of facilities in interstate commerce.¹⁰ After conviction,¹¹ the appellants contended that the Act was not intended to bring within its purview an illegal gambling operation local in nature and connected only incidentally with the use of a facility in interstate commerce.¹² The Fourth Circuit conceded the minuteness of the interstate aspect¹³ but affirmed the convictions, finding that "[t]he language of the Travel Act literally covers this gambling operation."¹⁴ The court noted that it had upheld two previous Travel Act convictions where federal jurisdiction was triggered solely by the interstate passage of checks.¹⁵

5. See, e.g., *United States v. Zizzo*, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965) (a valid exercise of congressional power pursuant to the commerce clause); *Turf Center, Inc. v. United States*, 325 F.2d 793 (9th Cir. 1963) (not unconstitutionally vague and ambiguous); *United States v. Corallo*, 281 F. Supp. 24 (S.D.N.Y. 1968) (use of interstate communication facilities does not violate first amendment freedom of speech); *United States v. Gerhart*, 275 F. Supp. 443 (S.D. W. Va. 1967) (not violative of the fifth amendment privilege against self-incrimination, the eighth amendment prohibition against cruel and unusual punishment, or the right to travel).

6. The House Report noted ". . . the need for the assistance of the Federal Government in view of the fact that law enforcement authorities are limited and hindered by the interstate nature of these activities." U.S. CODE CONG. & AD. NEWS, *supra* note 2, at 2665.

7. 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3528 (U.S. Apr. 1, 1975) (No. 74-899).

8. Gambling, if committed in violation of either state or federal law, is one of the activities proscribed under paragraph (b) of the statute, note 1 *supra*.

9. 507 F.2d at 1290.

10. *Id.*

11. The appellants were convicted by a jury in the United States District Court for the District of Maryland, at Baltimore of both a conspiracy charge and substantive violation of the Act. *Id.*

12. *Id.*

13. The court acknowledged that the number of out-of-state instruments involved in *LeFavre's* operation was apparently minimal relative to the volume of business conducted, and their involvement at all was arguably fortuitous and incidental, and certainly not vital to the operation of the gambling enterprise. *Id.* at 1293.

14. *Id.* at 1290.

15. The Fourth Circuit, in *United States v. Wechsler*, 392 F.2d 344 (4th Cir.), *cert. denied*, 392 U.S. 932 (1968), held that a check received as a bribe was sufficient to invoke the Travel

The circuit court rejected the appellants' argument that these decisions were vitiated by the Supreme Court's holding that gambling establishment operators did not violate the Act merely because their operation was frequented by out-of-state bettors.¹⁶ The Fourth Circuit stated that the Court had limited itself in that case to the issue of whether to extend the ambit of the statute to cover a factual situation which was outside the Act's clear language,¹⁷ and reiterated that the illegal activity in *LeFavre* fell squarely within the ordinary meaning of the Act's language,¹⁸ thus raising the issue of whether the use of interstate facilities must be a "substantial and integral" part of the underlying activity.¹⁹

The appellants relied on decisions of the Seventh and Second Circuits reversing Travel Act convictions where the involvement of interstate facilities was purely incidental to the defendants' activities.²⁰ The court confined these decisions to their "precise factual settings,"²¹ and stated that

Act when deposited in a bank account. The check bore the endorsement of a Washington, D.C. bank while having been drawn on a Virginia bank. In the dissenting opinion, Winter, J., took the position that ". . . as a matter of federal law the bank clearing operations do not constitute a use of interstate facilities as contemplated by § 1952." 392 F.2d at 353.

In *United States v. Salsbury*, 430 F.2d 1045 (4th Cir. 1970), the court held that the bank clearing process of out-of-state checks cashed in pursuance of illegal gambling was within the jurisdictional ambit of the Act.

Cf. United States v. Barnes, 383 F.2d 287, 290 (6th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968), where the Sixth Circuit suggested that the Travel Act would be violated if cashing of out-of-state checks was a usual or integral part of a local gambling activity.

16. *Rewis v. United States*, 401 U.S. 808, 811-12 (1971).

17. 507 F.2d at 1294-95. *But see United States v. Archer*, 486 F.2d 670, 680 (2d Cir. 1973), where the Second Circuit asserted that the opinion in *Rewis v. United States*, 401 U.S. 808 (1971), "indicates that the Act is not to be stretched to the limits of its language."

18. 507 F.2d at 1294-95.

19. *See note 3 supra* and accompanying text.

20. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974) (defendants deposited out-of-state checks received as bribes); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) (transatlantic telephone call from Paris to defendant in New York); *United States v. McCormick*, 442 F.2d 316 (7th Cir. 1971) (newspaper in which defendant advertised for lottery salesmen had a small percentage of out-of-state subscribers); *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971) (victim of extortion cashed out-of-state check to pay defendant).

21. 507 F.2d at 1294.

Assuming for the moment that the . . . decisions relied upon by appellants were correctly decided, we believe each can be readily explained by factors having nothing to do with a narrow or restricted reading of the Travel Act. *Id.* at 1293.

The court found that *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971), had been decided largely on the ground of a lack of criminality occurring subsequent to the use of interstate facilities, a requisite under the statute. In *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973), the court found the Second Circuit's decision was based at least partly on the interstate element's initiation by a government agent. It was "arguably true," said the court,

even if they were non-distinguishable, it would refuse to follow those circuits by reading into the Travel Act a "substantial and integral" requirement.²²

The court approved investigation of legislative history for purposes of determining the desirability of extending the ambit of the statute,²³ but rejected its use where the unambiguous words of the statute clearly covered certain activity.²⁴ The same reasoning led to denial of application of the "rule-of-lenity" requiring that ambiguity in a criminal statute be resolved in favor of the accused.²⁵ Impliedly admitting that Congress may not have had an operation such as that of the appellants in mind when passing the Act, the circuit court refused to confine its application of the statute to the primary activity contemplated by Congress.²⁶

Finally, in rejecting the appellants' contention that a conviction under the Travel Act requires a *knowing* use of facilities in interstate commerce, the court observed that the statute contained no such knowledge requirement, and that the interstate element was but a "jurisdictional peg" necessary to create federal jurisdiction over prohibited activities which in themselves supplied the requisite *mens rea*.²⁷ As 18 U.S.C. § 2 makes principals

that the defendant in *United States v. McCormick*, 442 F.2d 316 (7th Cir. 1971), had not benefited from the use of interstate facilities. 507 F.2d at 1293-94.

22. 507 F.2d at 1294. The court also decided against the appellants' alternative contention that the sufficiency of use of the interstate facilities was a factual question for the jury. *Id.* at 1297.

23. 507 F.2d at 1295. See *Rewis v. United States*, 401 U.S. 808, 811-13 (1971).

24. 507 F.2d at 1295. In considering whether the statute reached the factual instances under their consideration, the Second and Seventh Circuits did examine legislative history to ascertain congressional intent. *United States v. Isaacs*, 493 F.2d 1124, 1146-47 (7th Cir. 1974); *United States v. Archer*, 486 F.2d 670, 678-80 (2d Cir. 1973); *United States v. McCormick*, 442 F.2d 316, 317-18 (7th Cir. 1971); *United States v. Altobella*, 442 F.2d 310, 313-15 (7th Cir. 1971).

25. 507 F.2d at 1296. See *United States v. Enmons*, 410 U.S. 396, 411 (1973); *Bell v. United States*, 349 U.S. 81, 83 (1955).

In determining whether the Travel Act reached particular factual situations, the rule was applied in *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Isaacs*, 493 F.2d 1124, 1147 (7th Cir. 1974); *United States v. Archer*, 486 F.2d 670, 680 (2d Cir. 1973). See notes 16-17, 20, *supra* and accompanying text.

26. 507 F.2d at 1295. *Accord*, *United States v. Archer*, 486 F.2d 670, 680 (2d Cir. 1973); *United States v. Roselli*, 432 F.2d 879, 885 (9th Cir. 1970).

27. 507 F.2d at 1297. "The use of interstate facilities is not a crime requiring an additional *mens rea* beyond that required for participation in the gambling activity itself; it is just an act that confers federal jurisdiction over the underlying gambling activity, and nothing more." *Id.* at 1298. See *United States v. Roselli*, 432 F.2d 879, 891 (9th Cir. 1970), where the Ninth Circuit state that "[t]he sole reason for conditioning the . . . prohibitions upon use of interstate commerce is to provide a constitutional basis for the exercise of federal power."

of aiders and abettors,²⁸ the convictions of those appellants who did not actually use facilities in interstate commerce were upheld.²⁹ The court stated that since knowledge was not a requisite to a direct violation of the statute,³⁰ it would be an anomaly to impose such a requirement in order to convict non-users.³¹ Alternatively, the court sustained their convictions as having been "willing members of the conspiracy" to further the substantive violations.³² While recognizing that conspiracy is generally a specific intent crime,³³ the Fourth Circuit held that proof of intent to use interstate

28. 18 U.S.C. § 2(a) (1971) states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

29. 507 F.2d at 1298. These appellants were two "telephone girls" who received bets for the operation. They did not cash or deposit any checks, and thus did not use a facility in interstate commerce.

30. 507 F.2d at 1298. *Accord*, United States v. Isaacs, 493 F.2d 1124, 1153 (7th Cir. 1974); United States v. Roselli, 432 F.2d 879, 890-91 (9th Cir. 1970); United States v. Hanon, 428 F.2d 101, 107-08 (8th Cir. 1970); United States v. Barnes, 383 F.2d 287, 292 (6th Cir. 1967); United States v. Miller, 379 F.2d 483, 486 (7th Cir. 1967).

In United States v. Salsbury, 430 F.2d 1045, 1049 (4th Cir. 1970), the Fourth Circuit had no opportunity to decide the issue of requisite knowledge, as the defendant had been tried and convicted on the theory that knowledge of the interstate element was necessary.

31. 507 F.2d at 1298. *Cf.* United States v. Salsbury, 430 F.2d 1045, 1048-50 (4th Cir. 1970). *Contra*, United States v. Barnes, 383 F.2d 287, 290-92 (6th Cir. 1967). The non-using appellants could only be convicted on a showing that they ". . . had reason to expect or knew that the partnership manager was so employing facilities of interstate commerce . . ." *Id.* at 291.

The Sixth Circuit supported this opposite view by citing *Twitchell v. United States*, 313 F.2d 425 (9th Cir. 1963), *vacated and remanded sub. nom. Rogers v. United States*, 376 U.S. 188 (1964). In that case, the Ninth Circuit held that a defendant's conviction for conspiracy to violate the Mann Act could only be sustained if he either directly agreed to the illegal interstate transportation or to a plan in which the likelihood of its use was great, or if he showed his indirect agreement by significant participation in the operation with actual knowledge of the interstate element. 313 F.2d at 429.

The Fourth Circuit, noting that the defendant in *Twitchell* had been only a peripheral figure in the conspiracy, refused to apply its reasoning in *United States v. Salsbury*, 430 F.2d 1045, 1048-50 (4th Cir. 1970), where the defendant was "at the center of a far-flung illegal operation." *Id.* at 1049. In *LaFavre*, by upholding the convictions of the telephone girls who only received bets and never used interstate facilities, the court went a step further and rejected any knowledge requisite regardless of the tangential involvement of the participant. 507 F.2d at 1298.

32. 507 F.2d at 1298-99. *See* *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), wherein the Supreme Court held that a conspirator may be responsible for substantive violations of law committed in furtherance of the conspiracy by a co-conspirator, even though he was unaware of the substantive violations and did not participate in them. "A verdict on that theory requires submission of those fact issues to the jury." *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949).

33. 507 F.2d at 1299.

While one may, for instance, be guilty of running past a traffic light of whose existence

facilities was not necessary to establish a conspiracy to violate the Act.³⁴

The court's finding that the appellants' operation was encompassed in the bare language of the Travel Act³⁵ is correct. However, the refusal to investigate legislative history³⁶ because it may yield an "inference in every direction"³⁷ is unjustified when congressional intent can clearly be discerned by such an inquiry.³⁸ In a recent case,³⁹ the Supreme Court held that certain activities⁴⁰ as a matter of law were insufficient to invoke the jurisdiction of the Robinson-Patman Act and the Clayton Act.⁴¹ Noting congressional silence on the matter,⁴² the Court refused to extend the reach of the statutes to "local activities that hitherto have been left to state and

one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past. *Id.* at 1299 n.5, quoting from *United States v. Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941).

34. 507 F.2d at 1299. Shortly after *LeFavre*, the Supreme Court in *United States v. Feola*, 43 U.S.L.W. 4404 (U.S. March 19, 1975), held that ". . . where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense." *Id.* at 4412. The Court's decision reinstated a conviction for conspiring to assault a federal narcotics agent which the Second Circuit, in *United States v. Alsondo*, 486 F.2d 1339, 1342-44 (2d Cir. 1973), had reversed for failure of proof that the defendant had knowledge of the officer's federal capacity.

See *United States v. Isaacs*, 493 F.2d 1124, 1153 (7th Cir. 1974); *United States v. Roselli*, 432 F.2d 879, 891-92 (9th Cir. 1970); MODEL PENAL CODE § 5.03, Comment at 110-13 (Tent. Draft No. 10, 1960).

35. 507 F.2d at 1290-91.

36. *Id.* at 1295-96.

37. *Id.* at 1295. The court quoted from *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945).

38. See notes 2 and 24 *supra* and accompanying text. Cf. *United States v. Wechsler*, 392 F.2d 344, 349 (4th Cir. 1968) (dissenting opinion), where Judge Winter stated that in prosecuting under the Travel Act, "the government must be held to the exact class of transgressors whose activities Congress outlawed."

39. *Gulf Oil Corp. v. Copp Paving Co.*, 95 S. Ct. 392 (1974).

40. Intrastate sales of asphaltic concrete for use in construction of interstate highways. *Id.* at 395.

41. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1970); Clayton Act §§ 3, 7, 15 U.S.C. §§ 14, 18 (1970). The Court held that the "in commerce" language of these Acts' jurisdictional provisions did not reach "nominal connections between commerce and activities that may have no significant economic effect on interstate markets." *Gulf Oil Corp. v. Copp Paving Co.*, 95 S. Ct. 392, 400 (1974).

42. 95 S. Ct. at 400-02. The Court noted that congressional intent with respect to sections 3 and 7 of the Clayton Act was somewhat more ascertainable than in the jurisdictional provisions of the Robinson-Patman Act, note 41 *supra*, "[b]ut whether it would justify radical expansion of the Clayton Act's scope beyond that which the statutory language defines—expansion, moreover, by judicial decision rather than amendatory legislation—is doubtful." 95 S. Ct. at 402.

local regulation.”⁴³ On this basis, the Court eventually may be receptive to deciding the question of the degree of a local operation’s use of facilities in interstate commerce necessary to invoke the Travel Act. “Prosecutorial discretion”⁴⁴ suggested by the Fourth Circuit as the solution to undue application of the statute seems inappropriate when dealing with the extent of federal criminal jurisdiction.⁴⁵

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43. 95 S. Ct. at 401.

44. 507 F.2d at 1296. While it is true, as noted by the court, that Judge Friendly in *United States v. Archer*, 486 F.2d 670, 678 (2d Cir. 1973), stated that prosecutorial discretion is the primary solution to appropriate federal criminal jurisdiction, he also said that “. . . we are not prepared to say that, absent Congressional limitation, a federal court may never dismiss a prosecution as an abuse of federal power”

45. See *Rewis v. United States*, 401 U.S. 808, 812 (1971). In *FTC v. Bunte Bros.*, 312 U.S. 349, 351 (1941), the Supreme Court stated that “. . . in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background”

