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1966 LOTTERY AMENDMENT**

**MAY 2002**



80 New Scotland Avenue  
Albany, NY 12208  
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# **LEGISLATIVE INTENT AND NEW YORK'S 1966 LOTTERY AMENDMENT**

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**MAY 2002**

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## Legislative Intent and New York's 1966 Lottery Amendment

In 1966, the Constitution of the State of New York was amended to provide for a State lottery. Specifically, Article 1, Section 9 of the State Constitution which had previously banned all lotteries was amended to provide an exception for “lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe.”

While this provision has rarely been the subject of significant litigation<sup>1</sup> this provision is now the focus of a major lawsuit. In Dalton et al., v. Pataki et al., (filed January 29, 2002) opponents of the gambling expansion accomplished in the wake of 9/11 are claiming that the provisions in chapter 381, L. 2001 establishing a multi-state lottery and a video lottery at pari-mutuel racetracks violate the State's general prohibition against gambling in Article 1, Section 9.<sup>2</sup> Specifically, the opponents claim that a multi-state lottery violates that part of the lottery amendment which requires that the lottery be operated by the State. The opponents also claim that the video lottery provision is unconstitutional because it authorizes slot machines which cannot be lotteries, and they further claim that, by providing financial assistance to horsemen and breeders' group through the video lottery, the State is violating the Constitutional provision that the “net proceeds” of a lottery are to be applied exclusively in support of education.

The opponents also claim that the process by which the legislation was enacted did not pass Constitutional muster. The message of necessity issued by the Governor to get around the Constitutional requirement that a bill be on the legislators' desk in final form for three days was insufficient for the vote.<sup>3</sup> This created a situation where “unelected power brokers and influence-peddlers had more say than the rank and file members of both houses, who were left in the dark and asked by their leaders to vote on the bill immediately, virtually sight unseen, without any debate and with only a few minutes to explain their vote.”<sup>4</sup> The result was a bill “that mocks everything we are supposed to believe in about our republican form of government.”<sup>5</sup>

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1 The one major exception to this is Trump v. Perlee, 228 A.D. 2d 367 (1<sup>st</sup> Dept., 1996) which found that the lottery game of “Quick Draw” was constitutional.

2 The plaintiffs in the case argue that Parts “B”, “C”, and “D” of chapter 383 are unconstitutional. Part “B” authorized the approval of certain Indian gaming compacts and is not the subject of this article. Part “C” authorized the video lottery, and Part “D” authorized a multi-state lottery.

3 The requirement of a message of necessity is in Article 3, §14 of the State Constitution.

4 Summons at p. 2.

5 Id. At p. 3

These challenges bring into question the meaning of the term “lotteries operated by the state” as authorized in the 1966 Constitutional amendment and place the legislative history of the lottery amendment into significant focus.

Constitutional amendments in New York must pass two legislative sessions before they can be voted on by the people. The second passage of the amendment must be at the next regular legislative session convening after the succeeding general election.<sup>6</sup> The lottery amendment was debated and voted on in 1965<sup>7</sup> and 1966<sup>8</sup> before being approved by the electorate in November of 1966.<sup>9</sup> In 1967, legislation designed to implement the constitutional amendment was enacted.<sup>10</sup> This article reviews the transcripts of the debates of these proposals in the State Senate in order to shed some light on the current litigation. Texts of the legislative debate are only available from the State Senate. The State Assembly did not maintain records of debate at that time.

### *Scope of the Lottery*

In 1965, the Democrats had majorities in both houses of the legislature. In 1966, the Republicans regained control of the Senate, but the Democrats were the majority party in the Assembly. In 1967, the same situation prevailed with the Republicans controlling the Senate and the Democrats controlling the Assembly. While party affiliation frequently plays a dominant role in the voting in the State legislature, it played little role in the debate over the lottery.

Instead, the debate in both 1965 and 1966 focused on how the members believed a lottery was to work. To most of the sponsors of the bill, that answer was simple. The sponsors believed that the lottery was to resemble the New Hampshire lottery, which was the only state that had authorized a lottery. The New Hampshire lottery was based on the results of certain horse races conducted in the state. The sponsors envisioned the same system applying in New York.

The debate began in 1965 with Senator Mangano, one of the sponsors of the amendment, saying that the amendment “was based on a lottery of four or five races a year.”<sup>11</sup> Senator Speno, who was also a sponsor of the bill, claimed that four races would not be enough. There might be as many as ten races per year.<sup>12</sup> Another of the sponsors, Senator Mackell, believed that “we can base it on not four, but maybe six or eight, the best, the biggest races throughout the country.”<sup>13</sup>

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6 The procedure for amending the Constitution is spelled out in Article 19, §1 of the State Constitution.

7 S. 289 by Members Mangano, Lentol, Marine, Mackell, Mosberg, Brownstein, Doerr, Quinn, Speno, and Curran.

8 S. 897 by Members Lentol, Brownstein, Mackell, Speno, and Curran.

9 Due to court-ordered redistricting, a general election for the legislature was held in November of 1965.

10 Chapter 278, Laws of 1967. It was passed as S. 4644 Budget Bill.

11 Debate on S.289, June 14, 1965, [hereinafter S.289] Senate Transcripts at p. 4763.

12 *Id.*, at 4788.

13 *Id.*, at 4794.

Senator Brownstein, also one of the sponsors of the legislation, was the most specific. He said, “I think clearly we understand certainly as a matter of legislative intent that what we are talking about here and especially with reference to the New Hampshire lottery and the sweepstake. What we are talking about here is a state-operated game of chance which is dependent upon designated races.”<sup>14</sup>

Little changed in 1966. The sponsors again believed they were tying the lottery to the results of horse races. Senator Brownstein again spoke of a quarterly lottery.<sup>15</sup> After the people had ratified the lottery amendment, Senator Brownstein claimed that the lottery, of necessity, had to be based on pari-mutuel races in order to avoid a federal tax on gambling.<sup>16</sup> Senator Speno said, “It seems to me that those who feel this is an intelligent program ought to refer to it in terms of a sweepstake lottery so that it is clear we are relating this lottery to what is now a properly legalized form of wagering which is done at a track.”<sup>17</sup>

In debating the actual lottery bill in 1967, Senator Greenberg, an opponent of the lottery, recounted, “We were all told last year that we were going to have four horse races a year for the lottery.”<sup>18</sup>

In no small measure, the notion that the lottery was to be based on the results of horse races was based on federal law. In order to avoid the then 10% federal excise taxes on wagering,<sup>19</sup> New Hampshire had lobbied Congress to exempt State lotteries where the results of the lottery was based on horse races. Congress passed the exemption for State lotteries based on horse races in June of 1965.<sup>20</sup> Thus, it was believed that a lottery based on horse races was needed if the State wished to avoid paying an excise tax.<sup>21</sup>

There were a few statements that might be seen as broadening the notion of a state lottery, but even these statements were minimal. Senator Marine, a sponsor of the amendment in 1965, said, “To me, a lottery is nothing more than a raffle.”<sup>22</sup>

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14 *Id.*, at 4807.

15 Debate on S. 897, February 7, 1966, Senate Transcripts, [hereinafter S. 897] See Remarks of Senator Brydges at p. 341.

16 Steve Cady, “Form of Lottery Remains to Be Settled, but Sweepstakes System Based on Horse Races Is Expected,” *New York Times*, November 10, 1966, p. 35 [hereinafter Cady].

17 S. 897, *supra* note 15, at 315.

18 Debate on S. 4644, April 1, 1967, [hereinafter S. 4644] Senate Transcripts at p. 2736.

19 See Chapter 35, Internal Revenue Code

20 Act of June 21, 1965, Public Law No. 89-44, 26 USC §4402(c)3.

21 Cady, *supra* note 16.

22 S. 289, *supra* note 11, at 4780.

Senator Mackell, responding to lottery opponent Senator Marchi's question about whether a lottery needed to be related to horse racing, avoided a direct answer but said, "It is a prize, consideration, and multiple participation."<sup>23</sup> When Senator Marchi followed up with a question on whether policy/numbers would be a lottery, Senator Mackell said, "It is a different operation."<sup>24</sup>

Most of the opposition to the lottery amendment focused on policy arguments. Opponents complained about the morality of the government garnering money from gambling, the issue of the earmarking of the lottery revenue for education, and the regressive nature of lotteries.<sup>25</sup> In addition to the policy arguments, a number of the lottery foes questioned the alleged imprecision of the proposal. Senator Metcalf in 1965 suggested that "the sponsors are asking us to buy a pig in a poke, because the language is so indefinite that it would be very difficult from what is written here as to what would eventually come about."<sup>26</sup>

Senator Barrett in 1966 complained, "We are voting blind here, really. We have no specifics before us as to what may develop here in connection with the sale of these tickets, where they shall be sold, at what figure they shall be sold."<sup>27</sup> Similarly, Senator Laverne noted, "A lot of us are not sure what we are talking about when we say lottery."<sup>28</sup> Senator Brydges, who was the majority leader of the Senate in 1966, complained that there was nothing limiting the number of lotteries and nothing limiting the lottery to sweepstakes races.<sup>29</sup>

Yet, even the opponents did not seem to envision that the lottery would expand to more than a weekly operation. Senator Metcalf in 1965 questioned whether there would be one or ten lotteries.<sup>30</sup> Senator Brydges argued in 1966, "What started out to be a restrained type of lottery run annually, semiannually or quarterly next comes a monthly lottery, and if you need more money becomes a weekly lottery."<sup>31</sup> In the debate over passing the implementing lottery provisions in 1967, Senator Greenberg protested about having twelve lotteries per year. He asked, "What will happen next year? Twenty-four?"<sup>32</sup> Similarly Senator W.T. Smith in the

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23 *Id.*, at 4808.

24 *Id.*, at 4809.

25 In what may have been one of the more prescient statements made during the debate, Senator Laverne, perhaps the most vocal lottery opponent said, "The public should know it is not going to bring education one penny more than they would get by normal budgetary procedures, because whatever is anticipated for the lottery, they will get that much less from general funds." Debate on S. 897, January 25, 1966 Senate Transcripts at 256.

26 S. 289, *supra* note 11, at 4796.

27 S. 897, *supra* note 15, at 290.

28 *Id.*, at 331.

29 *Id.*, at 341.

30 S. 289, *supra* note 11, at 4797.

31 S. 897 *supra* note 15, at 363.

32 S. 4644, *supra* note 18, at 2736.

course of explaining his vote complained, “We have seen it proliferate into first four lotteries, then eight lotteries, then twelve lotteries. Next, I expect, it will be weekly.”<sup>33</sup>

In short, while keeping the language somewhat ambiguous, the supporters of the lottery amendment assumed that they were passing an amendment authorizing drawings based on selected horse races, probably on a quarterly basis, but at the very most on a weekly basis. As Senator Mackell said in 1965, “It would not be a daily occurrence.”<sup>34</sup> If there is any basis for the video lottery authorized by Part C of Chapter 383, it has to be based on the general definition of the term “lottery” under existing case law in New York. Since none of the lottery’s existing games have anything to do with a sweepstakes on selected horse races, that standard is no different than the standard that would be employed to justify the constitutionality of any of the lottery’s existing games.

The one conclusion that could fairly be drawn from the legislative history is that the portion of the Attorney General’s opinion in 1984 which found a sports parlay card to be unconstitutional<sup>35</sup> – because a professional athletic event could not be the basis of a lottery – is most assuredly wrong. The one thing that the lottery amendment was trying to accomplish was to base a lottery on the results of sporting events in horse racing. There likely were ample reasons to find a sports card lottery unconstitutional – most especially the fact that a selection would have been based at least in part on skill rather than pure chance - but the fact that that a sports card lottery was to be based on a sporting event was not one of them.

#### *Lottery Proceeds*

Interestingly enough, while there was nothing in the legislative debate on the issue of determining the proceeds of a lottery, there appears to be an assumption that the lottery would add purses at the tracks. The New Hampshire lottery, upon which the New York lottery was modeled, contained increases for the purses of certain thoroughbred stakes races at Rockingham Park in New Hampshire. Upon passage of the amendment, Reginald Webster, the head of the organization representing owners and trainers at the downstate thoroughbred tracks said, “Naturally, we expect to participate in this program.”<sup>36</sup> He added that the horsemen were prepared to race elsewhere if they were denied a share of the lottery revenue.

In announcing an agreement on legislation implementing the lottery in January of 2002, the New York Times wrote, “Part of the operational costs, if the lottery were based on horse races, would be the money given to the track to enhance the purse on lottery races. Sources here

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33 *Id.*, at 2753.

34 S. 289, *supra* note 11, at 4765.

35 Op. AG 84 – F1.

36 Cady *supra* note 16.

indicated that this purse subsidy might be \$100,000 a race; in New Hampshire it is \$200,000.”<sup>37</sup> Again, there was apparently a belief that the new lottery would be authorized to subsidize purses in horse racing.

### *State-Operated Lottery*

Very little was said in the Senate on the requirement that the lottery would have to be operated by the State. The most significant remark came from Senator Speno. He said in 1965, “The thing about this bill that appeals to me was the provision that it is to be operated by the State of New York. Now we need have no fear of lack of control if we, the legislature are going to be responsible for the control of the sale of these lottery tickets.”<sup>38</sup> If the issue of a multi-state lottery is basically one of legislative control, as suggested by Senator Speno, then the legislature surely through authorizing legislation has control over New York’s participation in a multi-state lottery.<sup>39</sup>

Some of the legislators viewed the lottery as a way of keeping money wagered by New Yorkers in the state or away from organized crime. Senator Lentol claimed in 1966 that a lottery “will draw away from the treasury of the underworld most of the money that is going in there now.”<sup>40</sup> Senator Brownstein saw the lottery as a way of keeping New York money inside New York.<sup>41</sup> The supporters saw the lottery as a way of raising significant revenue without having to raise taxes. Some legislators estimated that the lottery would raise \$500 million per year.<sup>42</sup> In that sense, it may be that the requirement for a state-operated lottery is simply a continuation of New York’s quarter-millennium ban on private lotteries.<sup>43</sup> Lotteries from which the State obtains the proceeds are valid; lotteries where the proceeds go to private parties are illegal. While there is little in the debate on the overall subject of the meaning of lotteries operated by the State, what there is in the debate tends to view the State lottery as one that the state could control and from which the state would derive revenue. What little there is in the debate tends to support the constitutionality of the multi-state lottery provisions in chapter 381. The multi-state lottery is subject to legislative control, and the State receives its same revenue from lottery sales made inside New York. On this issue, the opponents of gambling would need to look to the plain

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37 Sydney Schanberg, “Albany Favors \$2 Tickets Sold at Banks in Lottery,” New York Times, January 19, 1967, p. 22.

38 S. 289, supra note 11, at 4788.

39 This was the reasoning employed in Tichenor v. Missouri State Lottery Com., 742 S.W. 2d 170 (1988). See also Atty. Gen Op. No.87 –16 (Kansas, 1987). But cf. Opinion on Legality of Multi-State Lotteries, South Carolina, Attorney General, (March 25, 2002); Op. Ohio Atty. Gen. No. 88-002 (January 25, 1988)

40 S. 897, supra note 22, at 253-254.

41 S. 289, supra note 11, at 4785.

42 Id., at 4765 and 4776.

43 Chapter 856, Laws of 1747, Laws of the Colony of New York.

meaning of a lottery operated by the State while the proponents would resort more to the legislative history.

### *Message of Necessity*

The opponents of the legislation are in a difficult position in arguing that the legislature improperly passed chapter 381 in violation of the three-day rule. Previous decisions by the New York courts have largely left the issues of whether a message of necessity was sufficient to the political branches of government.<sup>44</sup> It may be worth noting that the original lottery bill in 1967 was also passed in a very heated atmosphere with little opportunity for public input or deliberation. The bill was passed under a message of necessity from Governor Rockefeller, and “mimeographed copies of the lottery bill were rushed to both houses”<sup>45</sup> in the middle of the last night of the legislative session. The situation in the Senate was such that before voting on the bill, Lieutenant Governor Wilson who presided over the Senate had to say, “Before the result is announced, the Chair wants to state for the record that the desk informs the Chair that a copy of the bill which is Senate Print 4644 has been placed on the desk of each of the members. Is there any member who has failed to receive a bill? Since no member has indicated that he has failed to receive a bill, the record will show that before the bill is passed a copy of the bill in final form was on the desk of each of the members.”<sup>46</sup>

The original 1967 lottery legislation was probably passed with less opportunity for study and debate than the 2001 lottery legislation.

### *Conclusion*

As the initial conception of a State lottery was predicated on pari-mutuel horse racing results, one of the stated purposes of the lottery was to assist the sport of horse racing. Senator Mackell, a sponsor of the amendment noted in 1965 that the lottery “will create a great deal of interest in some of the big races.”<sup>47</sup> He added, “It will encourage even greater attendance at the races.”<sup>48</sup> Nonetheless, over the past 35 years, the lottery has been seen as a major competitor of horse racing for the public’s gambling dollar. It would be ironic if the 2001 lottery legislation designed, in part, to fulfill the original lottery aim of assisting horse racing, would be found unconstitutional.

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44 See Sullivan County Harness Racing Assn. v. New York State Off-Track Pari-Mutuel Betting Comm., 30 NY 2d 207 (1972); Joslin v. Regan, 63 A.D. 2d 466 (4<sup>th</sup> Dept., 1978) aff’d 48 N.Y. 2d 746 (1979); Norwick v. Rockefeller, 70 Misc. 2d 923 (Sup. Ct., N.Y. County, 1972) aff’d 40 A.D. 2d 956 (1<sup>st</sup> Dept., 1972) aff’d 33 N.Y. 2d 537 (1973).

45 Richard Madden, “Legislature Sits 21 Hours in Finale,” New York Times, April 3, 1967, p. 28

46 S. 4644, supra note 18, at 2756–2757.

47 S 289, supra note 11, at 4794.

48 Id., at 4795.