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JAMES E. TIERNEY
ATTORNEY GENERAL

84-15

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

April 4, 1984

Richard J. Carey, Director
Maine State Lottery Commission
State House Station #30
Augusta, Maine 04333

Dear Mr. Carey:

This will respond to your Inter-Departmental Memorandum of February 9, 1984, in which you ask whether Congressional approval under Article I, § 10, cl. 3 of the United States Constitution (the "Compact Clause") is required if the States of Maine, New Hampshire and Vermont enter into a Tri-State Lottery Compact, the provisions of which are embodied in Legislative Document No. 2203. For the reasons discussed below, it is the Opinion of this Department that Congressional approval of the Tri-State Lotto Compact described in L.D. 2203 would not be required.[1/]

If L.D. 2203 were enacted, the State of Maine would enter into a compact with New Hampshire and Vermont for the purpose of operating a Tri-State Lotto to raise additional revenue for

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[1/] In an Opinion dated November 9, 1977 this Department observed, without analysis, that the creation of a Tri-State Lottery would probably require approval by the Congress. That Opinion, however, was issued in the context of a request by your predecessor to identify "potential legal problems of a three-state New England lottery," but without the benefit of an actual proposal. To the extent that Opinion is inconsistent with the views expressed herein, it no longer reflects the Opinion of this Office.

each of the party states. The new game would be in addition to the lotteries operated by each of the party states individually. Tickets to the "Tri-State Lotto" would be sold in each of the party states "and processed in a central area to be determined by the Commission." The compact would establish a Tri-State Lotto Commission with the authority to promulgate rules and regulations governing, among other things, the type of lottery to be conducted, the prizes to be awarded, the method to be used in selling tickets, and the locations at which tickets may be sold. Additionally, the Commission would be authorized to adopt a corporate seal and to enter into contracts, and to exercise any incidental powers "as may be necessary or proper for the effective performance of its functions."

The Compact would authorize the Commission to license agents to sell Tri-State Lotto tickets, and it specifies the factors to be considered in issuing such licenses. Licenses could be revoked or suspended by the Commission pursuant to the terms of the Compact and certain practices regarding the sale of tickets would be prohibited.

The Compact specifically provides how revenue generated from the sale of Tri-State Lotto tickets is to be collected and disposed of and how prizes are to be paid. Actions by the Commission must be unanimous, amendments to the Compact must be accomplished through concurrent legislation in each of the party states, and a state may withdraw from the Compact through the enactment of appropriate legislation. The Commission and its members enjoy sovereign immunity, and winnings are exempt from state and local taxation. Finally, while not expressly prohibited, the Compact does not purport to authorize the sale of Tri-State Lotto tickets outside of the three state area.

Article I, § 10, cl. 3 of the United States Constitution provides, in pertinent part, that "[n]o State shall, without the Consent of Congress, . . . , enter into any Agreement or Compact with another State. . . . " Although the language of this constitutional provision is extremely broad and if "[r]ead literally, . . . would require the States to obtain Congressional approval before entering into any agreement among themselves. . . ," the United States Supreme Court has held that it only applies to agreements "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." United States Steel Corp. v. Multistate Tax Comm'n., 434 U.S. 452, 468 (1978) quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893). See

also Cuyler v. Adams, 449 U.S. 433, 440 (1981); New Hampshire v. Maine, 426 U.S. 363, 369-70 (1976). The Court has consistently pointed out that the Compact Clause was not intended to frustrate cooperative efforts between states but to guard against the "enhancement of state power at the expense of the federal supremacy." United States Steel Corp. v. Multistate Tax Comm'n., 434 U.S. at 470. See also Holmes v. Jennison, 14 Pet. 540, 573, 10 L.Ed. 579 (1840). The relevant inquiry, therefore, must focus on the "impact [of an interstate compact] on our federal structure." 434 U.S. at 471.

Congress has enacted legislation prohibiting certain conduct in connection with lotteries. For example, 18 U.S.C. § 1301 prohibits the interstate transportation of lottery tickets; section 1302 prohibits the mailing of lottery tickets or other material concerning a lottery or any publications advertising a lottery or any check or other instrument or money for the purchase of a lottery ticket; section 1303 prohibits any employee of the Postal Service from knowingly delivering any such material; and section 1304 prohibits the radio broadcasting of "any advertisement of or information concerning any lottery." State-conducted lotteries, however, are exempted from most of these prohibitions by virtue of 18 U.S.C. § 1307(a) and (b) which provides, in relevant part:

> (a) The provisions of sections 1301, 1302, 1303 and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law--
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> (1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or
>
> (2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.
>
> (b) The provisions of section 1301, 1302 and 1303 shall not apply to the transportation or mailing --
>
> (1) to addresses within a State of equipment, tickets, or material

> concerning a lottery which is conducted by that State acting under the authority of State law; or . . . .

Similarly, 18 U.S.C. § 1953 prohibits the interstate transportation of "wagering paraphernalia," but that statute specifically exempts "equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law." 18 U.S.C. § 1953(b)(4).

In view of the foregoing, it is obvious that Congress has not prohibited the states from conducting lotteries, and has, in fact, exempted state-conducted lotteries from the criminal prohibitions referred to above. Moreover, federal legislation prohibiting various gambling activities is premised on whether such activities are illegal under the law of the State in which they occurred. See, e.g., 18 U.S.C. § 1953 (prohibiting interstate transportation of wagering paraphernalia); 18 U.S.C. § 1955 (prohibiting illegal gambling businesses); 18 U.S.C. § 1084 (prohibiting transmission of wagering information). Enactment of the Tri-State Lotto Compact would legalize operation of the lottery in each of the party states and therefore would not appear to conflict with any interest sought to be protected by the federal gambling laws. Since each state, through appropriate legislation, may authorize a state-run lottery without threatening the just supremacy of the Federal Government, it is difficult to see how the joint operation of a lottery by two or more states, in and of itself, interferes with that supremacy such that the Compact Clause becomes applicable.

Clearly, the mere fact that a Tri-State Lotto game will presumably result in larger prizes and additional revenue does not increase the "political power" of the states vis-a-vis the Federal Government. Similarly, the fact that the Compact in question would create an administrative arm, the Tri-State Lotto Commission, "is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy." United States Steep Corp. v. Multistate Tax Comm'n., 434 U.S. at 472.

It is, of course, true that the Tri-State Lotto Compact cannot broaden the exemptions for state-conducted lotteries which Congress has provided in 18 U.S.C. § 1307, for to do so would directly conflict with federal law. For example, the Compact may not, in the absence of Congressional approval, authorize a member state to transport or mail Tri-State Lotto

tickets to addresses in a state which is not a member of the Compact, since the exemption in 18 U.S.C. § 1307(b)(1) is limited to the transportation and mailing "to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law." (emphasis supplied). The Tri-State Lotto Compact, however, does not purport to authorize such conduct, nor does it in any other respect grant powers to the member states which Congress has sought to withhold, or which properly belong to the Federal Government.

In short, the Tri-State Lotto Compact authorizes Maine, New Hampshire and Vermont to sell tickets in each state to a new lottery game, the proceeds from which are to be pooled for the purpose of providing larger winnings and additional revenues. It is this Department's Opinion that the Compact described in L.D. 2203 would not enlarge the political power of the party states in relation to the Federal Government and therefore need not be approved by Congress pursuant to Article I, § 10, cl. 3 of the United States Constitution.

I hope this information is helpful to you, and please continue to call upon me if I can be of further assistance.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec
cc: Sen. Richard R. Charette
Rep. Harold R. Cox,
Chairmen, Joint Standing Committee
on Legal Affairs