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## Through the Wire Act

John T. Holden

Oklahoma State University - Main Campus, [john.holden@okstate.edu](mailto:john.holden@okstate.edu)

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# THROUGH THE WIRE ACT

John T. Holden\*

*Abstract:* Legalized sports gambling has become one of the hottest topics in state legislatures ever since the United States Supreme Court’s 2018 decision in *Murphy v. National Collegiate Athletic Ass’n*<sup>1</sup> allowed states to begin legalizing the activity. As states began to offer sports wagering, gambling became front and center in the news and the Trump administration’s Justice Department took the opportunity to rewrite a 2011 Office of Legal Counsel opinion, expanding the scope of the most prominent federal anti-gambling statute. The re-interpretation of the scope of the Wire Act reversed the Department of Justice’s position that the statute only applied to interstate sports wagering, and instead incorporated all forms of interstate wagering. The new interpretation is exceptional because it follows years of failed legislative attempts to re-write the statute. The executive branch used this interpretation to circumvent the legislature and expand the scope of the statute.

The nature of the Wire Act’s targeted activities is one of many questions surrounding a statute that was applied for decades with few questions. The rise of the internet has brought on many more questions regarding the scope of the Wire Act—questions that have become prescient in an era of expanded legal gambling. This Article analyzes the most significant questions regarding the application of the Wire Act and suggests that contrary to the Department of Justice’s 2018 opinion, the statute is intended to apply to a very small group of activities.

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\* John T. Holden is an Assistant Professor in the Department of Management at the Spears School of Business at Oklahoma State University. Holden received his Ph.D. from Florida State University, and his J.D. from Michigan State University. He filed two amicus curiae briefs during the case that resulted in the *Murphy v. National Collegiate Athletic Ass’n* decision. Holden can be reached at john.holden@okstate.edu.

1. 584 U.S. \_\_\_, 138 S. Ct. 1461, 1471 (2018).

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## INTRODUCTION

Following the end of World War II, American politicians prepared for a spike in crime.<sup>2</sup> There was a notable pattern of increased criminal incidents after major American conflicts like the Revolutionary War, the Civil War, and World War I.<sup>3</sup> But the post-World War II years were different. Despite a minor rise in murders during the 1950s, there was no national crime wave as one might anticipate.<sup>4</sup> However, while crime was not on the rise, gambling was.<sup>5</sup> A number of theories emerged as to why gambling spiked following the Second World War, ranging from people having more money than they did during the pre-war Great Depression years, to Nihilism centering around the Atomic age and the threat of nuclear war, which prompted people to live the best life they could before the Cold War turned hot.<sup>6</sup>

Despite being largely illegal, gambling was on the rise during the post-World War II years; one poll in 1950 found that more than 57% of

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2. DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET 46 (2005).

3. *Id.*

4. *Id.*

5. *Id.* at 46–47.

6. *Id.* at 47.

Americans had paid to participate in a game of chance.<sup>7</sup> Although reliable data on the value of the illegal gambling market during this time is uncertain, estimates from the early 1950s ranged from around \$1 billion to \$8 billion.<sup>8</sup> The numbers, even if hyperbolic as estimated, attracted the attention of Congress, which took a particular interest in the assumed association between organized crime and gambling.<sup>9</sup> This concern would prompt a near-decade-long process to enact legislation that specifically targeted organized crime's money-making operations, the most notable of which at the time was indeed gambling.<sup>10</sup> The federal Wire Act would be passed in 1961 and mark the first major statute to specifically target sports wagering on the federal level.<sup>11</sup>

The Wire Act was at the time of its passage the crowning achievement of Attorney General Robert F. Kennedy's war on organized crime; but for many years, the statute was largely unfamiliar to those outside of the criminal law field. Until the internet came to be in virtually every home in America, few bothered to consider the exact scope of the statute and whether it applied to gambling activities other than sports wagering.<sup>12</sup> In 2001, the Eastern District of Louisiana,<sup>13</sup> and subsequently the Fifth Circuit Court of Appeals, held that the Wire Act applied only to sports wagering and not to activities like online casino games.<sup>14</sup> Despite the Fifth Circuit's ruling, the scope of the Wire Act remained uncertain to some. Such was the case until Illinois and New York sought guidance from the Justice Department as to whether the online sale of lottery tickets would offend the statute.<sup>15</sup> In 2011, the Department of Justice concluded that the

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7. *Id.* (citing a poll conducted by George Gallup that showed a 12% rise in gambling over the previous five years).

8. *Id.* at 48. Estimating the size of the illegal gambling market remains an issue to this day, with some estimates putting the size of the illegal sports gambling at upwards of \$400 billion; but, in reality, this is unknown and virtually impossible to measure. See Jordan Weissmann, *Big Bucks or Bogus Betting Baloney?*, SLATE (Nov. 21, 2014, 2:19 PM), <https://slate.com/business/2014/11/adam-silver-says-theres-400-billion-per-year-of-illegal-sports-betting-in-the-u-s-alone-seriously.html> [<https://perma.cc/PAY6-RHKG>].

9. G. Robert Blakey, *Legal Regulation of Gambling Since 1950*, 474 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 13–14 (1984).

10. See Brett Smiley, *Mailbag Mythbusting: The Wire Act and Sports Betting, Explained*, SPORTS HANDLE (May 30, 2018), <https://sportshandle.com/mailbag-mythbusting-the-wire-act-and-sports-betting-explained> [<https://perma.cc/FH72-MA72>].

11. Transmission of Wagering Information Act, 18 U.S.C. § 1084 (1961).

12. See generally *In re Mastercard Int'l Inc.*, 132 F. Supp. 2d 468 (E.D. La. 2001).

13. *Id.* at 480–81.

14. *In re Mastercard Int'l Inc.*, 313 F.3d 257, 262–63 (5th Cir. 2002).

15. See VIRGINIA A. SEITZ, OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, WHETHER PROPOSALS BY ILLINOIS AND NEW YORK TO USE THE INTERNET AND OUT-OF-STATE TRANSACTION PROCESSORS TO SELL LOTTERY TICKETS TO IN-STATE ADULTS VIOLATE THE WIRE ACT (Sept. 20,

Wire Act only applied to sports betting, and this opinion on the law would remain the primary guidance on its scope for seven years.<sup>16</sup>

In 2018, the Justice Department, under the Trump administration, rescinded the previous guidance and issued a new interpretation of the Wire Act's scope.<sup>17</sup> The new interpretation determined that the statute applies to a variety of online gambling activities beyond sports wagering.<sup>18</sup> The new opinion followed several years of failed efforts, purportedly backed by casino magnate and Republican Party donor Sheldon Adelson, to legislatively override the Justice Department's 2011 opinion and pass a law banning all online gambling.<sup>19</sup> The new opinion was put on hold for ninety days by Deputy Attorney General Rod Rosenstein in order to allow companies to come into compliance;<sup>20</sup> but in the interim, the 2018 opinion was challenged by the New Hampshire Lottery, who asked for an injunction and declaratory relief, as states across the country looked for clear guidance.<sup>21</sup> The New Hampshire plaintiffs prevailed at the district court in a narrow decision tailored to the facts of the case and the plaintiffs' specific circumstances.<sup>22</sup>

Despite the New Hampshire District Court's ruling, many questions remain regarding the scope of the Wire Act. While the application of the statute to sports betting has never been in doubt, many questions arise as to exactly whose sports betting activities are implicated by the statute, as well as where exactly online betting can take place.<sup>23</sup> Following the

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2011) [hereinafter SEITZ MEMO], <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf> [<https://perma.cc/V37R-5S3T>].

16. See STEVEN A. ENGEL, OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, RECONSIDERING WHETHER THE WIRE ACT APPLIES TO NON-SPORTS GAMBLING 1 (Nov. 2, 2018) [hereinafter ENGEL MEMO], <https://www.justice.gov/olc/file/1121531/download> [<https://perma.cc/AK72-YUU3>].

17. *Id.*

18. *Id.*

19. Matthew Boyer, *Sheldon Adelson and His Astroturf Lobbyists Don't Want to Let You Gamble Online*, WASH. EXAMINER (Nov. 6, 2017, 6:27 PM), <https://www.washingtonexaminer.com/sheldon-adelson-and-his-astroturf-lobbyists-dont-want-to-let-you-gamble-online> [<https://perma.cc/LRD5-3T9B>].

20. Letter from Deputy Att'y Gen. to U.S. Attorneys, Assistant Att'ys Gen., & Dir., Fed. Bureau of Investigation (Jan. 15, 2019) [hereinafter DAG Wire Act Letter], <https://www.justice.gov/file/1124286/download> [<https://perma.cc/7C96-APJJ>].

21. See N.H. Lottery Comm'n v. Barr, 336 F. Supp. 3d 132, 136 (D.N.H. 2019); Eric Ramsey, *New Hampshire Lottery Sues DOJ Over Wire Act Opinion*, ONLINE POKER REP. (Feb. 15, 2019, 8:34 AM), <https://www.onlinepokerreport.com/35298/nh-lottery-doj-wire-act-lawsuit> [<https://perma.cc/J5P7-ML28>].

22. Barr, 336 F. Supp. 3d at 157 ("The parties nevertheless disagree as to whether a declaratory judgment should be limited to the parties or have universal effect. The plaintiffs maintain that declaratory relief 'necessarily extends beyond the [Commission] itself.' The Government contends that any declaratory relief must apply only to the parties to the case. I agree with the Government." (internal citations omitted)).

23. For instance, one common question is whether the intermediate routing of data that exceeds the

Supreme Court's decision in *Murphy v. National Collegiate Athletic Ass'n*,<sup>24</sup> which opened the doors for states to begin legalizing sports wagering after more than two decades of prohibition, the interest in legalizing sports betting has never been higher.<sup>25</sup> In the first year since the decision in *Murphy*, more than twenty states have introduced legislation to allow sports wagering within their borders; however, like an albatross around their necks, questions regarding just who is implicated and what activities are covered by the Wire Act are causing pause for states to legalize the most lucrative form of sports wagering, mobile wagering.<sup>26</sup>

This Article addresses many of the key questions surrounding the scope of the Wire Act and the intent of the statute's authors. It does so in five parts. Part I discusses the current status of the Wire Act and the history of efforts to overturn the 2011 Department of Justice opinion. Part II analyzes the legislative history of the Wire Act, and the many evolutions of the language in the act. Part III evaluates many of the most pressing questions surrounding the scope of the Wire Act including who is in the business of betting<sup>27</sup> and where the statute's safe harbor provision applies.<sup>28</sup> Part IV deliberates the potential application to sub-segments of the sports betting industry that have largely avoided Wire Act scrutiny, namely the daily fantasy sports industry and those entities that sell data, which facilitates the operation of sportsbooks. Finally, Part V discusses some minor amendments that could better position the Wire Act for a world with expanding legal sports gambling.

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jurisdiction of a state that allows mobile betting should trigger the Wire Act's reach by being interstate in nature. See Robert Fisher & Christopher Queenin, *High Wire Act: The DOJ Creates Uncertainty in the Budding Online Gambling Industry by Reversing Course on the Applicability of the Wire Act*, NIXON PEABODY (Feb. 3, 2019), <https://www.nixonpeabody.com/en/ideas/articles/2019/02/04/high-wire-act> [<https://perma.cc/Z9QM-FZDD>].

24. 584 U.S. \_\_\_, 138 S. Ct. 1461 (2018).

25. *Id.* at 1484–85. See also generally John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. L. REV. 329 (2019) (discussing the evolution of the regulation of sports betting).

26. See Steve Bittenbender, *Tennessee Legislators Punt Online Sports Betting Bill, Cite Wire Act Questions*, CASINO.ORG (Mar. 26, 2019), <https://www.casino.org/news/tennessee-legislators-punt-on-online-sports-betting-bill> [<https://perma.cc/CED8-AZAN>].

27. The Wire Act applies specifically to those “engaged in the business of betting or wagering.” 18 U.S.C. § 1084(a) (2018).

28. The Wire Act exempts “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 that sporting event or contest is legal into a State or foreign country in which such betting is legal.” *Id.* § 1084(b). However, it remains uncertain whether information that passes through a third state, where such information is illegal, violates the Wire Act.

## I. DEFINING THE SCOPE OF THE WIRE ACT

The federal government's increased attention on sports gambling can be traced to the 1950s, with the establishment of the Kefauver Committee, which was tasked with investigating and providing recommendations to combat the perceived growth of organized crime.<sup>29</sup> In order to combat organized crime, the federal government sought to target the money-making businesses of organized crime.<sup>30</sup> The Wire Act criminalized the transmission of wagering information across state lines by those in the business of betting.<sup>31</sup> The simplicity of the statute's text and the elements required for a Wire Act claim generated few challenges to the scope of the statute from the date of passage until the widespread availability of the internet, as most cases involved the placing of sports wagers via telephone.<sup>32</sup> The Wire Act states as follows:

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 not more than two years, or both.<sup>33</sup>

The Wire Act targets two separate types of activities: (1) the transmission of information or communications for placing bets; and (2) the transmission of information for payment related to gambling.<sup>34</sup> The specific application of the Wire Act to those in the business of betting, as opposed to casual gamblers, had indeed been one of the more complex questions regarding the Wire Act, until the internet era prompted novel questions to be raised.<sup>35</sup>

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29. See generally WILLIAM H. MOORE, *THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME 1950-1952* (1974); U.S. SENATE HISTORICAL OFFICE, *A History of Notable Senate Investigations: Special Committee on Organized Crime in Interstate Commerce*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/Kefauver.htm> [<https://perma.cc/6MFG-WFN4>].

30. See generally SCHWARTZ, *supra* note 2.

31. The Interstate Wire Act of 1961, 18 U.S.C. § 1084(a) (2018).

32. *Id.*

33. *Id.*

34. See *id.*

35. *United States v. Baborian*, 528 F. Supp. 324, 328 (D.R.I. 1981). However, the outer limits of the business of betting qualification of the Wire Act have not been clarified.

#### A. In re Mastercard

The modern questioning of the scope of the Wire Act likely originated around 1997, with the uncertainty as to whether websites that hosted online casinos implicated the Wire Act and the first hearings on internet gambling.<sup>36</sup> These modern issues about the scope of the Wire Act would initially culminate in the 2001 case, *In re Mastercard*.<sup>37</sup> In that case, the Eastern District Court of Louisiana was the first court to address the question of whether the Wire Act applied to activities other than sports betting.<sup>38</sup> The case was consolidated in Louisiana's Eastern District after Larry Thompson and Lawrence Bradley brought class actions against the major credit card networks, Visa and Mastercard, as well as several of their issuing banks, alleging that the companies were in violation of a variety of statutes, including the Racketeer Influenced and Corrupt Organizations (RICO) Act for facilitating payments to online casinos that allowed for illegal gambling.<sup>39</sup>

While these men were concerned citizens, they were also gamblers: Brady was charged more than \$7,000 for his "purchases" at online casinos, and Thompson was charged \$1,510 by Mastercard.<sup>40</sup> The plaintiffs accused Visa and Mastercard of actively directing American customers to participate in and aid and abet offshore "bookmaking activities in the United States where they are not legal."<sup>41</sup> The court addressed a variety of claims raised by the plaintiffs in the credit card companies' motion to dismiss, concluding that the plaintiffs had failed to state a claim upon which relief could be granted.<sup>42</sup>

Prior to dismissal, District Judge Duval addressed the Wire Act claims raised by the plaintiffs.<sup>43</sup> Visa and Mastercard argued that the plaintiffs' failure to allege that they wagered on sports was a "fatal defect" to their

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36. See, e.g., *The Internet Gambling Act of 1997: Hearing on S. 474 Before the Subcomm. on Tech., Terrorism, and Gov't Info. of the S. Comm. on the Judiciary*, 105th Cong. 2–3 (1997). The Senate held a hearing and proposed legislation in order to clarify the Wire Act, stating that the statute applies to all forms of wagering, not simply sports wagering, but also that the statute incorporates the internet within its scope, a question that was uncertain at the time. See *id.*

37. 132 F. Supp. 2d 468 (E.D. La. 2001).

38. See Elizabeth A. Walsh, *In re MasterCard International, Inc.: The Inapplicability of the Wire Act to Traditional Casino-Style Games*, 20 J. MARSHALL J. COMPUTER & INFO. L. 445, 447 (2002).

39. *In re Mastercard Int'l Inc.*, 132 F. Supp. 2d at 473–74.

40. *Id.* at 474 (noting that the plaintiffs' complaints state that they were charged as though the casino transactions were purchases as opposed to cash advances).

41. *Id.* at 475.

42. *Id.* at 497.

43. *Id.* at 479.



Wire Act claims.<sup>44</sup> The district court held that “a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. Both the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a ‘sporting event or contest.’”<sup>45</sup> Providing more support for the court’s plain reading, the plaintiffs had apparently relied on the first clause of the statute, which directly included the sporting events or contests language.<sup>46</sup> Judge Duval cited the then-ongoing efforts by Congress to amend the Wire Act to incorporate non-sports-gambling activities within the scope of the statute, as well as the legislative history of the statute. In jettisoning the Wire Act claims, the district court stated that the “[p]laintiffs’ argument flies in the face of the clear wording of the Wire Act and is more appropriately directed to the legislative branch than th[e] Court.”<sup>47</sup> The plaintiffs, however, were not inclined to support the new legislation and instead appealed the dismissal of their claims to the Fifth Circuit Court of Appeals.<sup>48</sup>

On appeal, the Fifth Circuit was unanimous in upholding the lower court’s dismissal of all of the plaintiffs’ claims.<sup>49</sup> In addressing the plaintiffs’ claims using the Wire Act as a predicate offense to find a violation of the RICO Act, the Fifth Circuit panel said: “[w]e agree with the district court’s statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion.”<sup>50</sup> The Fifth Circuit opinion in the *In re Mastercard* case remained the primary judicial guidance on the application of the Wire Act in the internet-era,<sup>51</sup> however, questions remained about which clauses of the Act applied only to sporting events, especially as states began to explore the prospect of online lottery sales.<sup>52</sup>

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44. *Id.* at 480.

45. *Id.* at 480.

46. *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1279–80 (D. Utah 2007) (noting that the *In re Mastercard* Court’s analysis was not actually necessary to its determination of the defendants’ motions as the defendants did appear to engage in some conduct that would still implicate the Wire Act).

47. *In re Mastercard Int’l Inc.*, 132 F. Supp. 2d at 481. Indeed, Judge Duval’s statement is perhaps more pertinent now than in 2001 given the recent efforts by the executive branch to re-write the scope of the statute via an Office of Legal Counsel memo. *See infra* section I.E.

48. *In re Mastercard Int’l Inc.*, 313 F.3d 257 (5th Cir. 2002).

49. *Id.* at 264.

50. *Id.* at 262–64.

51. *Id.* at 264. A prior case had concluded that information associated with sports wagers was a required element for a Wire Act claim, though prior to widely available internet access. *See United States v. Marder*, 474 F.2d 1192, 1194 (5th Cir. 1973).

52. *See generally* SEITZ MEMO, *supra* note 15.

*B. The 2011 Office of Legal Counsel Memorandum*

In a memorandum dated September 20, 2011, the Office of Legal Counsel, an office of the Department of Justice that opines on legal questions, issued an opinion on the scope of the Wire Act and its potential application to the use of the internet to sell lottery tickets to in-state adults using out-of-state transaction processors.<sup>53</sup> The author of the memorandum, Assistant Attorney General Virginia Seitz, begins by noting that it is the Office of Legal Counsel's conclusion that "interstate transmissions of wire communications that do not relate to a 'sporting event or contest,' fall outside of the reach of the Wire Act."<sup>54</sup> The impetus for the opinion was that Illinois and New York desired to sell lottery tickets online, but concerns arose over the interstate routing of transaction data.<sup>55</sup> While the states concluded that the action would not offend the Wire Act, the Department of Justice's Criminal Division referred the matter to the Office of Legal Counsel for an opinion on the matter.<sup>56</sup> Secondary concerns were also raised as to whether the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA)<sup>57</sup> may permit criminal conduct that the Wire Act prohibits.<sup>58</sup>

The Seitz memorandum notes that while there is "sparse case law" addressing the Wire Act's scope, with cases construing the statute both narrowly and broadly, the statute should only be applied to the "transmission of communications related to bets or wagers on sporting events or contests."<sup>59</sup> The Seitz memorandum divides the Wire Act into two broad clauses. The first clause prohibits:

[A]nyone engaged in the business of betting or wagering from knowingly using 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.'<sup>60</sup>

The second clause prohibits a person from knowingly utilizing a wire facility to transmit information that "entitle[s] the recipient to 'receive money or credit' either 'as a result of bets or wagers' or 'for information

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53. *Id.*

54. *Id.* at 1 (internal citations omitted).

55. *Id.* at 1–2.

56. *Id.* at 3.

57. 31 U.S.C. §§ 5361–5367 (2018).

58. *Id.* at 2–3.

59. *Id.* at 3–4.

60. *Id.* at 4.

assisting in the placing of bets or wagers.”<sup>61</sup> The question for the Office of Legal Counsel to resolve was whether the “sporting event or contest” requirement applied only to the second part of the first clause or if the requirement ran through the entirety of the two clauses.<sup>62</sup>

The Seitz memorandum concluded that the most plausible reading of the statute was that the “sporting event or contest” language modified the transmission language.<sup>63</sup> A broader reading of the scope of the prohibition would raise serious questions as to why Congress included the “sporting event or contest” language if it intended to prohibit all bets or wagers otherwise within the scope of the statute’s language.<sup>64</sup> Similarly, it was a logical interpretation that Congress would desire the two clauses to have a “parallel” scope and for both to be restricted to betting or wagering associated with “sports event[s] or contest[s].”<sup>65</sup>

The Office of Legal Counsel memorandum then examines the Wire Act’s legislative history, seeking to determine the intentions of Congress fifty years prior.<sup>66</sup> The Office of Legal Counsel memorandum highlighted the comma placement in an earlier version of the bill.<sup>67</sup> The comma placement made clear that the sporting event phrase modified both the “bets or wagers” phrase and the “information assisting in the placing of bets or wagers.”<sup>68</sup> The commas were removed when the class of individuals targeted by the statute changed to those involved in gambling businesses.<sup>69</sup> However, nothing in the subsequent legislative history suggested an intent to redefine the rest of the scope of the statute.<sup>70</sup>

While the phrase “sporting event or contest” is not present in the Wire Act’s second clause, the memorandum concludes that the reliance on “bets or wagers” is a shorthand reference to the entire phrase in clause one, which includes the “sporting event or contest” language.<sup>71</sup> The conclusion that the Office of Legal Counsel reached was that it was “Congress’s overriding goal in the Act to stop the use of wire communications for sports gambling in particular.”<sup>72</sup> As further evidence

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61. *Id.*

62. *Id.* at 5.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 6.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 7.

72. *Id.* at 8.

that Congress specifically included sports betting within the Wire Act to the exclusion of other gambling activities, the memorandum cites the Wagering Paraphernalia Act, enacted the same year as the Wire Act, which enumerates a number of gambling activities covered and distinguishes these activities from the conduct in the Wire Act.<sup>73</sup> Despite the 2011 memorandum, the limitation of the Wire Act to “sporting events or contests” would be questioned a short time later in 2015, as members of Congress would first seek to legislate on the scope of the Wire Act.<sup>74</sup>

### C. *Restoration of America’s Wire Act*

The period after the 2011 Wire Act opinion left some members of Congress feeling that the Wire Act had been misinterpreted by a “misguided,” partisan Justice Department.<sup>75</sup> Despite allegations that the 2011 memorandum was partisan, both political parties supported a legislative dismantling of the opinion, with Republican Lindsey Graham and Democrat Dianne Feinstein championing the bill, Restoration of America’s Wire Act (RAWA).<sup>76</sup> Congress aimed to modernize the Wire Act’s scope to ban not only sports wagering but virtually all forms of online gambling.<sup>77</sup> The purported driving force behind RAWA was not the Senators who introduced the bill, but Las Vegas Sands Corporation and casino magnate Sheldon Adelson, who has long opposed online gambling as a threat to his casino business.<sup>78</sup> Several early efforts were made to introduce RAWA legislation, with each failing to reach major milestones in the congressional process.<sup>79</sup>

### D. *Murphy v. National Collegiate Athletic Ass’n*

As Congress questioned new Justice Department appointees about whether the Wire Act opinion should be revisited, New Jersey was challenging the constitutionality of a partial ban on states’ ability to

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73. *Id.* at 11.

74. See Restoration of America’s Wire Act, H.R. 707, 114th Cong. (2015).

75. See Press Release, Senate Comm. on the Judiciary, Graham Statement on Justice Department’s Restoration of Wire Act (Jan. 16, 2019), <https://www.judiciary.senate.gov/press/rep/releases/graham-statement-on-justice-departments-restoration-of-wire-act> [<https://perma.cc/G5KZ-Z3YG>] (blaming the Wire Act opinion on the Obama Administration’s Justice Department).

76. See *id.*; Restoration of America’s Wire Act, H.R. 707, 114th Cong. (2015).

77. See Chris Grove, *The Restoration of America’s Wire Act—Inside the Proposed Ban on Regulated Online Gaming*, ONLINE POKER REP. (Apr. 20, 2017), <https://www.onlinepokerreport.com/11725/graham-chaffetz-introduce-anti-online-gambling-bill> [<https://perma.cc/67F6-SS9G>].

78. See *id.* (reporting that early drafts of RAWA, originally titled the Internet Gambling Control Act, identified it as originating from Adelson lobbyists).

79. *Id.*

authorize sports wagering.<sup>80</sup> The *Murphy* case challenged Congress's ability to stop state legislators from both passing new legislation and repealing existing legislation.<sup>81</sup> In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA).<sup>82</sup> Whereas the Wire Act relied on the Commerce Clause to prohibit gambling that crosses state lines,<sup>83</sup> the PASPA filled the gap that the Wire Act left unregulated—it directly banned states from authorizing new sports wagering schemes even if the transactions remained entirely within state lines.<sup>84</sup> New Jersey initially challenged the law by attempting to pass a law authorizing sports wagering, but was rebuffed by the Third Circuit.<sup>85</sup> The state then attempted to partially repeal its laws banning sports gambling, which led to the Supreme Court granting review.<sup>86</sup>

The Supreme Court found that by restricting the state's ability to repeal laws that it had previously passed, Congress violated the anti-commandeering principle and intruded into New Jersey's sovereign jurisdiction.<sup>87</sup> While Justice Alito held that Congress had the power to ban sports wagering in totum, he said it could not dictate that state legislators do so on behalf of Congress.<sup>88</sup> The finding that PASPA was unconstitutional opened the door for states across the country to begin passing laws legalizing sports wagering, and to begin competing with Nevada—a state that had held a virtual monopoly on legal sportsbook style betting since 1992.<sup>89</sup> Even prior to the Supreme Court's decision, states began preparing for a future date that would allow them to offer

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80. See John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3370584](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3370584) [<https://perma.cc/ZVV2-DGNT>].

More specifically, New Jersey argued that the PASPA unconstitutionally commandeered the state legislature to maintain a ban on sports wagering that the state no longer desired. The State argued that this requirement imposed by the PASPA was not a valid preemption exercise by the federal government and was incompatible with the Supreme Court's decisions in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). See Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488, 499–506 (D. N.J. 2014).

81. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. \_\_\_, 138 S. Ct. 1461, 1471 (2018).

82. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (1992).

83. The PASPA was also passed as Commerce Clause legislation, as it was suggested that intrastate gambling had an impact on interstate commerce. See Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 13–14 (1992).

84. See generally Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1 (2017) (discussing the potential equal sovereignty problems with sports betting regulations).

85. *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 214–15 (3d Cir. 2013).

86. *Murphy*, 138 S. Ct. at 1471–73.

87. *Id.* at 1481–82.

88. *Id.*

89. See Holden, *supra* note 80, at 7–9.

sports wagering, either as a result of a Supreme Court decision or congressional repeal.<sup>90</sup> The *Murphy* decision, however, has catalyzed the movement of states seeking to legalize sports wagering, with more than thirty introducing legislation since the beginning of 2018;<sup>91</sup> and accompanying many of these bills has been the desire to include mobile betting. The rise in sports betting legislation and general discussion of increasing access to gambling generally was met with a new memorandum from the Office of Legal Counsel, reversing the 2011 opinion.<sup>92</sup>

*E. The 2018 Office of Legal Counsel Memorandum*

Years after RAWA was first introduced, the Wire Act was ascribed new meaning.<sup>93</sup> In November 2018, the Justice Department issued its latest memorandum on the subject, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*.<sup>94</sup> The memorandum, authored by the Office of Legal Counsel's Assistant Attorney General Steven A. Engel, enabled the executive branch to accomplish what the legislative branch had failed to do.<sup>95</sup> The twenty-three-page memorandum explains that the Criminal Division of the Department of Justice asked for the Office of Legal Counsel to reconsider the 2011 opinion, as it purportedly represented a departure from the Department's previous prosecutorial policy.<sup>96</sup> The memorandum concluded that all but one of the Wire Act's prohibitions bars conduct beyond sports wagering.<sup>97</sup>

The 2018 memorandum concluded that the 2011 opinion erred in reading the "sporting event or contest" to run through both clauses in their entirety, which was a departure from the prosecutorial approach that was

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90. *Id.*

91. Dustin Gouker, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker> [<https://perma.cc/VE9N-DGBZ>] (last updated Jan. 11, 2020).

92. ENGEL MEMO, *supra* note 16; Dustin Gouker, *Department of Justice Reverses Wire Act Opinion that Said Law is Limited to Sports Betting*, ONLINE POKER REP. (Jan. 21, 2019, 3:31 PM), <https://www.onlinepokerreport.com/34391/doj-new-wire-act-opinion> [<https://perma.cc/3X22-8NTX>].

93. Tom Hamburger, Matt Zaposky & Josh Dawsey, *Justice Department Issues New Opinion that Could Further Restrict Online Gambling*, WASH. POST (Jan. 14, 2019, 7:47 PM), [https://www.washingtonpost.com/politics/justice-department-issues-new-opinion-that-could-further-restrict-online-gambling/2019/01/14/a501e2da-1857-11e9-8813-cb9dec761e73\\_story.html?utm\\_term=.1118271998cc](https://www.washingtonpost.com/politics/justice-department-issues-new-opinion-that-could-further-restrict-online-gambling/2019/01/14/a501e2da-1857-11e9-8813-cb9dec761e73_story.html?utm_term=.1118271998cc) [<https://perma.cc/JV9R-UH2X>].

94. ENGEL MEMO, *supra* note 16.

95. *Id.* at 1–2.

96. *Id.*

97. *Id.* at 2.

taken prior to the 2011 opinion.<sup>98</sup> Successful prosecutions for activities beyond sports gambling were cited as a basis for asserting a broad scope of the Wire Act in the 2018 memorandum, in addition to a challenge to the 2011 opinion regarding the ambiguity of the statute.<sup>99</sup> The second memorandum relied on “[t]raditional canons of statutory construction” to determine the following: “[i]n construing the reach of modifiers like ‘on any sporting event or contest,’ the default rule is that ‘a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.’”<sup>100</sup> The grammatical structure and placement of the commas led the 2018 memorandum to conclude that the first clause prohibits sports wagering via its second prohibition, but its first prohibition is not so limited and incorporates additional activities.<sup>101</sup>

The Wire Act’s second clause, which lacks a reference to sports gambling, was thus reinterpreted in 2018 to apply to a variety of forms of gambling. There was no necessity to interpret the “sporting event or contest,” modifier as running parallel through both clauses.<sup>102</sup> Relying again on *Lockhart*, the 2018 memorandum concluded in regards to the second clause that it would be structurally inappropriate to extend the “sporting event or contest” language at the end of the first clause forward through the entirety of the first clause and down through the entirety of the second clause where the language does not appear.<sup>103</sup> The memorandum opined on the scope of the prohibition by stating the following: “[i]n sum, the linguistic maneuvers that are necessary to conclude that the sports-gambling modifier sweeps both backwards and forwards to reach all four of section 1084(a)’s prohibitions are too much for the statutory text to bear.”<sup>104</sup>

In justifying an application of the “statute as written,” the memorandum concluded that the application of “sporting event or contest” lacked the “patent absurdity” necessary to conduct an investigation beyond the text.<sup>105</sup> The 2018 memorandum concluded it was improbable that Congress would have not wanted to include bets and wagers in non-sporting events as well.<sup>106</sup> The 2018 memorandum dismisses the Seitz memorandum’s analysis that when Congress revised the statute, it

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98. *Id.* at 11.

99. *Id.* at 4–7.

100. *Id.* at 7 (citing *Lockhart v. United States*, 577 U.S. \_\_\_, 136 S. Ct. 958, 962 (2016)).

101. *Id.* at 10–11.

102. *Id.* at 11.

103. *Id.*

104. *Id.* at 13–14.

105. *Id.* at 14.

106. *Id.* at 10–11.

intended only to modify the language regarding which enterprises were incorporated, and not the wholesale expansion of the statute.<sup>107</sup> In addition to its new conclusions regarding the scope of the Wire Act, the Office of Legal Counsel also opined on the interaction between the Wire Act and the UIGEA, an issue that the Seitz memorandum determined was mooted by the opinion on the Wire Act's scope.<sup>108</sup> The memorandum determined that the UIGEA is not impacted by the Wire Act, and vice versa.<sup>109</sup> This new Wire Act interpretation was met with surprise and exasperation in many parts of the country that had relied on the 2011 opinion to offer various forms of online gambling that in one respect or another relied on interstate transmissions. As a result, the Justice Department implemented a ninety-day compliance period.<sup>110</sup>

#### F. *The New Hampshire Case*

The New Hampshire Lottery Commission quickly filed suit, challenging the new Department of Justice conclusion that the Wire Act applies more broadly than to sports gambling alone.<sup>111</sup> The new interpretation sparked concerns from lotteries who offered online sales, as well as gaming companies who offered intrastate betting, and relied on the UIGEA's determination regarding interstate intermediate routing to offer online gaming, as such activities may implicate the new scope of the Wire Act.<sup>112</sup> Joining the lawsuit was NeoPollard Interactive, a lottery provider that hired the same legal team that had prevailed in May 2018 at the Supreme Court in the *Murphy* case.<sup>113</sup>

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107. *Id.* at 16.

108. *Id.* at 17–18.

109. *Id.* at 18.

110. See DAG Wire Act Letter, *supra* note 20.

111. See N.H. Lottery Comm'n v. Barr, 336 F. Supp. 3d 132 (D.N.H. 2019); Ramsey, *supra* note 21.

112. Ramsey, *supra* note 21; Christine Swanick, *DOJ Opinion Leaves Industry Hanging: If UIGEA Exclusions Don't Modify the Wire Act What Does that Mean for Intrastate Gambling Transactions?*, L. LEVEL (Jan. 18, 2019), <https://www.lawofthelevel.com/2019/01/articles/gambling/uigea-exclusions-dont-modify-wire-act/> [<https://perma.cc/D84Z-EEQE>].

113. C. Ryan Barber, *Gibson Dunn Team Sues Justice Department Over Reversal on Online Gaming*, LAW.COM (Feb. 16, 2019, 11:21 AM), <https://www.law.com/nationallawjournal/2019/02/16/gibson-dunn-team-sues-justice-department-over-reversal-on-online-gambling> [<https://perma.cc/5MBY-KRRD>]; Michael Casey, *Judge Gives Justice Department a Deadline in N.H. Lottery Case*, CONCORD MONITOR (Apr. 12, 2019, 5:40 PM), <https://www.concordmonitor.com/Judge-gives-Justice-Department-a-deadline-in-lottery-case-24816229> [<https://perma.cc/Y79E-CX6H>]. In perhaps a soothsaying moment, Judge Barbadoro noted that regardless of the outcome of the district court case, the scope of the Wire Act appeared destined for the Supreme Court. See John Brennan, *New Hampshire Judge: The Wire Act Covers Only Sports Betting*, US BETS (June 4, 2019), <https://www.usbets.com/new-hampshire-wire-act-sports-betting-ruling> [<https://perma.cc/K46K-QV8Z>].



On June 3, 2019, Judge Barbadoro ruled that section 1084(a) of the Wire Act “applies only to transmissions related to bets or wagers on a sporting event or contest. The 2018 [Office of Legal Counsel] Opinion is set aside.”<sup>114</sup> The first challenge the plaintiffs faced was establishing that they had standing, as there had not been any actual enforcement actions taken against non-sports gambling operators under the new opinion, let alone the plaintiffs. Judge Barbadoro found that the threat faced by the plaintiffs was concrete and particularized enough that they had standing.<sup>115</sup> Judge Barbadoro further held that the 2018 memorandum was sufficiently final to merit judicial review under the Administrative Procedure Act and that the 2018 memorandum read ambiguity into the Wire Act that was not present in order to justify the most recent interpretation.<sup>116</sup>

The decision from the New Hampshire District Court appeared to be conclusive, but Judge Barbadoro was very careful to note that the decision was limited to the plaintiffs and was not a sweeping nationwide injunction.<sup>117</sup> The decision has left the door open, not only for an appeal by the Department of Justice, but also for other states to challenge the New Hampshire District Court’s decision in other federal district courts. The decision, which put the plaintiffs under the auspices of the 2011 memorandum, remains a very limited ruling in terms of its practical implications. One of the questions that remains is: what exactly was the Wire Act intended to cover? In Part II, this Article examines the legislative history of the Wire Act.

## II. THE WIRE ACT’S LEGISLATIVE HISTORY

The Wire Act’s history has been the subject of much debate in recent years.<sup>118</sup> But, prior to 2011, the Wire Act existed for almost fifty years with little controversy. The statute was used largely to target interstate

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114. *Barr*, 336 F. Supp. 3d at 160.

115. *Id.* at 142–44 (“After operating for years in reliance on OLC guidance that their conduct was not subject to the Wire Act, the plaintiffs have had to confront a sudden about-face by the Department of Justice. Even worse, they face a directive from the Deputy Attorney General to his prosecutors that they should begin enforcing the OLC’s new interpretation of the Act after the expiration of a specified grace period. Given these unusual circumstances, the plaintiffs have met their burden to establish their standing to sue.”).

116. *Id.* at 145–52.

117. *Id.* at 157–59. Judge Barbadoro justified the limited scope of the injunction by stating “[d]eclaratory judgments do not bind non-parties. The Act allows me to ‘declare the rights and other legal relations of any interested party seeking such declaration.’ It thus limits me to declaring the rights and legal relations of the plaintiffs seeking the declaration.” *Id.* at 157 (internal citations omitted).

118. See e.g., James Trusty & Andrew Silver, *DOJ High-Wire Act*, IFRAH L. (Apr. 29, 2019), <https://www.ifrahlaw.com/ifrah-on-igaming/doj-high-wire-act/> [https://perma.cc/XYZ9-8S44].

bookmaking operations with little fanfare for much of that period.<sup>119</sup> Two events brought the Wire Act's scope into question: first, the arrival of the internet; and second, the wide-spread expansion of state-sponsored gambling—two things that the authors of the Wire Act likely never even contemplated.

The Wire Act originated out of the Kefauver Committee, led by Tennessee Senator Estes Kefauver.<sup>120</sup> The Kefauver Committee spent the early part of the 1950s travelling the United States and holding hearings in fourteen cities over two years to determine the scope of organized crime's grasp.<sup>121</sup> The Kefauver Committee returned a series of recommendations for new legislation, none of which were immediately adopted.<sup>122</sup> It was not until 1961 that Congress would act on one of Kefauver's recommendations by passing the Wire Act.<sup>123</sup> The Kefauver Committee prompted more than a decade of hearings aimed at targeting organized crime's money-making businesses.<sup>124</sup>

The period between the 1940s and the 1960s in America saw a shift in community perceptions of crime.<sup>125</sup> Chief among this societal change was the perception of gambling, as it transitioned from being viewed as a local matter to a national matter.<sup>126</sup> During this period, there were early attempts by law enforcement agencies to establish estimates of the size of the illegal gambling market.<sup>127</sup> Government officials noted that the illegal gambling market was run by two syndicates: one controlling the slot machine and related activities market; and the other controlling the race wire.<sup>128</sup>

The race wire, or "racing wire," was a high-speed service that disseminated information on gambling contests to "racing rooms" and individual bookmakers across the country.<sup>129</sup> The speed of the wire

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119. See, e.g., John Holden, *What We Can Learn from Ted Olson's History With The Wire Act*, LEGAL SPORTS REP. (June 19, 2019), [https://www.legalsportsreport.com/32826/holden-wire-act-ted-olson/\[https://perma.cc/U8XK-LCC7\]](https://www.legalsportsreport.com/32826/holden-wire-act-ted-olson/[https://perma.cc/U8XK-LCC7]) (discussing the application of the statute against offshore bookmakers targeting U.S.-based consumers).

120. See SCHWARTZ, *supra* note 2, at 71.

121. See *id.*

122. *Id.* at 72–73.

123. *Id.* at 78–79, 105.

124. See John Holden, *Legislative Sausage Making: How We Got The Wire Act, Part Two*, LEGAL SPORTS REP. (Sept. 11, 2018, 12:17 PM), <https://www.legalsportsreport.com/22329/making-the-wire-act-sports-betting-part-two> [https://perma.cc/A8A5-JQLA].

125. SCHWARTZ, *supra* note 2, at 45.

126. *Id.* at 45.

127. *Id.* at 48.

128. *Id.*

129. See Note, *Racing Wire Service*, 5 STAN. L. REV. 493, 493–95 (1953).

service was the factor that enabled subscribing bookmakers to be profitable.<sup>130</sup> A bookmaker who did not subscribe to the wire service might lose out to a customer who had access to live data regarding race winners.<sup>131</sup> Missouri Attorney General J.E. Taylor said that the racing wire was a relatively unknown service outside of those familiar with gambling.<sup>132</sup> Despite the relative obscurity of the racing wire, several states began to take steps to regulate race wires during the 1940s, and Congress held hearings over eleven days in April and May of 1950.<sup>133</sup> On April 4, 1950, Senator Johnson of Colorado told his Senate colleagues, “[g]ambling information ought to be restricted but there is a border line between gambling information and legitimate news.”<sup>134</sup> The concern with the overlap between gambling information and reporting information was something that would permeate the congressional hearings that would precede the passage of the Wire Act.

#### A. *Transmission of Wagering Information—1950*

The initial 1950 hearing on the Transmission of Wagering Information revealed several key themes. First, there were concerns regarding boundaries of state and federal jurisdiction, and to what extent gambling was a local issue versus a national issue. The second theme that emerged centered on the emphasis on horse racing that Congress sought to examine, but it appeared that betting on team sports was a much greater market. Third, providers of wire services expressed concern that the proposed bill, as written, might require the services to monitor the actions of their customers, even when the providers were merely making information available.

The first Senate hearing regarding criminalizing the transmission of wagering information heard testimony, or received correspondence, from more than sixty witnesses.<sup>135</sup> Those who testified can be categorized into four groups: state and local officials, federal officials, media and wire service operators, and bookmakers.<sup>136</sup> The testimony at the hearing revealed that the wire services were of far greater importance to

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130. *Id.* at 495.

131. *Id.*

132. See J.E. Taylor, *The Transmission of Racing Information by Wire in Missouri*, 17 MO. L. REV. 16, 16 (1952).

133. See *Transmission of Gambling Information: Hearing on S. 3358 Before a Subcomm. of the S. Comm. on Interstate and Foreign Commerce*, 81st Cong. (1950); Note, *Racing Wire Service*, *supra* note 129, at 498.

134. 96 CONG. REC. 4639 (1950) (statement of Sen. Johnson).

135. *Transmission of Gambling Information*, *supra* note 133, at III–IV.

136. *Id.*

bookmakers than horse racing alone. The *New York Times* makes reference to the testimony of Wayne Coy, chairman of the Federal Communications Commission (FCC), noting that Mr. Coy was concerned about the burden of having enforcement placed on the FCC as opposed to a federal law enforcement agency.<sup>137</sup> The article also noted that Senator Capehart remained unconvinced that local officials required federal assistance to curb gambling.<sup>138</sup> Perhaps in the interest of presenting both sides of the argument, the article quoted alleged underworld figure Frank Costello, who denied involvement with bookmaking but noted that he considered bookmakers “no more detrimental to society than a stock broker, and that liquor was probably more harmful to more people than gambling.”<sup>139</sup>

The first hearings that took place regarding the transmission of gambling information began on April 17, 1950, before the Senate Subcommittee of the Committee on Interstate and Foreign Commerce.<sup>140</sup> The committee heard testimony from more than sixty witnesses, received written statements from eight organizations, and received letters from half of the country’s state attorneys general.<sup>141</sup> The impetus for the congressional hearing was the Attorney General’s conference, which took place in February of 1950.<sup>142</sup> The conference culminated in a resolution stating: “[b]e it resolved, That this conference go on record as favoring Federal legislation making Interstate use of telephone, telegraph, or radio facilities for dissemination of horse race results for illegal gambling purposes a Federal crime.”<sup>143</sup> Following the resolution, the conference attendees made clear that their recommendation excluded the common dissemination of sports information through press associations and newspapers.<sup>144</sup>

The state attorneys general present at the 1950 conference further noted that “organized gambling” on baseball, football, and basketball games made prominent use of interstate communication facilities for carrying on its transactions.<sup>145</sup> U.S. Attorney General J. Howard McGrath opened the

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137. Harold B. Hinton, *Coy Urges Ban on Transmission of Racing Data, Even for Papers*, N.Y. TIMES, Apr. 25, 1950, at 1.

138. *Id.*

139. Harold B. Hinton, *No Laws Can Halt Gambling, Costello Tells Senate Body: Says He is Not Qualified to Testify on Gambling*, N.Y. TIMES, Apr. 28, 1950, at 1.

140. *See generally* *Transmission of Gambling Information*, *supra* note 133.

141. *See id.* at III, IV.

142. *Id.* at 3.

143. *Id.*

144. *Id.*

145. *Id.*

hearing before the subcommittee by stating that gambling “cannot operate on its present gigantic scale without corrupting what it touches.”<sup>146</sup> In emphasizing the importance of having a clear federal policy for restricting the transmission of wagering information, McGrath further acknowledged that the regulation of gambling had traditionally been left to the state.<sup>147</sup>

The attorney general for Nevada, Alan H. Bible, observed that gambling enterprises are primarily local in nature, and differences in state law may obscure the ability to regulate gambling on a national level.<sup>148</sup> As a result, Bible advocated that federal gambling law should serve an ancillary role to assist states in enforcing their own laws.<sup>149</sup> The Nevada attorney general further argued that any federal regulation prohibiting transmission of wagering information in interstate commerce should exempt states that permit the practice.<sup>150</sup>

John P. McGrath, spokesman for the National Institute of Municipal Law Offices (NIMLO), cited the findings of a California public utilities commission hearing that determined that the citizens of the state do not have an inherent right to utility services, including the telephone, and that these services therefore may be withheld on the basis that they are being used in conjunction with illegal activity.<sup>151</sup> A discussion between Mayor Newton of Denver and Senator Capehart revealed the challenge in negotiating the competing interests of state and local governments and the federal government.<sup>152</sup> Senator Capehart proposed a hypothetical ban on parimutuel wagering in the states as a means to curb illegal wagering and inquired if Newton would be in favor of a ban, and Mayor Newton responded that he would not support such a ban.<sup>153</sup> Instead, Newton was determined that the federal government should be primarily concerned with drafting and passing legislation that would break up interstate organized crime syndicates.<sup>154</sup>

The testimony of Herzel Plaine of the Solicitor General’s Office within the Department of Justice estimated that there may have been as many as 150,000 bookmakers operating in the country during World War II.<sup>155</sup>

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146. *Id.* at 11 (testimony of J. Howard McGrath).

147. *Id.* at 12.

148. *Id.* at 15 (testimony of Alan H. Bible).

149. *Id.*

150. *Id.*

151. *Id.* at 19 (testimony of John P. McGrath).

152. *Id.* at 69–70.

153. *Id.* at 70.

154. *Id.*

155. *Id.* at 77 (testimony of Herzel Plaine).

When asked whether he believed that there was an organized nationwide syndicate of 150,000 bookmakers, Assistant Attorney General James M. McInerney said that there is “no evidence which indicates that there is such an organized criminal syndicate.”<sup>156</sup> McInerney further noted that, in his estimation, federal crime appeared to be decreasing and there was little support for the contention that there was a nationwide increase in organized criminal activity.<sup>157</sup> McInerney also elucidated that state and local governments have failed to eradicate bookmakers for two principal reasons: first, state police forces lack the manpower, and second, bookmaking has a reputation as a victimless crime.<sup>158</sup>

Arizona Senator McFarland, in questioning Assistant Attorney General McInerney, inquired as to whether Congress should also prohibit dissemination of gambling information via the mail.<sup>159</sup> McInerney responded that banning dissemination of gambling materials through the mail would be a further hindrance to bookmakers, but it may be more prudent to simply ban the dissemination of gambling materials in interstate commerce.<sup>160</sup> McInerney further detailed that the race wire operators collect their information for dissemination by placing agents at racetracks who then transmit the real-time information back to the wire service for dissemination, either with authorization of the tracks or in secret without authorization.<sup>161</sup>

Mayor Thomas D’Alesandro of Baltimore, when asked whether horse racing should be banned because it provides an environment that promotes gambling, responded that it should not because the prospect of presenting a similar argument for sports such as baseball or basketball would not garner support.<sup>162</sup> Mayor D’Alesandro further noted to Wyoming Senator Lester Hunt that the proposed bill would likely not encapsulate betting on baseball or other sports; instead, it would only apply to horse racing.<sup>163</sup> While supporting the proposed legislation, Mayor D’Alesandro noted that he had not seen evidence of a nationwide crime syndicate operating within the city of Baltimore.<sup>164</sup>

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156. *Id.* at 77–78 (testimony of James M. McInerney).

157. *Id.*

158. *See id.* at 81.

159. *Id.* at 87.

160. *Id.*

161. *Id.* at 88.

162. *Id.* at 113 (testimony of Thomas D’Alesandro, Jr.).

163. *Id.* at 115.

164. *Id.* at 116–17.

Nathaniel Goldstick, counsel for the city of Detroit, testified that the city had managed to eliminate traditional cigar store front bookmakers, but that these had been replaced by “vest-pocket handbook operators,” who are essentially a mobile form of bookmakers.<sup>165</sup> Goldstick testified that it was his belief that a federal law criminalizing the transmission of wagering information could eliminate the business model used by bookmakers.<sup>166</sup> In a discussion between Goldstick and Senator Capehart of Indiana, a further challenge to implementation of the proposed bill was identified when it was noted that the federal government would be unlikely to provide investigative services to local or state law enforcement.<sup>167</sup>

The 1950 hearing that surrounded the first iteration of legislation that would eventually become the 1961 Wire Act was focused on the theme of separation of powers between state and federal governments. While state and municipal authorities welcomed federal assistance, they also stressed that these bookmakers, in their estimation, were primarily local operations. The inquiry as to whether there was a national gambling syndicate was countered by representatives of various federal and state agencies and governments that appeared to have little information that would support such a finding, in stark contravention to the impetus for convening the initial hearing.<sup>168</sup>

The focus of the 1950 discussion was on the transmission of horse racing information, and there was a consistent attempt by members of the Senate to inquire as to the scope of wagering on professional sports. For instance, Western Union provided a ticker service that furnished inning by inning scores, which facilitated information to bookmakers to operate with up to the minute information.<sup>169</sup> While the availability of play-by-play baseball information was noted to be important for bookmakers, Thomas McElroy, assistant attorney general of Texas, stated that he did not believe it was necessary to include play-by-play baseball information within the scope of the statute.<sup>170</sup>

Wayne Coy of the FCC noted that at the time basketball and football games had what were perceived to be centrally created odds that were produced and transmitted in advance.<sup>171</sup> However, according to his

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165. *Id.* at 155 (testimony of Nathaniel Goldstick).

166. *Id.* at 155–56.

167. *Id.* at 180–81.

168. *See, e.g., id.* at 115–16 (testimony of Mayor D’Alessandro) (discussing the lack of support he had seen for a finding of nationwide crime syndicates operating within Baltimore).

169. *Id.* at 93 (testimony of James M. McInerney).

170. *Id.* at 321 (testimony of Thomas McElroy).

171. *Id.* at 327 (testimony of Wayne Coy).

testimony, a great deal of betting on baseball took place during the game, and odds could fluctuate on a play-by-play basis.<sup>172</sup> Coy advocated for the interest of completeness, but noted the difficulties of crafting a bill to cover all “information assisting in the placing of bets,” because it could effectively cover “all information concerning baseball games.”<sup>173</sup>

Russell Brophy, a Los Angeles-based bookmaker, articulated that Congress faced a challenge in attempting to regulate what activities the proposed ban would apply to.<sup>174</sup> A bookmaker will take a bet on “anything that the public would be interested in,” according to Brophy’s testimony.<sup>175</sup> Brophy further informed the Senate subcommittee that stopping the racing wire would not stop people from gambling.<sup>176</sup> Brophy expressed that the business of bookmaking on baseball far surpasses the off-track-betting business.<sup>177</sup> The frequency of baseball games provides an attractive feature for both bookmakers and bettors.<sup>178</sup>

Walter Semingsen of Western Union stated that the company’s commercial news department provided sports scores through various ticker services, noting that the company had a history of assisting law enforcement, and that the company did not provide gambling information, such as live odds.<sup>179</sup> As a result of the perceived burden that would be presented by requiring Western Union to know what business its customers were in before providing its service, it was proposed that common carriers should be exempt for the scope of the statute.<sup>180</sup> Semingsen further attempted to distance Western Union’s service from other race wires by noting that all the baseball information was gathered by Western Union, operating under contract with the various baseball leagues.<sup>181</sup> Samuel Perlman noted that criminalizing the publication of specific aspects of sporting events, such as live scores or horse racing results, would simply create a monopoly for bookmakers who are already operating illegally, as they would find a means to gather the information.<sup>182</sup>

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172. *Id.* at 327–28.

173. *Id.* at 328.

174. *Id.* at 498 (testimony of Russell Brophy).

175. *Id.*

176. *Id.* at 499.

177. *Id.* at 506.

178. *Id.*

179. *Id.* at 598–99 (testimony of Walter Semingsen).

180. *Id.* at 604.

181. *Id.* at 628.

182. *Id.* at 709 (testimony of J. Samuel Perlman).



B. *Anticrime Legislation—1951*

The second Senate hearing to take place with regards to legislation that would become the Wire Act took place over September 19, 20, and 21, 1951.<sup>183</sup> The Anticrime Legislation hearings of 1951 contained four separate, but related, gambling bills.<sup>184</sup> Herzel E. Plaine, special assistant to the attorney general, testified that the new proposed bill, Senate Bill 1563, presented an improvement over the bill debated in 1950, because it now contained a licensing provision.<sup>185</sup> By incorporating a licensing provision that would be administered by the FCC, the federal government could delineate wire services used for legitimate activities from wire services utilized primarily for bookmaking because the bookmaking wire services would be unable to meet the burden of licensure.<sup>186</sup> Plaine further explained that it was the position of his office that requiring licenses for wire services would not run afoul of the First Amendment protections granted to speech or the press, and as an added security, newspapers were exempted from the scope of the legislation.<sup>187</sup>

Proposed Senate Bill 1564, the one of the four that was a direct predecessor to the Wire Act, also contained a provision that would create a separate offense for any individual who “surreptitiously” obtained and transmitted gambling information regarding horse or dog racing or sporting events without the permission of the venue operator.<sup>188</sup> Plaine made efforts to articulate that the Department of Justice was not attempting to limit the dissemination of the information itself, but instead the agency was trying to limit individuals who used the information for gambling purposes.<sup>189</sup> Assistant Attorney General Raymond Whearty testified that it would be beneficial if the proposed laws contained broader language, arguing that the term “gambling enterprise” should be included so that it would be clear that organized entities were the target.<sup>190</sup> While Whearty testified that the Department of Justice did not have an objection to the bill, he noted that questions remained within the Department

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183. See *Anticrime Legislation: Hearing on S. 1563, S. 1564, S. 1624 & S. 2116 Before the S. Comm. on Interstate and Foreign Commerce*, 82nd Cong. (1951).

184. *Id.*

185. *Id.* at 8 (testimony of Herzel E. Plaine).

186. *Id.* at 9.

187. *Id.* at 9.

188. *Id.* at 12.

189. *Id.* at 17.

190. *Id.* at 22 (testimony of Raymond P. Whearty).

whether there was a conflict of federal regulation infringing on an area of state concern.<sup>191</sup>

Wayne Coy, chairman of the FCC, testified that the prohibitions contained within the proposed bills were within the domain of federal jurisdiction and did not intrude on state sovereignty.<sup>192</sup> In his testimony, Coy identified further problems in the proposed bill, including the lack of definition exempting “newspapers of general circulation,” a term Coy believed would be exploited by the very bookmakers engaged in the behavior the bill sought to stamp out.<sup>193</sup>

Spencer J. Drayton, executive secretary for the Thoroughbred Racing Associations of the United States, testified that the organization’s Code of Standards prohibited wire-services from disseminating directly or indirectly to illegal bookmakers.<sup>194</sup> Drayton supported the position that bookmaking was a local issue, but argued that the “bookmakers’ wire service” was a monopolistic enterprise that had a “corrupting influence in all sports today.”<sup>195</sup> While Drayton noted his opinion that federal intervention might be necessary in order to curb some aspects of the gambling wire service, he questioned whether the language might extend too far and ban activities that were legal and regulated in a variety of states.<sup>196</sup>

Walter Semingsen, Assistant Vice President of Western Union, testified before the Senate Committee that the “furnishing or receiving of racing news” is no more similar to gambling than the publication of racing news in daily newspapers or on television.<sup>197</sup> Semingsen testified that it was Western Union’s position that the proposed bills put an undue burden on common carriers to investigate what activities their customers intended to utilize their services for.<sup>198</sup> John Hanselman of AT&T testified that there were more than half a billion messages generated each year in interstate commerce, and it would not be reasonable to subject the carriers to liability, as proposed, for failing to know the content of each particular message.<sup>199</sup>

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191. *Id.* at 24.

192. *Id.* at 41 (testimony of Wayne Coy).

193. *Id.* at 48.

194. *Id.* at 69 (statement of Spencer J. Drayton).

195. *Id.*

196. *Id.* at 70.

197. *Id.* at 72 (statement of Walter Semingsen).

198. *Id.* at 83.

199. *Id.* at 98 (testimony of John J. Hanselman).

On the final day of the hearings in 1951, Senator Herbert R. O'Connor of Maryland testified that the proposed bills were intended to strike at "organized criminals and hoodlums."<sup>200</sup> Senator O'Connor further argued that despite the reluctance of the FCC to take on oversight of the proposed bills, it was likely best suited to monitor for prohibited activities.<sup>201</sup> Senator O'Connor's support for the bill, however, was challenged by Benedict P. Cottone, FCC general counsel, who argued that the bill posed a burden on the FCC in having to determine the fitness of applicants for licensure.<sup>202</sup>

The 1951 hearings were followed by a series of Senate reports.<sup>203</sup> The first report, filed by Senator Johnson of Colorado, expressed the committee's opinion that the "most effective and basic means of halting illegal off-track betting on racing is in the hands of local enforcement officials."<sup>204</sup> The recommendations were for licensure, and a ban on the transmission of racing information until after the conclusion of the event.<sup>205</sup> The report clearly articulated that the bill's purpose was to "aid the respective States in coping with off-track horse- and dog-race betting carried on illegally by bookmakers by denying or hampering the use of interstate communications facilities to furnish information and news essential to such operations."<sup>206</sup> The report noted that while initially proposed to "prohibit the transmission of all sporting information," this would likely run into constitutional concerns.<sup>207</sup> The Johnson Senate report clearly articulated that the definition of "gambling information" was "limited to information concerning horse racing and dog racing."<sup>208</sup> While the gambling information provisions of the draft bill applied specifically to horse and dog racing, disseminators of all sporting information were required to file a statement that they were using the communication facilities for such a purpose though such transmissions were not prohibited nor made a federal crime.<sup>209</sup>

A subsequent report, filed by Senator O'Connor, would have expanded the scope of the legislation so as to include within the purpose not only

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200. *Id.* at 106 (statement of Herbert R. O'Connor).

201. *Id.* at 107.

202. *Id.* at 154 (testimony of Benedict P. Cottone).

203. *See* S. REP. NO. 82-925 (1951); S. REP. NO. 82-927 (1951).

204. S. REP. NO. 82-925, at 2 (1951).

205. *Id.*

206. *Id.* at 7.

207. *Id.* at 26.

208. *Id.* at 32.

209. *Id.* at 36.

horse and dog racing, but also other sporting events.<sup>210</sup> O’Conor’s report noted that while the Department of Justice opposed the draft bill, the Senate Crime Investigating Committee encouraged the consideration of the bill as a means of slowing the access of bookmakers to information.<sup>211</sup> The O’Conor report clearly advocated for a broader scope in the proposed law than was proposed by the Johnson report, though the bill would not pass, prompting another effort in 1954.<sup>212</sup> But before the third hearing on the subject, a bill was introduced in 1953 that received the analysis of the Senate Committee on Interstate and Foreign Commerce.<sup>213</sup>

The Senate report noted that the new bill was intended to assist the states “in coping with off-track horse- and dog-race betting carried on illegally by bookmakers by denying or hampering the use of interstate communications facilities . . . .”<sup>214</sup> The 1953 report, like the 1951 Johnson report, banned the transmission of gambling information on horse and dog racing, but did not include other sports within that prohibition, instead requiring lessees or wire circuits to maintain a list of purchasers of sports information.<sup>215</sup> But like the 1951 legislation, the 1953 legislation did not gain sufficient support to pass.<sup>216</sup>

### C. *Antigambling Legislation—1954*

The third Senate hearing heard testimony from very few witnesses; however, for the first time, the subcommittee received statements and heard testimony from industry groups.<sup>217</sup> While industry groups were present at the 1954 hearing, the proposed bill was not supported by the agency tasked with executing its enforcement.<sup>218</sup> The Senate report that followed the hearing made clear that the purpose of the latest bill was to “prohibit the recurrence of the wire service as a tool of the bookmaking racket which made it possible to organize bookmakers throughout the country through the means of selling them a fast service provided by a network of communication facilities.”<sup>219</sup> The 1954 bill, Senate Bill 3542,

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210. S. REP. NO. 82-927, at 1.

211. *Id.* at 2.

212. *Antigambling Legislation: Hearing on S. 3190 & S. 3542 Before a Subcomm. of the Comm. on Interstate and Foreign Commerce*, 83rd Cong. (1954).

213. *See* S. REP. NO. 83-500 (1953).

214. *Id.* at 5.

215. *Id.* at 6.

216. *Antigambling Legislation*, *supra* note 212.

217. *Id.* at III.

218. *Id.* at 8 (testimony of Rosel Hyde).

219. S. REP. NO. 83-1652, at 1 (1954).

sought to make clear that the legislation was only to apply to horse and dog racing, striking the word “sporting” from the draft.<sup>220</sup> The Department of Justice concluded that sports like “baseball, boxing, and other sporting events . . . cannot be organized and controlled” in the same manner as animal racing, and were thus removed.<sup>221</sup> While the sporting event language was struck from the prohibition, it remained an obligation for lessors disseminating sports event information to file statements detailing their activity with their common carriers.<sup>222</sup>

The third Senate hearing on limiting the transmission of gambling information across wired communication facilities took place on June 7 and 8, 1954.<sup>223</sup> The hearing generated a transcript of forty-seven pages, the shortest transcript of any hearing regarding legislation that would become the Wire Act.<sup>224</sup> Warren Olney III, assistant attorney general, testified that Senate Bill 3542 was essentially the same bill that the Justice Department had supported since 1950.<sup>225</sup> Olney testified that the proposed bill was necessary because bookmaking monopolies were operating beyond the reach of state-level authorities by positioning themselves outside of the jurisdiction and transmitting wagering information into jurisdictions creating an interstate issue.<sup>226</sup>

Rosel Hyde, chairman of the FCC, testified that he viewed preventing the transmission of wagering information as a law enforcement problem and not as an obligation of an administrative agency.<sup>227</sup> Chairman Hyde noted that the proposed bill appeared to limit its own “effectiveness and efficiency” by banning communication facilities from transmitting gambling information in interstate or foreign commerce, but exempting gambling transmission for printed news or television and/or radio purposes.<sup>228</sup> Hyde argued that it was his belief that Congress should pass a law that was to be enforced by local law enforcement agencies and not the FCC or common carriers.<sup>229</sup> Rufus King, of the American Bar Association (ABA), testified that the proposed wagering information ban was endorsed by the ABA membership.<sup>230</sup> In contrast, Walter Gallagher,

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220. *Id.* at 1.

221. *Id.* at 2.

222. *Id.* at 5.

223. *See Antigambling Legislation, supra* note 212.

224. *Id.*

225. *Id.* at 3 (testimony of Warren Olney III).

226. *Id.* at 4.

227. *Id.* at 8 (testimony of Rosel Hyde).

228. *Id.*

229. *Id.* at 10.

230. *Id.* at 14, 16 (testimony of Rufus King) (King testified that while the ABA supported the bill the

counsel for various sporting news agencies, including the *Illinois Sport News* and the *Daily Sport News*, testified that it was his belief that the proposed bills went too far in attempts to prohibit dissemination of wagering information.<sup>231</sup> Gallagher suggested that it was problematic that wagering information, the possession of which was not prohibited at the state level, was proposed to be prohibited at the federal level.<sup>232</sup>

#### D. *Report of Proceedings—1956*

The fourth Senate hearing on a bill to limit the transmission of wagering information took place on July 2, 1956, before the Subcommittee on Communications of the Senate Committee on Interstate and Foreign Commerce.<sup>233</sup> Similar to the hearing in 1954, the 1956 hearings contained debate on the legislative predecessor to the Wire Act, in addition to a bill that sought to amend slot machine regulations.<sup>234</sup> The first person to testify regarding Senate Bill 950 was David Luce, first assistant, Criminal Division Department of Justice, who articulated that the bill had a dual purpose: first, to assist the states in the enforcement of their own laws; and second, to aid in the suppression of organized crime activities.<sup>235</sup> Luce testified that the definition of gambling information was restricted to information relating to horse and dog racing.<sup>236</sup> In response to a question from Senator Potter about whether this statute would have any impact on wire services carrying information about football or baseball games, Luce responded that the proposed bill only applied to horse and dog racing.<sup>237</sup> Luce noted that the exclusion of other sports from the bill was prefaced on the belief that syndicated bookmaking had not entered the field of sports.<sup>238</sup>

Warren Baker, of the FCC, noted that the agency no longer had objections to the proposed bill.<sup>239</sup> Rufus King, appearing again for the ABA, testified that the new bill omitted the provision that restricted

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organization actually supported amending the language to encapsulate additional games of chance).

231. *Id.* at 28–29 (testimony of Walter Gallagher).

232. *Id.* at 28.

233. See *Report of Proceedings: Hearing on S. 3018 & S. 950 Before the Subcomm. on Communications of the Comm. on Interstate and Foreign Commerce*, 84th Cong. (1956).

234. *Id.* at 2.

235. *Id.* at 3 (testimony of David Luce).

236. *Id.* at 3.

237. *Id.* at 5.

238. *Id.*

239. *Id.* at 24 (testimony of Warren Baker).

“instantaneous” transmission of gambling information.<sup>240</sup> King seemed to rebut the testimony of Luce, arguing that organized crime had begun to shift its focus away from horse and dog racing into baseball, football, and college sports.<sup>241</sup> King further testified that it was his belief that organized crime was involved in the fixing of college basketball games.<sup>242</sup> King concluded by stating that while the ABA supported Senate Bill 950, earlier versions of the bill were more comprehensive and stronger, in his opinion.<sup>243</sup>

The fourth Senate hearing on a bill that predated the Wire Act suggested, once again, a very narrow interpretation of the scope of the proposed legislation.<sup>244</sup> The *New York Times* reported that Rufus King’s comments about gambling and collegiate sports prompted Senator Potter to comment that Congress may wish to investigate the issue.<sup>245</sup> The *Times* further noted that Potter was under the impression that the Justice Department appeared out of touch with the evolution of the gambling world.<sup>246</sup> It would be nearly five years before the final two hearings on legislation regarding the transmission of wagering information, and nearly a decade after Senator Kefauver made his initial recommendations.

#### *E. Legislation Relating to Organized Crime—1961*

The House hearing in 1961 represented a change from previous hearings, as it saw discussions of various versions of bills that would accomplish similar objectives. Testimony revealed that the draft bills presented many of the same concerns as previous iterations, including: (1) being too broad or overly vague; (2) having questionable constitutional foundations; and (3) prompting questions about who would bear the burden of enforcement.<sup>247</sup> The *New York Times* reported on the

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240. *Id.* at 39 (testimony of Rufus King).

241. *Id.* at 43.

242. *Id.* at 44. Indeed, one of the largest game-fixing scandals in the history of the United States took place involving primarily New York based teams in the 1950s accepting bribes from organized crime figures to manipulate the outcomes of collegiate basketball games. See John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 456 n.13 (2015).

243. *Report of Proceeding: Hearing on s. 3018 & s. 950 Before the Subcomm. on Communications of the Comm. on Interstate and Foreign Commerce*, 84th Cong. 49 (1956).

244. See, e.g., *id.* at 39 (1956) (testimony of Rufus King, noting previous bills were more comprehensive).

245. *Sports Inquiry Urged: Potter Asks Study of Gambling Influence on Colleges*, N.Y. TIMES, July 6, 1956, at 22.

246. *Id.*

247. See e.g., *Legislation Relating to Organized Crime Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcommittee No. 5 of the Committee of the Judiciary*, 87th Cong. 379 (1961) (testimony of Arthur H. Christy, Chairman, Comm. on Criminal Courts, Law & Procedure of the Ass’n of the Bar

House hearing, noting that Attorney General Robert F. Kennedy estimated that organized gambling had a gross value of \$7 billion.<sup>248</sup>

In 1961, Congress held several hearings on omnibus bills aimed at halting the perceived growth of organized crime. One of the hearings occurred over seven days in May 1961 and heard testimony on a bill directly related to the version of the Wire Act that was signed into law.<sup>249</sup> Representative William McCulloch of Ohio introduced the hearings on the eleven bills to be debated by asking for nonpartisan support for the bills, noting that the majority of the bills were nearly identical to those from the previous Eisenhower administration.<sup>250</sup> The Wire Act legislation was introduced as two separate bills, House Bill 3022<sup>251</sup> and House Bill 7039.<sup>252</sup>

Attorney General Robert F. Kennedy testified first, citing anecdotes of corruption at the local level and the need for the federal government to step in and assist “honest citizens.”<sup>253</sup> Kennedy further compared the corner bookmaker to the part of an iceberg that floats above the surface of the water, noting that the visible bookmaker represented only a small portion of the illegal gambling network.<sup>254</sup> Kennedy further stressed the need for federal involvement by arguing that local officials were unable to reach the leaders of these gambling enterprises because they live far from the action.<sup>255</sup> Kennedy further noted that the intention of the legislation was to limit the application to gambling as a business, not as a social activity.<sup>256</sup>

Max D. Paglin testified on behalf of the FCC before the House of Representatives and reiterated the FCC’s long standing position that it did not desire to be in a situation in which it was tasked with law enforcement obligations.<sup>257</sup> Paglin further informed the House committee that the proposed definition of “wire facility” might not encapsulate modern

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of N.Y.C., noting the bill may criminalize a large number of potentially unintended activities).

248. *Congress Urged to Act on Crime*, N.Y. TIMES, May 18, 1961, at 18.

249. *See Legislation Relating to Organized Crime Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcommittee No. 5 of the Committee of the Judiciary*, 87th Cong. (1961).

250. *Id.* at 5 (statement of Rep. William McCulloch).

251. *Id.* at 6.

252. *Id.* at 8.

253. *Id.* at 19 (statement of Robert F. Kennedy, Att’y Gen. of the U.S.).

254. *Id.* at 20.

255. *Id.* at 21.

256. *Id.* at 26.

257. *Id.* at 126 (testimony of Max D. Paglin, Gen. Counsel, Fed. Comm’n’s Comm’n).



means of radio transmission.<sup>258</sup> The National Association of Defense Lawyers in Criminal Cases, represented by Richard A. Green, filed a prepared statement arguing that the proposed House Bill 3022 “appear[s] to have little or no value in prosecuting gambling crimes.”<sup>259</sup> The United States Independent Telephone Association (USITA), represented by Bradford Ross, testified that the association remained concerned that proposed House Bill 3022 would require the members to act as police to enforce the statute or face criminal and civil penalties themselves.<sup>260</sup>

Dan F. Hazen, Assistant Vice President of Western Union, testified that he was concerned that the language used may require his employees to engage in investigative work.<sup>261</sup> Hazen argued that the proposed regulations with penalty provisions seemingly targeted corporations like his that already made attempts to comply and assist law enforcement when they were made aware of allegations of illegal activity.<sup>262</sup>

Concerns regarding the scope of House Bill 3022 were further highlighted by Arthur H. Christy, a representative of the New York City Bar Association, who believed that the proposed requirement for filing affidavits by operators transmitting gambling information was impractical and would be “difficult to enforce.”<sup>263</sup> Christy further argued that enforcement of the proposed bill seemed impractical and relied on the employees of common carriers to enforce a federal law.<sup>264</sup> The American Civil Liberties Union (ACLU) argued that the language used was unnecessarily broad and placed an unconstitutional inhibition on freedom of expression for a broad class of activities.<sup>265</sup> The House hearings would lead into Senate hearings in June of 1961.<sup>266</sup>

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258. *Id.* at 132.

259. *Id.* at 161 (statement of Richard A. Green, Chairman, Comm. on Legislation, Nat’l Ass’n of Def. Lawyers).

260. *Id.* at 192 (statement of Bradford Ross, U.S. Indep. Tel. Ass’n).

261. *Id.* at 295 (testimony of Dan F. Hazen, Assistant Vice President, W. Union Tel. Co.).

262. *Id.* at 297–99.

263. *Id.* at 379 (testimony of Arthur H. Christy, Chairman, Comm. on Criminal Courts, Law & Procedure of the Ass’n of the Bar of N.Y.C.).

264. *Id.* at 379.

265. *Id.* at 383 (statement of the ACLU).

266. *The Attorney General’s Program to Curb Organized Crime and Racketeering Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the Committee on the Judiciary, 87th Cong. (1961).*

*E. The Attorney General's Program to Curb Organized Crime – 1961*

The Senate held their hearings in June 1961, over five nonconsecutive days, to debate a series of bills.<sup>267</sup> The hearings would serve as companions to the hearings in the House of Representatives that occurred several weeks earlier.<sup>268</sup> The Senate bill that would eventually become the Wire Act was labeled, “S. 1656.”<sup>269</sup> Attorney General Robert F. Kennedy opened the hearing before the Senate Judiciary Committee by testifying to the importance of the seven proposed bills.<sup>270</sup>

Kennedy stated that it was not the intention of the Department of Justice to usurp local police powers, but it was only the federal government that could tackle the complex structure of organized crime due to the multistate basis on which the organized crime groups operated.<sup>271</sup> Kennedy testified that Senate Bill 1656 had been carefully drafted to protect the freedoms guaranteed to the press.<sup>272</sup> The bill contained exemptions for “legitimate news reporting of sporting events,” and it was argued that nothing in the bill would alter the present state of sports reporting.<sup>273</sup> Kennedy would further observe: “[i]n fact, wireless communication was not included in this bill because it is our belief that the Federal Communications Commission has ample authority to control the misuse of this means of communication.”<sup>274</sup> Kennedy stated that the bill did not exempt common carriers, but that they should not be burdened unless there was intentional supplying or maintaining of facilities being used for gambling purposes.<sup>275</sup>

Kennedy testified that while the bill “is not interested in the casual dissemination of information with respect to football, baseball or other sporting events between acquaintances,” the bill would apply to the professional gambler, who was a large layoff bettor who attempted to avoid liability by stating, “I just like to bet. I just make social wagers.”<sup>276</sup> Kennedy stressed that while the bill was not intended to apply to nonprofessional gamblers, it would be poor public policy for the

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267. *See id.*

268. *See id.*

269. *See id.*

270. *Id.* at 1 (statement of Robert F. Kennedy, Att’y Gen.).

271. *Id.* at 11.

272. *Id.* at 12.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 12–13.

Department of Justice to be seen condoning some forms of gambling, but not others.<sup>277</sup>

Richard March appeared on behalf of his client, the USITA, and his law partner, Bradford Ross, to deliver to the committee Ross's statement.<sup>278</sup> In the statement, Ross argued that Senate Bill 1656 placed telephone companies in a dilemma of facing regulatory or criminal prosecution or civil damages by having to act as an enforcement agency.<sup>279</sup> Ross argued that making the telephone company responsible for determining whether a client was using a service for illegal gambling business would unfairly subject the companies to law suits from customers who had their service disconnected. John J. Hanselman, assistant vice president of AT&T, testified that the language restricting the bill to "wire communication facility" should be extended so that it encompassed any "communication facility."<sup>280</sup> Hanselman stated that his company believed the language of the bill should be modified and that his company had concerns about the absence of a provision to hold common carriers harmless.<sup>281</sup> In a supplemental statement filed by Bradford Ross, he noted that the USITA would endorse a version of the Wire Act if the bill contained protections against civil suits resulting from termination of services at the direction of law enforcement.<sup>282</sup>

Dan F. Hazen of the Western Union Telegraph Company testified that the company had concerns about the proposed bill and the absence of any requirement on the part of law enforcement to notify the provider of suspected criminal activity and failure of the company to terminate the service as the basis for a violation.<sup>283</sup> Hazen noted that not only did the telegraph company not possess subpoena power, the Communications Act banned the monitoring of "leased facility services" to determine if there was a violation of law.<sup>284</sup>

Rufus King of the ABA noted that the proposed bill was quite similar in scope to the original bill proposed in 1950.<sup>285</sup> King noted that he had a personal concern over whether the bill did enough to protect the act of casual betting, noting that it was his interpretation that if he were to call

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277. *Id.* at 13.

278. *Id.* at 34 (statement of Richard S. T. March, Att'y, U.S. Indep. Tel. Ass'n).

279. *Id.* (statement of Bradford Ross, U.S. Indep. Tel. Ass'n).

280. *Id.* at 39 (statement of John J. Hanselman, Am. Tel. & Tel. Co.).

281. *Id.* at 40.

282. *Id.* at 45 (supplemental statement of Bradford Ross, U.S. Indep. Tel. Ass'n).

283. *Id.* at 58 (statement of Dan F. Hazen, Assistant Vice President, W. Union Tel. Co.).

284. *Id.*

285. *Id.* at 64 (statement of Rufus King, Rice & King, appearing on behalf of the Am. Bar Ass'n).

his brother in Maryland and place a one-dollar bet on a baseball game, he would be violating the Wire Act.<sup>286</sup> King went on to note that it struck the ABA as odd that while the Wire Act prohibited the transmission of wagering information, it did not prohibit the transfer of money for payment of gambling debts.<sup>287</sup>

In response to the testimony of the telephone and telegraph executives, Herbert Miller, assistant attorney general, testified that the Department of Justice opposed any exemption for common carriers.<sup>288</sup> Miller noted that if the common carriers determine that illegal activity was taking place, they should be in a position to act.<sup>289</sup> The Department of Justice's opposition to a "hold harmless" provision in the statute would leave improperly aggrieved customers with no resolution.<sup>290</sup> Miller testified that the bill was intended to cover only sporting events and contests, but conceded, in response to a question, that wrestling was within the scope of the statute despite the fact that it was "more of a performance than a contest."<sup>291</sup> Miller went on to testify that the bill "was aimed at a particular situation, gambling, a specific type of gambling, and the layoff bettor."<sup>292</sup>

The Senate Judiciary hearing on Senate Bill 1656 represented the final full-scale hearing into the bills that were debated prior to the enactment of the Wire Act. However, there was an additional hearing, held as an executive session before the Senate Committee on the Judiciary.<sup>293</sup> The committee debated what final tweaks were to be made, including the incorporation of some of the common carriers requests.<sup>294</sup> The final Senate Judiciary hearing reported that Senate Bill 1656 would be reported to the whole Senate.<sup>295</sup> Following the House and Senate hearings, each legislative body submitted a report.<sup>296</sup>

The Senate report noted that there was a modification to the text of the bill specifying that it was to apply to those in the business of betting or wagering.<sup>297</sup> The legislation was to target bookmakers and layoff men

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286. *Id.* at 65.

287. *Id.* at 69.

288. *Id.* at 275 (statement of Herbert Miller, Assistant Att'y Gen., Criminal Div., Dep't of Justice).

289. *Id.*

290. *Id.* at 277.

291. *Id.* at 278 (quoting Sen. Estes Kefauver).

292. *Id.* (testimony of Herbert Miller, Assistant Att'y Gen., Criminal Div., Dep't of Justice).

293. *See Report of Proceeding: Hearing held before the Comm. on the Judiciary, 87th Cong.* (July 10, 1961).

294. *See id.*

295. *Id.* at 69.

296. S. REP. NO. 87-588 (1961); H.R. REP. NO. 87-967 (1961).

297. S. REP. NO. 87-588, at 2 (1961).

“who need incoming and outgoing wire communication in order to operate.”<sup>298</sup> The Senate report included a letter from the attorney general to the vice president that noted that the modern bookmaker relied on wire communications for not only horse racing results, but also for wagering on sporting events.<sup>299</sup> The House Report of August 17, 1961, echoes much of the sentiment of the Senate report.<sup>300</sup> There is little indication across the totality of the Wire Act’s legislative history that the application beyond sports wagering inclusive of dog and horse racing was ever contemplated. Over eleven years, there was a significant evolution in what was proposed.

#### *F. Evolution of the Wire Act*

The scope of the Wire Act experienced significant changes after a decade of evolution. The first version of the bill contained a very specific focus on horse racing.<sup>301</sup> The first major evolutionary moment would come in 1954, when references to sporting events would be replaced with specific reference to horse and dog racing.<sup>302</sup> This trend would continue until the Kennedy administration introduced new versions of the Wire Act.<sup>303</sup> The Wire Act’s focus was shifted back to sporting events and contests, and those who made a business of betting and wagering.<sup>304</sup>

The first attempt to pass legislation banning the transmission of wagering information through wire was Senate Bill 3358, in 1950.<sup>305</sup> Senate Bill 3358 was composed of six sections.<sup>306</sup> Section one stated that the bill was intended to assist the states in the enforcement of their laws to suppress organized gambling activities.<sup>307</sup> Section two defined five terms, including “gambling information” as:

[B]ets or wagers or related information assisting in the placing of bets or wagers on any sporting event or contest, or transactions or information facilitating betting or wagering activities on any

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298. *Id.* at 3.

299. *Id.* at 4–5.

300. H.R. REP. NO. 87-967 (1961).

301. *See Transmission of Gambling Information: Hearing on S.3358 Before the Senate Subcomm. of the Comm. on Interstate and Foreign Commerce*, 81st Cong. 2 (1950).

302. *See S. REP. NO. 83-1652*, at 1 (1954).

303. H.R. 3022, 87th Cong. (1961).

304. *Id.*

305. *See Transmission of Gambling Information: Hearing on S.3358 Before the Senate Subcomm. of the Comm. on Interstate and Foreign Commerce*, 81st Cong. (1950).

306. *Id.* at 1–2.

307. *Id.* at 1.

sporting event or contest. In connection with horse racing, gambling information includes among other things entries, scratches, jockeys, jockey changes, weights, probable winners . . . betting odds, changes in the betting odds, the post positions, the results, and the prices paid.<sup>308</sup>

Section three included the applicability of the statute, noting that it was unlawful to maintain any facility, other than a radio broadcasting facility, if that facility received or transmitted gambling information.<sup>309</sup>

Senate Bill 2116 was the subject of a Senate hearing one year after Senate Bill 3358.<sup>310</sup> Senate Bill 2116 was nearly identical to its predecessor bill, Senate Bill 3358, containing the exact same penalties for violations and requiring enforcement by the common carriers.<sup>311</sup> The introduction of bills of identical text is not uncommon, in particular when bills are introduced toward the conclusion of the congressional term.

In 1954, Senate Bill 3542 was introduced and was the subject of hearings.<sup>312</sup> Senate Bill 3542 represented the first major shift in the evolution of legislation to curb the transmission of wagering information, as the legislation that mentioned sporting events had those references deleted and replaced by horse or dog racing.<sup>313</sup> Senate Bill 3542 also included an addition, in section three, that contained a clarification statement that the act was not intended to prevent the transmission of news regarding sporting events to press outlets.<sup>314</sup> Additionally, Senate Bill 3542 required a written statement from the lessee as opposed to a sworn affidavit regarding the intended purpose of the lease of wire services.<sup>315</sup> There were no references in the bill to any criminal punishments.<sup>316</sup>

Senate Bill 950 was introduced in February 1955; however, the bill would not have a hearing until July of 1956.<sup>317</sup> Senate Bill 950 contained five sections.<sup>318</sup> Section two of the proposed statute continued to define

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308. *Id.*

309. *Id.* at 2.

310. See *Anticrime Legislation: Hearing on S. 1563, S. 1564, S. 1624 & S. 2116 Before the Comm. on Interstate and Foreign Commerce* 82nd Cong. 1–2 (1951).

311. *Id.* at 1–2.

312. See *Antigambling Legislation: Hearing on S. 3190 & S. 3452 Before the S. Comm. on Interstate and Foreign Commerce*, 83rd Cong. 1–3 (1954).

313. *Id.*

314. *Id.* at 2.

315. *Id.*

316. *Id.*

317. See *Report of Proceedings: Hearing on S. 3018 & S. 950 Before the Subcomm. on Communications of the S. Comm. on Interstate and Foreign Commerce*, 84th Cong. (1956).

318. See *S. 950*, 84th Cong. (1955).

gambling information as only containing dog and horse racing events or contests.<sup>319</sup> Senate Bill 950 provided for a more detailed explanation of the obligations of common carriers upon receipt of a notice from law enforcement.<sup>320</sup> While common carriers had a similar burden placed upon them, as in the previous bills, absent from Senate Bill 950 was any role for the FCC to participate in the enforcement of the proposed legislation.<sup>321</sup>

In 1961, the House of Representatives debated two bills that were classified as predecessors to the passed version of the Wire Act. House Bill 3022 was the first of the two bills to be debated.<sup>322</sup> Missing from House Bill 3022 was the preamble that had consistently stated that the purpose of the bill was to assist the states in enforcing their own anti-gambling laws.<sup>323</sup> Also changed was the definition of gambling information. No longer did the legislation reference “animal racing”; instead, the definition referred solely to “sports event or a contest,” and with the definition there was also a qualification that a violator must be in the “business of accepting such wagers.”<sup>324</sup> While not inclusive of animal racing, House Bill 3022 did propose to ban participation in lotteries with limited exceptions (e.g., lotteries for a charitable purpose).<sup>325</sup> House Bill 3022 also required the filing of affidavits as to whether a wire operator has transmitted wagering information in the past twelve months and imposed criminal penalties for failure to file or false filing of an affidavit.<sup>326</sup> House Bill 3022 represented a dramatic shift from the proposed Senate Bill 950. The House bill was much more focused on federal objectives and on those in the “business of accepting wagers.”<sup>327</sup>

House Bill 7039, which was debated during the same hearing as House Bill 3022, was narrowly focused on the individuals who “lease[], furnish[], or maintain[]” wire communication facilities.<sup>328</sup> The bill proposed that the transmission of bets or wagers or assisting others in placing of bets or wagers in interstate commerce was punishable by a fine not to exceed \$10,000 or two years in prison.<sup>329</sup> House Bill 7039

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319. *Id.*

320. *Id.*

321. *Id.*

322. *See* H.R. 3022, 87th Cong. (1961).

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 2.

328. *See* H.R. 7039, 87th Cong. (1961).

329. *Id.*

specifically referenced sporting events or contests, and while it did not state that it was drafted to assist states in enforcement of their own state laws, it stated that it did not create immunity under any state law.<sup>330</sup>

Senate Bill 1656, introduced in April 1961 and debated during Senate hearings, was the companion to House Bill 7039, and the final Senate version of the bill that would become the Wire Act.<sup>331</sup> The bill evolved from introduction on April 18, 1961, to the bill that was reported on July 24, 1961, though the principle change was the inclusion of the phrase “[w]hoever being engaged in the business of betting or wagering,” from the original “[w]hoever leases, furnishes, or maintains any communication facility with intent.”<sup>332</sup> The Senate bill’s change of the language of the companion House bill to implement the “[w]hoever being engaged in the business of betting or wagering” in the place of “[w]hoever leases, furnishes or maintains,” bears little indication that anything other than added specificity of the intended subject of the statute,<sup>333</sup> a fact supported by the associated hearings.<sup>334</sup>

The scope of the Wire Act has been a subject of much debate, particularly since the rise of the internet.<sup>335</sup> The congressional hearings held from 1950 to 1961 reveal that the Wire Act’s scope was often debated. However, the intent of the law appeared to have been limited to the transmission of wagering information in relation to sporting events or animal racing events, with little indication that other gambling activities were intended to be included in any of the later draft bills. Statements, such as those made in 2015 by Republican Congressman Jason Chaffetz that it was Congress’s intent to ban all forms of wagering under the Wire Act, are unsupported by the hearings that took place over the eleven years of congressional hearings.<sup>336</sup> Similarly, there appears to be little indication that Congress intended the amendment to Senate Bill 1656 to incorporate

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330. *Id.*

331. See *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. (1961).

332. See S. 1656, 87th Cong. (Apr. 18, 1961); S. 1656, 87th Cong. (July 24, 1961).

333. See S. 1656, 87th Cong. (July 24, 1961).

334. See *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. (1961).

335. See, e.g., *In re MasterCard Int’l Inc.*, 132 F. Supp. 2d 468 (E.D. La. 2001), *aff’d sub nom.*, *In re MasterCard Int’l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002) (noting that non-sports internet gambling is not prohibited by the Wire Act).

336. See Chaffetz, *Gabbard Work to Restore America’s Wire Act*, TULSI GABBARD (Feb. 4, 2015), <https://gabbard.house.gov/news/press-releases/chaffetz-gabbard-work-restore-americas-wire-act> [<https://perma.cc/74BP-HJCU>].



the range of activities suggested by the 2018 Office of Legal Counsel memorandum.<sup>337</sup> While the legislative history helps elucidate Congress's intent with regards to the scope of the Wire Act, numerous questions regarding the statute's application persist. In Part III, this Article examines some of the prominent questions surrounding the application of the Wire Act in the modern internet era.

### III. WHAT IS THE SCOPE OF THE WIRE ACT?

The scope of the Wire Act has been something of an open question since at least the late-1990s, when Congress began to try and regulate online gambling.<sup>338</sup> Whether the Wire Act applies to sports wagering alone, or whether it applies to a variety of activities, has been the primary focus of Wire Act discussions and there remain a number of prescient questions regarding the statute as a result of the *Murphy* decision, and expanding state legalization of sports wagering.<sup>339</sup> Part III examines some of the most pressing questions regarding the Wire Act's scope, including: (1) whether the Wire Act applies to the internet; (2) who is in the "business of betting"; (3) whether the Wire Act applies exclusively to sports betting; (4) what constitutes "information" assisting in placing bets or wagers; and (5) whether the Wire Act's safe harbor exempts transmissions that pass through third-party states that do not allow the same conduct that is allowed in both the originating and receiving jurisdiction.

#### A. *The Wire Act and the Internet*

The Wire Act was passed in 1961, decades before the internet became ubiquitous in American homes.<sup>340</sup> While then-Attorney General Robert F. Kennedy<sup>341</sup> and the subsequent Senate report<sup>342</sup> noted that wireless communications were not to be included within the statute's scope, the

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337. See ENGEL MEMO, *supra* note 16.

338. *The Internet Gambling Act of 1997: Hearing on S. 474 Before the Subcomm. on Technology, Terrorism, and Government Information of the S. Comm. on the Judiciary*, 105th Cong. 2–3 (1997).

339. See Nick Rummell, *Worries of Online Gambling Crackdown Spur States to Action*, COURTHOUSE NEWS SERV. (May 20, 2019), <https://www.courthousenews.com/worries-of-online-gambling-crackdown-spur-states-to-action> [https://perma.cc/KL6X-TW4A].

340. See Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000-2015*, PEW RES. CTR. (June 26, 2015), <https://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015> [https://perma.cc/6NJJ-2ZSW].

341. *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 12 (1961).

342. S. REP. No. 87-588, at 2 (1961).

internet still relies on wired communications facilities in order to exist.<sup>343</sup> But the application of the Wire Act to the internet had obviously not been contemplated in 1961, as the internet remained years away, leaving contemporary courts to address the question of whether the Wire Act applies to the internet.<sup>344</sup>

One of the first cases to apply the Wire Act to internet sports wagering was *United States v. Cohen*<sup>345</sup> in 2001. Cohen operated a sports betting operation in Antigua that accepted wagers both via the telephone and via the internet.<sup>346</sup> While Cohen never directly appealed the issue of whether the Wire Act applied to internet wagering, in addition to the telephone wagering, the court expressed that the internet communications passed through “wire facilities,” thus implicating the statute.<sup>347</sup> *In re Mastercard* adds further support to the position that, as internet wagering passes through wire communication facilities, the Wire Act is applicable to internet conduct.<sup>348</sup> In *United States v. Lyons*,<sup>349</sup> the defendants argued, on appeal, that the Wire Act is inapplicable to the internet, as it is not a “wire communication facility;” however, the First Circuit rejected this argument noting that the statute has regularly been attached to infringing conduct over the internet, and that the internet involves a transmission “to and from customers.”<sup>350</sup>

While, in early attempts to regulate internet gambling, congressional testimony may have lacked certainty regarding the application of existing laws to the internet,<sup>351</sup> courts have not struggled to find that the Wire Act incorporates the internet within its prohibition of the use of a “wire communication facility.”<sup>352</sup> The Wire Act appears to certainly apply to transactions taking place via the internet, but the statute only applies to

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343. For an overview of how the internet functions, see Steven Li, *How Does the Internet Work?*, MEDIUM (Aug. 1, 2017), <https://medium.com/@User3141592/how-does-the-internet-work-edc2e22e7eb8> [<https://perma.cc/D5H6-4F3F>].

344. C. Jeremy Pope, *Losing the Battle but Winning the War: The Federal Government’s Attempts to Regulate Internet Gaming Through Utilization of the Wire Act and Other Means*, 74 MISS. L.J. 903, 907 (2005).

345. 260 F.3d 68 (2d Cir. 2001).

346. *Id.* at 70–71.

347. *Id.* at 76.

348. *In re MasterCard Int’l Inc.*, 132 F. Supp. 2d 468, 479–81 (E.D. La. 2001), *aff’d sub nom.*, *In re MasterCard Int’l Inc.*, 313 F.3d 257 (5th Cir. 2002) (discussing that, while the Wire Act is limited to interstate internet sports wagering, such conduct does fall with the statute’s scope).

349. 740 F.3d 702 (1st Cir. 2014).

350. *Id.* at 716–18.

351. See *The Internet Gambling Act of 1997: Hearing on S. 474 Before the Subcomm. on Technology, Terrorism, and Government Information of the S. Comm. on the Judiciary*, 105th Cong. (1997).

352. 18 U.S.C. § 1084(a) (2018).

those in the “business of betting or wagering,” which is examined in section B.<sup>353</sup>

*B. Who is in the Business of Betting or Wagering?*

The phrase “business of betting or wagering” appears in a variety of federal statutes, including the Wire Act and the UIGEA.<sup>354</sup> The legislative hearings in the later years of efforts to pass Wire Act legislation noted the importance of not targeting casual bettors, but instead targeting bookmakers, and large layoff bettors.<sup>355</sup> Hayes and Conigliaro argued that the plain language interpretation of the Wire Act supports a narrow interpretation as to the scope of the phrase “the business of betting or wagering.”<sup>356</sup> A narrow interpretation, as suggested, would incorporate a bookmaker, as the bookmaker is obviously within the business of accepting bets or wagers, but may not incorporate a parimutuel operator, “who has no stake in the event’s outcome and, thus, is not itself betting or wagering.”<sup>357</sup> The lack of definition within the statute, and the narrow result of the plain meaning may suggest that the phrase has some ambiguity requiring a more extensive examination of the legislative history.<sup>358</sup>

The legislative history of the Wire Act contains repeated observations that the statute was not intended to target the casual or social wager made amongst friends.<sup>359</sup> The Senate report that discusses the purpose of the addition of the “business of betting or wagering” language states as follows:

The second amendment changes the language of the bill, as introduced (which prohibited the leasing, furnishing, or maintaining of wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers), to prohibit the use of wire communication facility by persons engaged in the business of betting or wagering, in the

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353. *Id.*

354. See Ben J. Hayes & Matthew J. Conigliaro, “The Business of Betting or Wagering”: A Unifying View of Federal Gaming Law, 57 *DRAKE L. REV.* 445, 447 (2009).

355. See *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 12–13 (1961).

356. Hayes & Conigliaro, *supra* note 354, at 451–52.

357. *Id.* at 452.

358. *Id.*

359. See *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 12–13 (1961); *supra* section II.E.

belief that the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed; and has further amended the bill to prohibit the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering which is designed to close another avenue utilized by gamblers for the conduct of their business.<sup>360</sup>

The purpose of the amended language was to target those running gambling businesses and to close loopholes that might allow someone to escape prosecution. The legislation was referred to as targeting organized crime and professional gambling operations.<sup>361</sup> By 1961, it became apparent that Congress supported a more limited range of targeted entities, through a narrow interpretation of those in the business of betting or wagering.

Although the legislative history of the Wire Act supports a narrow application of the statute, the case law is perhaps slightly broader. Nevertheless, there has been no direct challenge to the business of betting or wagering not involving “bookmakers, professional gamblers, criminal organizations, or individuals associated with such persons.”<sup>362</sup> Importantly, courts have held that the Wire Act does not incorporate the act of mere betting.<sup>363</sup> While there is likely a fact-specific analysis of when casual betting becomes a gambling business, in one case regarding an ongoing relationship between a bettor and an acquaintance, where the acquaintance accepted between fifty and seventy wagers, the Court found that the activity violated the Wire Act.<sup>364</sup> The Wire Act’s application to those in the business of betting or wagering is likely a fairly narrow scope of activities with which the government is capable of targeting both by the law’s plain language and existing jurisprudence.<sup>365</sup>

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360. S. REP. No. 87-588, at 2 (1961).

361. *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 12 (1961).

362. *See* Hayes & Conigliaro, *supra* note 354, at 460–61.

363. *See, e.g.*, *United States v. Baborian*, 528 F. Supp. 324, 327–28 (D.R.I. 1981), *rev’d sub nom*, *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983) (noting that while some aspects of who was intended to be covered by the phrase “professional gambler” are uncertain, “[w]hatever meaning the Congress had in mind, it certainly did not appear to include a mere bettor”).

364. Hayes & Conigliaro, *supra* note 354, at 462 (citing *Truchinski v. United States*, 393 F.2d 627, 630–31 (8th Cir. 1968)).

365. *See id.* at 465–66.

C. *Does the Wire Act only Apply to Sports Betting?*

Indeed, the most enduring question in recent memory about the Wire Act's scope asks whether the Wire Act incorporates only sports betting or whether it incorporates a plurality of activities.<sup>366</sup> The 1997 internet gambling hearing featured testimony that elucidated the perception that the Wire Act was only intended to apply to sports wagering.<sup>367</sup> Gambling expert Anthony Cabot testified:

The key deficits with application of current law to Internet gambling would be solved by this bill's expansion of the definition of a communication facility, by its removing of ambiguities caused by the words "sporting event or contest," and by broadening the definition of a bet or wager.<sup>368</sup>

The implication of Cabot's testimony was that the Wire Act would require an amendment to incorporate activities beyond sports betting.<sup>369</sup> There is virtually no testimony in the final two Wire-Act-related hearings that indicate the scope of the bill to incorporate a range of activities beyond sports betting.<sup>370</sup> In fact, the assistant attorney general testified that the statute "was aimed at a particular situation, gambling, a specific type of gambling, and the layoff bettor."<sup>371</sup> The Miller testimony was in reference to the statute targeting the narrow gambling activity of sports betting.<sup>372</sup> Contrary to the 2018 Office of Legal Counsel's assertions that the amendments to the language imposing the "business of betting or wagering" language was part of a scheme to limit only one portion of the statute to sports betting or wagering, there is no indication in the Senate report detailing this change that such was the intent.<sup>373</sup>

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366. See Mark Hichar & Erica Okerberg, *DOJ Opinion Increases the Scope of the Wire Act, Significantly Affecting Gaming Industry Stakeholders*, 23 GAMING L. REV. 168 (2019).

367. *The Internet Gambling Act of 1997: Hearing on S. 474 Before the Subcomm. on Technology, Terrorism, and Government Information of the S. Comm. on the Judiciary*, 105th Cong. (1997).

368. *Id.* at 24 (statement of Anthony Cabot).

369. *Id.*

370. See *Legislation Relating to Organized Crime: Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. (1961); *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. (1961).

371. *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 278 (1961) (statement of Herbert Miller, Assistant Att'y Gen. of the U.S.).

372. *Id.*

373. S. REP. No. 87-588 (1961).

The case law on the whether the Wire Act only applies to sports wagering is mixed, with *In re Mastercard* being the most prominent decision to hold that the statute is limited to wagering on “sporting events or contests.”<sup>374</sup> In addition to the Fifth Circuit, there is dicta from the First Circuit supporting a conclusion that the Wire Act applies exclusively to betting and wagering on sporting events or contests.<sup>375</sup> Meanwhile, in other cases, such as *United States v. Lombardo*,<sup>376</sup> courts have concluded that the sporting event or contest language is limited to individual prohibitions within the two clauses of the statute but the statute as a whole is more broadly applicable.<sup>377</sup> The *Lombardo* decision as to the scope of the Wire Act is nearly entirely based on a reading of the statute, and summarily dismisses the *In re Mastercard* decision on the basis of the fact that the decision was based on a prohibition within the Wire Act that includes the sporting events or contests language, while not engaging with the fact that the *In re Mastercard* decision does not delve into this delineation between the clauses.<sup>378</sup> Instead, the Utah District Court looks to a New York case wherein the defendant, who operated an online casino, was charged with a variety of state and federal counts.<sup>379</sup> While the *Lombardo* decision was correct regarding the *New York v. World Interactive Gaming Corp.*<sup>380</sup> decision to convict the defendants, the New York state court did not address the scope of the “sporting events and contests” language and instead focused the statute’s application to those in the business of betting or wagering.<sup>381</sup> Indeed, the 2018 Wire Act memorandum suggests that at least four cases have indicated that the Wire Act’s sporting event or contest language may apply to only a specific

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374. *In re Mastercard Int’l Inc.*, 313 F.3d 257, 262 (5th Cir. 2002) (noting that “[t]he district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had failed to allege that they had engaged in internet sports gambling” and “agree[ing] with the district court’s statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion”).

375. *See United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014).

376. 639 F. Supp. 2d 1271 (D. Utah 2007).

377. *Id.* at 1278–82 (noting that its analysis was not actually necessary to its determination of the defendants’ motions as the defendants did appear to engage in some conduct that would still implicate the Wire Act).

378. *Id.* at 1279–80.

379. *Id.* (citing *New York v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 714 N.Y.S.2d 844 (Sup. Ct. 1999)).

380. 185 Misc. 2d 852, 714 N.Y.S.2d 844, 861–62 (Sup. Ct. 1999).

381. *Id.*

portion of the statute,<sup>382</sup> but the overwhelming majority of reported cases have dealt with bookmaking as the targeted offense.<sup>383</sup>

The legislative history of the Wire Act provides a clear indication that the intent of the statute was to target bookmakers and layoff bettors and not the casual gambler betting on sporting events or contests.<sup>384</sup> There is virtually no indication in the hearings or reports from 1961 that Congress intended a broader range of activities to be targeted.<sup>385</sup> The plain reading of the statutory text has been referred to as both ambiguous<sup>386</sup> and not ambiguous.<sup>387</sup> While there appears to be sufficient ambiguity that two justice departments, and various federal district courts have reached different conclusions as to where the sporting events and contests language applies, this in principle should justify an examination of the legislative history,<sup>388</sup> which would lead to the conclusion that the Wire Act as a whole was intended to implicate a very small segment of the illegal gambling industry involving betting on sporting events and contests. There is also a pressing need to address the question of what information is used to assist in the placing of bets or wagers, particularly as legal sports gambling expands nationwide and gaming operators and supporting industries look to control costs.

#### D. *What is Information Assisting in Placing Bets or Wagers?*

The Wire Act prohibits the “transmission of . . . information assisting in the placing of bets or wagers,” but what exactly is included within

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382. ENGEL MEMO, *supra* note 16, at 4 n.5.

383. *See* Hayes & Conigliaro, *supra* note 354, at 460–61 (suggesting that in the roughly 190 reported federal decisions involving the a Wire Act conviction being upheld, the decision has involved “bookmakers, professional gamblers, criminal organizations, or individuals associated with such persons”).

384. *See supra* section II.E.

385. *Legislation Relating to Organized Crime: Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcomm. No. 5 of the S. Comm. on the Judiciary*, 87th Cong. (1961); *see also The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. (1961).

386. *See* SEITZ MEMO, *supra* note 15, at 4–6.

387. *See* ENGEL MEMO, *supra* note 16, at 23.

388. *See* Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1, 7 (1954) (noting that even staunch supporters of the plain meaning rule recognize that legislative history may be used to resolve ambiguity); Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229, 261 (2004) (discussing a New York statute that governs statutory construction, which says that where legislation is clear as to legislative intent, and there is not ambiguity, courts should not endeavor further; but when it is not clear from the text, the court may be required to look into the intent of the legislature).

“information” is an open question.<sup>389</sup> In *United States v. Scavo*,<sup>390</sup> Frank Scavo was convicted under the Wire Act for providing a Minneapolis bookmaker with odds and point spread information.<sup>391</sup> Scavo appealed, arguing, amongst other things, that there was insufficient evidence to support a Wire Act conviction.<sup>392</sup> The Court of Appeals rejected Scavo’s argument, finding that the supplying of line information was sufficient to implicate the reach of the Wire Act.<sup>393</sup>

In contrast, in *United States v. Baborian*,<sup>394</sup> the defendant was accused of both wagering and providing betting opinions on which games would be best for a codefendant to wager on.<sup>395</sup> The court found that Baborian was a mere casual bettor, and Congress did not intend to criminalize the discussion and evaluation of outcomes or opinions of sporting events amongst friends.<sup>396</sup> While these cases do little to elucidate the outer boundaries of what information is within the scope of the Wire Act, it is evident from the *Scavo* decision that information that enables a bookmaker to operate, such as providing odds and betting line information, is likely sufficient to trigger the statute.<sup>397</sup> Merely expressing betting predictions, on the other hand, likely does not trigger the statute.<sup>398</sup>

#### *E. Does the Wire Act Prohibit the Intermediate Routing of Gambling Information?*

Whether the Wire Act’s safe harbor protection exempts the so-called intermediate routing of information is a question that has been asked more frequently since the *Murphy* decision, and the doors of opportunity for states to legalize sports betting have opened.<sup>399</sup> The safe harbor provision is contained within section (b) of the Wire Act and states as follows:

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389. 18 U.S.C. § 1084(a) (2018). The mention of information is present in both Wire Act clauses “information assisting in the placing of bets or wagers on any sporting event or contest” and “or for information assisting in the placing of bets or wagers.” *Id.*

390. 593 F.2d 837 (8th Cir. 1979).

391. *Id.* at 839–40.

392. *Id.* at 840.

393. *Id.* at 841.

394. 528 F. Supp. 324 (D.R.I. 1981), *rev’d sub nom*, *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983).

395. *Id.* at 326.

396. *Id.* at 331.

397. *United States v. Scavo*, 593 F.2d 837, 840–42 (8th Cir. 1979).

398. *Baborian*, 528 F. Supp. at 331.

399. See Christine Swanick, *DOJ Opinion Leaves Industry Hanging: If UIGEA Exclusions Don’t Modify the Wire Act What Does That Mean for Intrastate Gambling Transactions?*, SHEPPARD MULLIN FIN. & BANKR. L. BLOG (Jan. 18, 2019), <https://www.bankruptcylawblog.com/uigea-exclusions-dont-modify-wire-act.html> [<https://perma.cc/VZ9F-SRKJ>].



Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for 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 that sporting event or contest is legal into a State or foreign country in which such betting is legal.<sup>400</sup>

For example, intermediate routing occurs when data that originates in state A, New Jersey, where the activity is legal and ends in state C, Nevada, where the activity is also legal, passes through state B, Washington, where the implicated activity is illegal.<sup>401</sup> The UIGEA exempts intermediate routing specifically, and for that reason the absence of such a provision in the Wire Act raises concerns that there is no such protection from intermediate routing implicating the statute.<sup>402</sup> While not conclusive, there is an indication in the House report that Congress intended for intermediate routing to not be a concern.<sup>403</sup> In explaining the safe harbor provision, the report states:

Phrased differently, the transmission of gambling information on a horserace from a State where betting on that horserace is legal to a State where betting on the same horserace is legal is not within the prohibitions of the bill. Since Nevada is the only State which has legalized offtrack betting, this exemption will only be applicable to it. For example, in New York State parimutuel betting at a racetrack is authorized by State law. Only in Nevada is it lawful to make and accept bets on the race held in the State of New York where parimutuel 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. On the other hand, it is unlawful to make and accept bets in New York State on a race being run in Nevada. Therefore, the transmission of information assisting in the placing of bets and wagers from Nevada to New York would be contrary to the provisions of the bill. Nothing in the exemption, however, will permit the transmission of bets and wagers or money by wire

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400. 18 U.S.C. § 1084 (b) (2018).

401. See *DOJ Reconsiders Its View on the Wire Act – What Happens Now?*, DUANE MORRIS (Jan. 16, 2019), [https://www.duanemorris.com/alerts/doj\\_reconsiders\\_view\\_wire\\_act\\_what\\_happens\\_now\\_0119.html](https://www.duanemorris.com/alerts/doj_reconsiders_view_wire_act_what_happens_now_0119.html) [<https://perma.cc/GBA7-LW5D>].

402. See 31 U.S.C. § 5362(10)(E) (2006) (“The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.”).

403. H.R. REP. NO. 87-967, at 3 (1961).

as a result of a bet or wager from or to any State whether betting is legal in that State or not.<sup>404</sup>

The passage, while not addressing illegality in noncontiguous states, implies that the intent was to allow for transmission that crosses through third-party states where the activity is illegal—provided the transaction remains unchanged in both the originating and receiving jurisdiction where the activity is lawful.<sup>405</sup>

In *Lyons*, the First Circuit Court of Appeals explained that “the safe harbor provision only applies to the transmission of ‘information assisting in the placing of bets.’ The safe harbor provision does not exempt from liability the interstate transmission of bets themselves.”<sup>406</sup> So, while the safe harbor may enable the transmission of information such as betting odds and information to travel interstate between friendly jurisdictions, the statute does not enable interstate wagering compacts, even if legal in both the originating and receiving jurisdiction.<sup>407</sup> The First Circuit clarified that “the Wire Act prohibits interstate gambling without criminalizing lawful intrastate gambling or prohibiting the transmission of data needed to enable intrastate gambling on events held in other states if gambling in both states on such events is lawful.”<sup>408</sup> There is no case directly on point addressing the intermediate routing issue. Perhaps most informative is a case which originated in 1962.<sup>409</sup>

In *United States v. Yaquinta*,<sup>410</sup> six defendants were operating a bookmaking operation whereby the defendant, Yaquinta, would relay horse racing information that he received by radio transmitter to others in bookmaking shops around the state of West Virginia.<sup>411</sup> Known to the defendants, long distance calls were connected via an operator in Ohio, and thus when Yaquinta placed his calls to others in West Virginia the calls were being routed through a wire communication facility in Ohio.<sup>412</sup> In denying the defendants’ motions to dismiss, the Northern District of West Virginia judge cited the congressional intent of stamping out illegal gambling.<sup>413</sup> This is indeed an important point of distinction as the

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404. *Id.*

405. *Id.*

406. *United States v. Lyons*, 740 F.3d 702, 713 (1st Cir. 2014) (citing *United States v. McDonough*, 835 F.2d 1103, 1104–05 (5th Cir. 1988)); *United States v. Bala*, 489 F.3d 334, 342 (8th Cir. 2007)).

407. *Id.*

408. *Id.*

409. *United States v. Yaquinta*, 204 F. Supp. 276 (N.D. W. Va. 1962).

410. 204 F. Supp. 276 (N.D. W. Va. 1962).

411. *Id.* at 277.

412. *Id.*

413. *Id.* at 278–79.

*Yaquina* defendants were engaged in illegal conduct in both West Virginia and Ohio, which is hardly the scenario of two jurisdictions that each have legalized an activity and a third that has not.<sup>414</sup> The *Yaquina* and *Lyons* cases appear to reach different conclusions regarding the safety of intermediate routing; in all likelihood it was not Congress's intent to allow pass-through states to criminalize conduct, legal at both the origin and destination, but it appears as though an ambitious prosecutor in a state where information passes through, particularly if there is a re-routing of sorts, akin to operating patching together calls, there is a possibility for exposure under the Wire Act.<sup>415</sup>

### 1. Pooling

The practice of pooling player funds from multiple states is a common practice in various forms of online gambling. It is how the Mega Millions and Powerball lotteries are able to offer jackpots worth hundreds of millions of dollars, effectively having a lottery that includes forty-four states, as well as the District of Columbia and the U.S. Virgin Islands.<sup>416</sup> The advantage of pooling agreements is that it allows smaller states to offer the same types of pricing as larger states without gambling companies being exposed to the larger risk associated with a smaller market.<sup>417</sup> Since prior to the 2018 Office of Legal Counsel opinion, the agreements have been popular among states that allow online poker and other forms of internet gambling.<sup>418</sup> Exempting pooling from the Wire Act for horse racing was deemed necessary to allow the sport to remain commercially viable, as it enabled interstate simulcast racing.<sup>419</sup>

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414. *Id.*

415. H.R. REP. NO. 87-967, at 3 (1961). Some states have attempted to make their own declarations regarding the non-application of intermediate routing, though these declarations are worthless, as states cannot legislate the scope of federal law. *See, e.g.*, NEW JERSEY SPORTS WAGER LAW P.L. 2018, C.33, <https://www.nj.gov/lps/ge/docs/SportsBetting/SportsWageringLawPL2018c3.pdf> [<https://perma.cc/AX8K-DAUT>].

416. *See* Ryan Butler, *Could States Share Sports Betting Liquidity Despite Laws?*, GAMBLING.COM (Jan. 10, 2019), <https://www.gambling.com/news/could-states-share-sports-betting-liquidity-despite-laws-1753100> [<https://perma.cc/G46P-4Y87>].

417. Tamara S. Malvin, *Online Gambling and the DOJ's Wire Act Reinterpretation*, JDSUPRA (Jan. 28, 2019), <https://www.jdsupra.com/legalnews/online-gambling-and-the-doj-s-wire-act-66154> [<https://perma.cc/VZ5A-J8UC>].

418. James G. Gatto, *INSIGHT: Interstate Online Gambling Dealt Blow by DOJ Flip Flop on Wire Act*, BLOOMBERG L. (Feb. 14, 2019, 1:01 AM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-interstate-online-gambling-dealt-blow-by-doj-flip-flop-on-wire-act> [<https://perma.cc/GVX9-A89V>].

419. Andy Faust, *Thanks to the Wire Act, There is No "Shared Liquidity" in Sports Betting*, LEGAL SPORTS BETTING (June 10, 2019, 11:47 AM), <https://www.legalsportsbetting.com/news/thanks-to-the-wire-act-there-is-no-shared-liquidity-in-sports-betting> [<https://perma.cc/7888-JAU4>].

By virtue of accepting bets or wagers in interstate commerce, internet gambling activities, beyond sports wagering, may face a new threat that they were presumed safe based on the 2018 Office of Legal Counsel memorandum.<sup>420</sup> But by the text of the statute, the sports betting community remains prohibited from accepting bets or wagers via interstate wire communication facilities, as the statute's safe harbor only enables the interstate (or foreign) transmission of *information*, not the bets and wagers themselves.<sup>421</sup> While UIGEA exempts intermediate routing concerns that may arise with pooling, UIGEA's rule of construction does not alter or modify any other state or federal law,<sup>422</sup> leaving in place the Wire Act's prohibition on interstate transmission via wire communication facility of bets or wagers, even where the betting or wagering was legal in both jurisdictions.<sup>423</sup>

Some of the common questions regarding the scope of the Wire Act have been analyzed in Part III. Part IV examines the application of the Wire Act to two of the largest segments of the sports gambling industry currently operating in interstate commerce, the daily fantasy sports industry, and the gambling data sales industry.

#### IV. APPLYING THE WIRE ACT IN THE MODERN WORLD

In the nearly sixty years since the passage of the Wire Act much has changed, not only technologically, but with respect to moral concerns across society. Gambling is viewed less as a scourge that preys on people than it is a viable funding mechanism for projects that are desperately

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420. *Id.*

421. 18 U.S.C. § 1084(b) (1994). A court has never directly addressed the issue of whether interstate parimutuel pools trigger the Wire Act, but dicta from the Eighth Circuit suggests that such interstate pooling may offend the statute. *See Hayes & Conigliaro, supra* note 354, at 464–65 (“Here, the trial record suggests that North Dakota passed the 2001 account wagering statute in an attempt to attract interstate electronic betting. If the reach of § 1084 is as broad as its legislative history suggests, the attempt, if successful, will violate federal law. We leave that issue to another day.” (citing *United States v. Bala*, 489 F.3d 334, 342 (8th Cir. 2007))).

422. 31 U.S.C. § 5361(b) (2006) (providing UIGEA's rule of construction, which states that “[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States”).

423. *See United States v. Cohen*, 260 F.3d 68, 75 (2d Cir. 2001) (“As we have noted, that safe harbor excludes not only the transmission of bets, but also the transmission of betting information to or from a jurisdiction in which betting is illegal. As a result, that provision is inapplicable here, even if WSE had only ever transmitted betting information.”).

needed.<sup>424</sup> One of the first tests of the willingness of American society to accept legalized sports betting was the rise of daily fantasy sports.<sup>425</sup>

A. *Daily Fantasy Sports and the Wire Act*

The daily fantasy sports industry took the country by storm, culminating in a massive advertising spend in 2015.<sup>426</sup> The two major companies, FanDuel and DraftKings, attracted hundreds of millions of dollars of investments from venture capital firms, media partners, and professional sports leagues.<sup>427</sup> The two major companies offered three prominent types of contests: (1) guaranteed prize pool contests, which often involved thousands of contestants vying for prizes of upwards of one million dollars in some of the largest contests;<sup>428</sup> (2) fifty-fifty contests, which involve a large pool of players competing against each other (though typically fewer than a guaranteed prize pool contest) and the top half of the pool doubles their money;<sup>429</sup> and (3) head-to-head contests, where two daily fantasy competitors face off against one another directly, with the winner taking the other's money, minus a commission or "rake" that the website takes.<sup>430</sup>

The relevance of the Wire Act to daily fantasy sports websites is potentially significant.<sup>431</sup> The primary question facing the daily fantasy sports industry, with respect to whether they have exposure under the Wire Act, centers on whether daily fantasy sports players are making bets and wagers.<sup>432</sup> Daily fantasy sports appear to possess many similarities to

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424. See Holden, *supra* note 80.

425. See John T. Holden & Simon A. Brandon-Lai, *Advertised Incentives for Participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classification and Consumer Implications*, 15 ENT. & SPORTS L.J. 1, 2 (2017).

426. *Id.*

427. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 126 (2016).

428. See John T. Holden, Will F. Green & Ryan M. Rodenberg, *Daily Fantasy, Tipping, and Wire Fraud*, 21 GAMING L. REV. & ECON. 8, 9 (2017).

429. *Id.*

430. *Id.*

431. See Edelman, *supra* note 427, at 137.

432. See *United States v. McDonough*, 835 F.2d 1103, 1104 (5th Cir. 1988) ("A federal statute makes criminal the transmission of wagers in interstate commerce. This court held in *Martin v. United States* that such transmission is proscribed whether or not wagering is forbidden by the law of the state where the bet is received. That decision determines the law of the circuit, so we affirm a conviction for receiving bets on baseball and football games by telephone from Texas to Massachusetts despite the lack of evidence or any charge that placing such bets in Massachusetts was a state criminal offense."); Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 SPORTS L. J. 79, 89 (2015).

some forms of sports wagering, though whether the contests' entry fees constitute a bet or wager likely depends on state law.<sup>433</sup> In Texas, for example, it violates state law if a person "makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest."<sup>434</sup> FanDuel and DraftKings have contended that the fantasy sports contestant is the actual competitor, not the professional athletes, which would generally allow for an exemption from gambling laws and allow for competitors who pay an entry fee to compete in a contest and win a prize, but the Texas attorney general dismissed this assertion.<sup>435</sup>

The determination of whether an entity is a bet or wager is likely subject to a state-by-state determination in the case of daily fantasy sports operators; but with the congressional intent behind the Wire Act being to aid states in enforcing their own laws, it is likely that the federal government could act against a daily fantasy sports operator who meets a state law definition for illegal gambling.<sup>436</sup> Daily fantasy sports companies have potential exposure, in particular in states that have conclusively found the practices to be illegal. The sites that continue to operate, in states such as Texas, are not the only entities with potential exposure to Wire Act liability in the new world of state-regulated sports wagering.<sup>437</sup>

### B. *Data Partnerships and the Wire Act*

The modern sports betting world relies on many of the same features that bookmakers used the wire services for back in the 1950s, though today the companies have names like Sportradar and Genius Sports.<sup>438</sup> Sportradar's business serves three types of customers: "bookmaking customers and lotteries; digital and media customers; as well as leagues

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433. See Holden & Brandon-Lai, *supra* note 425, at 2.

434. Tex. Op. Att'y Gen. No. KP-0057 at \*9 (Jan. 19, 2016) (citing Tex. Penal Code §§ 47.01–.10), <https://www.legalsportsreport.com/wp-content/uploads/2016/01/Texas-ag-dfs-decision.pdf> [<https://perma.cc/V4A3-QFY7>].

435. *Id.*

436. See, e.g., S. REP. No. 87-588, at 2 ("The purpose of the bill, as amended, is to amend 'Chapter 50: Gambling,' of title 18, United States Code, with respect to the transmission of bets, wagers, and related information, to assist the several States in the enforcement of their laws pertaining to gambling . . ."). There is also an essential analysis of whether the websites are in the business of betting, which is discussed in *supra* section III.B.

437. See Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN (Feb. 18, 2016), [https://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legal-your-state-state-look](https://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legal-your-state-state-look) [<https://perma.cc/6U6A-CGB9>].

438. See John Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 NYU J.L. & BUS. 35 (2019).

and competition organizers.”<sup>439</sup> While both Sportradar and Genius Sports operate integrity services that monitor for irregular betting line movements that may indicate nefarious activity, their principal money-making business is selling sports data.<sup>440</sup>

The potential exposure under the Wire Act for data providers is dependent on a number of factors, but as both companies are official data suppliers of professional sports leagues, evaluating potential liability is worthwhile.<sup>441</sup> First, the locations of both the originating and receiving groups must be analyzed. As we are most likely addressing the sale of betting or wagering information, as opposed to bets or wagers themselves, the Wire Act’s safe harbor appears relevant.<sup>442</sup> While a number of states have expressed an interest in legalizing sports wagering, only a handful have done so, leaving many areas of the country still inhospitable to transmit “information assisting in the placing of bets or wagers.”<sup>443</sup> For betting information that originates from a state that has not legalized the type of betting fueled by the data sold from a prohibited jurisdiction, there is a potential problem under the Wire Act.

A second point of analysis is whether it is possible for data companies to argue that they are engaging with the data “for use in news reporting of sporting events.”<sup>444</sup> But this seems unlikely with respect to the delivery of information to sportsbooks themselves,<sup>445</sup> though it is possible that data companies’ sales to legitimate news clients may be protected by not only the Wire Act’s safe harbor, but also by the First Amendment.<sup>446</sup> Unlike the sale to legitimate news enterprises, the sale to sportsbooks is obviously for powering a business engaged in betting or wagering.<sup>447</sup> The most

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439. Taylor Bloom, *The Evolution of Sportradar*, SPORTTECHIE (Jan. 26, 2017), <https://www.sporttechie.com/the-evolution-of-sportradar> [<https://perma.cc/HBV9-L8RK>].

440. See Holden & Schuster, *supra* note 438, at 45, 49.

441. See Matt Rybaltowski, *Shakedown Fees: NBA, MLB Demanding Nevada Sportsbooks Pay More or Get Cut Off*, SPORTSHANDLE (May 2, 2019), <https://sportshandle.com/nba-mlb-demands-data-fee-nv-sportsbooks> [<https://perma.cc/Y66K-PU8S>].

442. 18 U.S.C. § 1084(b) (1994).

443. *Id.*; see also Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Dec. 30, 2019), [https://www.espn.com/chalk/story/\\_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization](https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization) [<https://perma.cc/VZG4-HPFQ>].

444. 18 U.S.C. § 1084(b) (2018).

445. See Rybaltowski, *supra* note 441.

446. See generally Ryan M. Rodenberg, Asa D. Brown & John T. Holden, *Real-Time Data and The First Amendment*, 11 WASH. J.L. TECH. & ARTS 63 (2015).

447. Matt Rybaltowski, *Tempers Flare At Panel On Official Sports Betting Data Requirements*, SPORTSHANDLE (May 17, 2019), <https://sportshandle.com/official-data-conference-panel/> [<https://perma.cc/W5SU-HL94>] (noting that real-time “data is the fuel that powers the in-play [betting] engine”).

significant question is likely whether the information being transmitted is within the scope of the Wire Act.

Whether the Wire Act's prohibition on the transmission of "information assisting in the placing of bets or wagers" encapsulates the type of data being sold to sportsbooks requires one to analyze what type of information assists in the placing of bets or wagers.<sup>448</sup> The impetus for the Wire Act was to target the means by which organized crime was able to run its bookmaking operations, notably the use of wire services that provided scores and other information that bookmakers could use to set and adjust the betting lines they shared with their customers.<sup>449</sup> While the Rhode Island District Court in *Baborian* opined that the sharing of opinions on which games had value to wager on was outside the scope of the Wire Act,<sup>450</sup> in *Scavo*, the Eighth Circuit rejected the argument that suppliers of betting line information are beyond the reach of the Wire Act.<sup>451</sup> In another case, the supplying of betting lines and weather reports was viewed by the Eighth Circuit as potential information assisting in placing bets or wagers.<sup>452</sup> In *United States v. Reeder*,<sup>453</sup> the Eighth Circuit found that the provisioning of scores and late breaking information constituted information within the scope of the Wire Act.<sup>454</sup> The determinations of whether the type of information being sold by data providers to sportsbooks and whether the safe harbor provision of the Wire Act is triggered, are likely fact-dependent inquiries, but the scope of which information courts have determined assist in the placing of bets or wagers may be problematic for some companies.

## V. RE-WRITING THE WIRE ACT

The reality of modern day sports gambling is that much of it takes place in interstate commerce and illegally.<sup>455</sup> Indeed, the illegal sports gambling market presents gamblers with some advantages over the legal market, with the existence of the Wire Act likely having an impact on some of

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448. 18 U.S.C. § 1084(a) (1994); *see supra* section III.D.

449. *See supra* Part II.

450. *United States v. Baborian*, 528 F. Supp. 324, 331 (D.R.I. 1981), *rev'd sub nom.* *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983).

451. *United States v. Scavo*, 593 F.2d 837, 841 (8th Cir. 1979).

452. *See Truchinski v. United States*, 393 F.2d 627, 631 (8th Cir. 1968).

453. 614 F.3d 1179 (8th Cir. 1980).

454. *Id.* at 1185.

455. *See* Brett Smiley, *How the U.S. Legal Sports Betting Business is Fundamentally Disadvantaged*, SPORTSHANDLE (Nov. 21, 2019), <https://sportshandle.com/legal-sports-betting-disadvantages/> [<https://perma.cc/FH72-MA72>].



these factors.<sup>456</sup> The expansion of legal sports gambling across the country has brought about a need to modernize the Wire Act to better reflect modern commerce and enable betting operators to offer products that can be competitive with offshore operators who are illegally accepting wagers from individuals located within the United States. The foundational question if the Wire Act is to be left in place is what should be done to clarify the intended scope of the statute.<sup>457</sup> The uncertainty that has been interjected into the Wire Act's scope as a result of the 2018 Engel memo has caused legislators and operators to take caution.<sup>458</sup> While clarity over the scope of the Wire Act would calm the gambling industry's nerves, certain clarifications to the statute should be considered in order to make legal sports betting more competitive with the illegal market. Thus, providing a viable alternative certain clarifications to the statute should be considered.

The first consideration would be to adopt the language from the UIGEA in regard to intermediate routing, thereby clarifying a major question mark surrounding the Wire Act's scope. At present, if information originating in a state with legal sports betting like Oregon passes through states like Washington, where sports betting currently remains illegal, the Wire Act may be implicated even if the end destination of that information is a jurisdiction with legal sports betting, such as Nevada.<sup>459</sup> The adoption of the intermediate routing language from the UIGEA would bring consistency to federal statutes affecting sports gambling, something that is presently lacking.<sup>460</sup> Adding certainty to the questions surrounding the intermediate routing of information through states like Washington, where sports gambling remains illegal, is but one means of improving the Wire Act for contemporary society.

There is also a need to better define what is within the scope of the term "information." At present, there remains a great deal of uncertainty as to just what information is included within the "information" assisting in the placing of bets or wagers.<sup>461</sup> The absence of enumerated pieces of "information" within the statute has left lawyers with questions as to what exactly triggers this clause of the statute. While we know the transmission

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456. *Id.*

457. *See supra* section III.C.

458. *See A Guide to Understanding the Wire Act*, PLAYUSA, <https://www.playusa.com/us/wire-act/> [<https://perma.cc/8ZC7-DPBJ>].

459. *See supra* section III.E.

460. *See* 31 U.S.C. § 5362(10)(E) (2006) ("The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.").

461. *See supra* section III.D.

of betting line information is sufficient to implicate this clause<sup>462</sup>—and opinions on who will prevail in a game are not sufficient<sup>463</sup>—there remains a great deal of ambiguity as to what other pieces of information constitute “information assisting in the placing of bets or wagers on any sporting event or contest.”<sup>464</sup> An enumerated list of types of information used by bookmakers would add certainty to the statute, perhaps inclusion of things like: (1) betting odds; (2) injury information; (3) expected weather; and (4) starting lineups. While many of these items would have legitimate uses in news reporting, such activity is already protected by the second clause of the statute.<sup>465</sup>

A more dramatic amendment to the Wire Act would be to allow for interstate wagering in states that both allow the same types of wagers.<sup>466</sup> The Wire Act was never intended to exist in a world with widespread legalized sports betting, it was passed in an era when gambling was almost wholly illegal. An amendment to the statute that allows for interstate wagers to be placed between jurisdictions with legal wagering could enable a more competitive betting market that is better able to compete with the illegal market by allowing consumers to shop for better prices before placing a wager.<sup>467</sup> Meanwhile, allowing the Wire Act’s safe harbor to protect bets, as well as information in assisting bets, would be one means of combatting the illegal sports betting market, by adding competition to the legal market likely generating better prices for consumers. However, the most impactful change regarding the Wire Act would not require amending the statute at all.

One of the biggest impediments to eradication of the illegal market is the lack of enforcement of federal gambling laws.<sup>468</sup> The lack of

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462. See *United States v. Scavo*, 593 F.2d 837, 840 (8th Cir. 1979).

463. *United States v. Baborian*, 528 F. Supp. 324, 331 (D.R.I. 1981), *rev’d sub nom.* *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983).

464. 18 U.S.C. § 1084(a) (1994).

465. See *id.* § 1084(b).

466. Presently, the Wire Act only allows interstate transmission of information assisting in placing of bets or wagers between legal jurisdictions. See *United States v. Lyons*, 740 F.3d 702, 713 (1st Cir. 2014); *United States v. Bala*, 489 F.3d 334, 342 (8th Cir. 2007); *United States v. McDonough*, 835 F.2d 1103, 1104–05 (5th Cir. 1988).

467. There is evidence that bookmakers exploit fans’ biases towards local teams. See David Purdum & Doug Kezirian, *The ‘Homer Effect’: A New Bookmaking Quandary*, ABC NEWS (June 19, 2018), <https://abcnews.go.com/Sports/homer-effect-bookmaking-quandary/story?id=56010419> [<https://perma.cc/Q8BU-AKWM>].

468. See *Post-PASPA: An Examination of Sports Betting in America: Hearing Before the Crime, Terrorism, & Homeland Sec. & Investigations Subcomm. of the H. Judiciary Comm.*, 115th Cong. (2018), <https://docs.house.gov/meetings/JU/JU08/20180927/108721/HHRG-115-JU08-Wstate-BruningJ-20180927.pdf> [<https://perma.cc/9NA3-X4D4>] (written testimony of Jon C. Bruning, Managing Partner, Bruning Law Grp.).

enforcement of gambling laws like the Wire Act has been a major component in the proliferation of illegal gambling. This lack of enforcement, and the seeming ubiquity of gambling that has resulted, has led to questions being raised over the fairness of enforcing gambling laws against anyone.<sup>469</sup> Much of the confusion surrounding the Wire Act could be resolved by a consistent approach to prosecuting illegal sports gambling operations. Absent a renewed commitment to enforcement of the statute, illegal gambling operators are likely to maintain an advantage over legal operators, as the likelihood of there being any consequences for their illegal actions are minimal.

As states like Washington begin to consider whether to legalize sports gambling or even to expand their existing gambling offerings to include online gambling, the Wire Act casts a large shadow.<sup>470</sup> States such as Washington, which have a large tribal gaming presence, face a difficult challenge in passing new gambling bills as the tribes and states have existing gaming compacts, which the authorization of a new type of wagering activity threatens to disrupt.<sup>471</sup> As a result of the more complicated gaming landscape in Washington State, and others similarly situated, it is possible that there will be some movement from the federal government to clarify or amend the Wire Act before legal sports betting makes its arrival.

## CONCLUSION

The Wire Act, which was passed before the moon landing, is now antiquated, having been drafted long before the internet and the reintroduction of lotteries, which came about in 1964.<sup>472</sup> Attempts to regulate the current world of legalized and state-regulated sports wagering with a statute that never endeavored to address such a world is sure to create difficulties. The challenges facing legalized sports betting are numerous, but chief among them is the ability to operate as a

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469. See John Holden, *Breaking Down The Rise and Fall of Legendz Sportsbook, Part II*, LEGAL SPORTS REP. (Aug. 1, 2019), <https://www.legalsportsreport.com/32871/legendz-sportsbook-sports-betting-2/> [<https://perma.cc/4BGE-7QTH>].

470. The Washington Gambling Commission held hearings in October 2019 with one stakeholder group and has engaged in an ongoing study of what sports gambling might look like in the state. See John Holden, *Checking Into What MLB Told Washington State Regulators*, LEGAL SPORTS REP. (Oct. 22, 2019), <https://www.legalsportsreport.com/35707/mlb-washington-state-sports-betting/> [<https://perma.cc/LG7V-N22F>].

471. James Drew, *Legal Sports Betting Might Be Years Away in Washington, Even as Other States Move Ahead*, OLYMPIAN (May 17, 2019), <https://www.theolympian.com/latest-news/article230517364.html> (last visited Apr. 17, 2020).

472. Kevin Flynn, *How NH Defied the Feds, Mob and Church to Create the First State Lottery*, N.H. MAG. (Dec. 14, 2015), <https://www.nhmagazine.com/how-nh-defied-the-feds-mob-and-church-to-create-the-first-state-lottery> [<https://perma.cc/49FD-VUYS>].

commercially viable entity in states that authorize sports betting, which may be threatened if activities like pooling offend the Wire Act.

The Wire Act's reinterpretation by the Department of Justice in 2018 adds increased focus to the deficiencies in the statute. The legislative history quite conclusively illustrates that neither Congress nor the authors in the Justice Department intended a broad statute that applied far beyond bookmakers and layoff wagering. The current interpretation appears to be an exercise of the executive branch interpreting laws in a fashion such that the legislative branch is removed from the process, as the 2018 Wire Act memorandum accomplishes what Congress failed to do via RAWA.

The Wire Act will continue to be a prominent focus as online wagering continues to expand. Unfortunately for the sports gambling industry, the Wire Act remains a very significant obstacle to realizing the true revenue potential of a widely legal market. Barring repeal or substantial revision, the Wire Act casts a vast shadow over both the legal and illegal sports gambling industries.