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MILLER, KEITH C.

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SPORTS BETTING INTEGRITY AT RISK: THE ROLE OF THE WIRE ACT

Keith C. Miller*

In the aftermath of the Supreme Court's invalidation of the federal law that limited sports betting to Nevada, nearly half the states have established regulated sports betting. Early indications are that the future of sports betting will be dominated by the use of online mobile applications. One federal law, however, the 1961 Wire Act, stands as an obstacle to the development of online markets for sports betting across state lines. This is more than a threat to the gaming industry. The Wire Act dampens incentives for bettors to migrate from illegal markets to the legal state markets and pits the limited enforcement resources of states against powerful global enterprises that operate illegally in the United States. The Wire Act needs to be brought into the twenty-first century and replaced with a law that recognizes the benefits that interstate markets for sports betting have for consumers. Along with this, a specific but limited role for the federal government needs to be created to combat the illegal sports betting markets that operate on a global basis. Without these actions, illegal markets will continue to flourish and undermine the integrity of sports contests and sports wagering in the United States.

* Ellis and Nelle Levitt Distinguished Professor of Law, Drake University. The author would like to thank his research assistants, Billy Daniels and Ryan Benn, for their help with this article.

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I. INTRODUCTION

On May 14, 2018, the Supreme Court issued a ruling that changed the landscape of gambling in the United States. In *Murphy v. NCAA*,¹ the Court held that Congress exceeded its constitutional authority when it forbade states from authorizing or allowing sports betting within a state.² In the approximately two years since that ruling, at least eighteen jurisdictions have passed laws legalizing sports betting, and more states are sure to follow.³ Moreover, sports betting has proven to be a popular form of gambling, with the money wagered by sports gamblers

1. *Murphy v. California*, 138 S. Ct. 1461 (2018).

2. 28 U.S.C. § 3702 (2012), *declared unconstitutional by Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

3. Ryan Rodenberg, *United States of sports betting: An updated map of where every state stands*, ESPN (June 9, 2020), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization.

exceeding many estimates.⁴ The biggest driver of the success of sports wagering has been the use of the Internet and mobile application to place bets. Indeed, in New Jersey, the state that scored the knock-out punch to the federal law, the percentage of money bet on sports through a mobile application in 2019 was nearly eighty-four percent of the total wagered.⁵ Figures from other states also make it clear that the future of sports wagering will be centered on mobile sports wagering.⁶

Despite the rapid growth of sports wagering in the United States, its expansion is threatened by a 1961 federal law, the Wire Act,⁷ which effectively forbids any expansion of sports betting beyond the boundaries of a state.⁸ Additionally, as interpreted by the Department of Justice's Office of Legal Counsel ("OLC") in 2018, the Wire Act may proscribe online sports betting even if the bettor and the sportsbook's computer servers are in the same state.⁹

4. Despite expectations of Nevada's handle decreasing because of the Court's decision, Nevada's handle also grew in 2019. Kelsey McCarson, *Nevada Hits Record \$5.3B for Sports Betting Handle in 2019*, GAMBLING.COM (Jan. 30, 2020), <https://www.gambling.com/news/nevada-hits-record-5-3b-for-sports-betting-handle-in-2019-2199500>; Devin O'Connor, *New Jersey Sports Betting Handle Could Overtake Nevada Next Year*, CASINO.ORG (Apr. 25, 2019, 7:39 AM), <https://www.casino.org/news/new-jersey-sports-betting-handle-could-overtake-nevada-next-year/>. *US Sports Betting Revenue and Handle*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting/revenue/> (last updated Aug. 26, 2020).

5. Press Release, New Jersey Office of the Attorney General, DGE Announces December 2019 Total Gaming Revenue Results (Jan. 14, 2020), <https://www.nj.gov/oag/ge/docs/Financials/PressRel2019/December2019.pdf> [hereinafter DGE Announces Results].

6. See, e.g., Matthew Waters, *PA Sports Betting Needs Less than A Year To Reach Mobile Potential*, LEGAL SPORTS REP. (Jan. 16, 2020), <https://www.legalsportsreport.com/36906/pa-sports-betting-december-2019-revenue/> (showing Pennsylvania's percentage of handle from online sports betting was eighty-six point eight percent in December); Matthew Waters, *Indiana Sports Betting Mobile Growth Outpacing Even The Biggest Markets*, LEGAL SPORTS REP. (Mar. 10, 2020), <https://www.legalsportsreport.com/38939/indiana-sports-betting-mobile-growth/> (showing a percentage of handle from online sports betting of seventy-seven point nine percent in February).

7. 18 U.S.C. § 1084 (2018).

8. "Whoever . . . in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate . . . commerce of bets or wagers . . . on any sporting event or contest . . . shall be fined under this title or imprisoned . . ." *Id.* § 1084(a) (emphasis added).

9. Memorandum from Steven A. Engel, Assistant Attorney General on Reconsidering Whether the Wire Act Applies to Non-Sports Gambling to the Acting Assistant Attorney General, Criminal Division, at 18 (Nov. 2, 2018), <https://www.justice.gov/sites/default/files/opinions/attachments/2018/12/20/2018-11-02-wire-act.pdf> [hereinafter 2018 Opinion]. The Opinion was not released until January of 2019, but it is dated November 2, 2018. See *id.* at 1; Dustin Gouker, *Department Of Justice Reverses Wire Act Opinion That Said Law Is Limited To Sports Betting*, ONLINE POKER REP. (Jan. 14, 2019, 3:06 PM), <https://www.onlinepokerreport.com/34391/doj-new-wire-act-opinion/>.

The implications of the OLC's construction of the Wire Act are vast and have application to all forms of Internet gambling.¹⁰ A challenge to the OLC's interpretation of the Wire Act is currently before the First Circuit Court of Appeals,¹¹ and many predict the case will find its way to the Supreme Court.¹² As it relates to sports wagering, however, a ruling affirming the OLC position could undermine the victory on sports betting won by the states in the Supreme Court in 2018. Even a ruling limiting the Wire Act's application does not cure a critical flaw of that law, a shortcoming that strikes at the heart of the integrity of the sports contests upon which bets are placed.

This Article will focus on the developments in sports wagering in the aftermath of the *Murphy* decision. With the ascendance of legal, regulated online sports betting, the Wire Act in its present form has outlived whatever value it may have had. Unless amended or repealed, the law threatens the growth of sports betting. Even worse, it complicates efforts to protect sports contests from corruption. If legal sports betting is to fulfill one of its core tenets—that a regulated structure for sports betting protects the integrity of sports contests—the Wire Act has to be rewired.

II. THE DEMISE OF PASPA AND THE RISE OF SPORTS BETTING LEGISLATION IN STATES

The Professional and Amateur Sports Protection Act (PASPA)¹³ was enacted in 1992 to halt the spread of sports betting in the United States.¹⁴ At that time, only Nevada had a system of full-scale sports wagering.¹⁵ PASPA was an unusual law in that it did not proscribe sports wagering directly. Rather, it forbade states from authorizing or licensing sports betting.¹⁶ While there is general acceptance of the proposition that Congress has authority under the Commerce Clause to prohibit

10. See 18 U.S.C. § 1084(a).

11. *N.H. Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132 (D.N.H. 2019), *appeal filed*, 1st Cir., Aug. 29, 2019.

12. Steve Bittenbender, *US Justice Department Wire Act Opinion Case Now Heads to Appellate Court*, CASINO.ORG (Aug. 17, 2019, 7:28 AM), <https://www.casino.org/news/us-justice-department-will-take-wire-act-opinion-case-to-appellate-court/> (noting this appeal is “the next step in a process that will likely end up before the Supreme Court”).

13. 28 U.S.C. §§ 3701-3704 (2012), *declared unconstitutional by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

14. ANTHONY CABOT & KEITH MILLER, *SPORTS WAGERING IN AMERICA: POLICIES, ECONOMICS, AND REGULATION* 56-57 (2018).

15. PASPA had a “grandfather” provision which permitted Nevada to continue to offer sports betting, effectively giving the state a monopoly on sports betting. See 28 U.S.C. § 3704(a)(1).

16. 28 U.S.C. § 3702.

sports wagering,¹⁷ this indirect manner of achieving that objective is what led to the demise of the law.

In 2011, New Jersey threw down the gauntlet when voters passed a constitutional amendment allowing sports betting in the state.¹⁸ Then, in 2012, the New Jersey legislature authorized and created a regulatory structure for sports betting.¹⁹ The major sports leagues and the NCAA sued New Jersey in the fall of 2012 and obtained injunctive relief in federal court on the basis that New Jersey was acting in violation of the federal law.²⁰ For nearly six years, the state took its lumps in the courts of the Third Circuit, losing case after case.²¹

Nevertheless, the handwriting was on the wall when the Supreme Court granted certiorari in July of 2017.²² For the Court to review a case after federal courts had uniformly *upheld* the constitutionality of a federal law indicated the Court had doubts about that law's constitutionality.²³ These reservations were confirmed during the oral argument in December of 2017.²⁴ Sure enough, on May 14, 2018, the Court struck down PASPA as an unconstitutional commandeering of state legislative powers.²⁵

The details of the Court's analysis and its implications for other areas of law have been the subject of many commentaries and they are not the focus of this paper.²⁶ In the aftermath of the decision, states lost

17. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1484-85 (2018) (“Congress can regulate sports gambling directly . . .”).

18. *Id.* at 1471.

19. *Id.*

20. *NCAA v. Christie*, 926 F. Supp. 2d 551, 553, 578-79 (D.N.J. 2013).

21. See *NCAA v. Governor of N.J. (Christie I)*, 730 F.3d 208, 241 (3d Cir. 2013); *NCAA v. Governor of N.J. (Christie II)*, 832 F.3d 389, 402 (3d Cir. 2016).

22. *Murphy*, 138 S. Ct. at 1461.

23. SCOTT L. NELSON, GETTING YOUR FOOT IN THE DOOR: THE PETITION FOR CERTIORARI 4 (2010) (“[T]he Court is unlikely to accept a case to resolve it if the case would come out the same way . . .”).

24. See Amy Howe, *Argument analysis: Justices seem to side with state on sports betting*, SCOTUS BLOG (Dec. 4, 2017, 2:51 PM), <https://www.scotusblog.com/2017/12/argument-analysis-justices-seem-side-state-sports-betting/>.

25. *Murphy*, 138 S. Ct. at 1461, 1484-85.

26. See, e.g., Diane Krausz, *Murphy v. NCAA: A Road Map to Cannabis Federalism Issues?*, 90 N.Y. ST. B. J. 24, 24 (2018) (state marijuana laws); Matthew A. Melone, *Murphy v. NCAA & South Dakota v. Wayfair, Inc.: The Court's Anticommandeering Jurisprudence May Preclude Congressional Action with Respect to Sales Taxes on Internet Sales*, 67 DRAKE L. REV. 413, 415-16 (2019) (internet sales tax); Garrett Epps, *The Supreme Court Says Congress Can't Make States Dance to Its Tune*, ATLANTIC (May 14, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/paspa-sanctuary-cities/560369/> (state sanctuary city laws).

no time in seizing the opportunity to establish sports betting.²⁷ The first wave of states included Delaware, New Jersey, Rhode Island, West Virginia, Mississippi, Pennsylvania, and New Mexico.²⁸ As of May 2020, ten more states have legal, regulated sports books in operation,²⁹ and six more jurisdictions have passed laws authorizing sports betting and are in various stages of implementing that legislation.³⁰ How many more states will be added to the list of those allowing sports betting in 2020 is uncertain, but there is every reason to believe this trend will continue.³¹ Indeed, this response by states to the *Murphy* decision ranks as one of the fastest expansions of any form of gambling in the United States.³²

III. THE FEDERAL GOVERNMENT'S INVOLVEMENT WITH GAMBLING AND SPORTS BETTING

The regulation of gambling in the United States has historically been regarded as the province of state governments rather than the federal government.³³ States vary in their perception of gambling depending upon the culture, history, and values of the particular state. Accordingly, when the federal government legislates in the gambling field it is typically with the purpose of assisting states in enforcing their own gambling laws. For example, in the 1960s and 1970s, Congress passed several laws which sought to counter the multi-state gambling operations controlled by organized crime.³⁴ The involvement of the federal government in investigating and prosecuting members of criminal organizations conducting gambling operations across state borders assisted state law enforcement whose efforts were frustrated by

27. Rodenberg, *supra* note 3 (explaining Delaware began its “full-scale sports gaming operation” about a month about the federal law was deemed unconstitutional).

28. Note that New Mexico is limited to tribal casinos. This is due to a tribal-state compact that didn't forbid sports betting. *See* Rodenberg, *supra* note 3.

29. These states include Arkansas, Colorado, Illinois, Indiana, Iowa, Michigan, Montana, New Hampshire, New York, and Oregon. *See id.*

30. The states in this “pending launch” mode are North Carolina, Oklahoma, Tennessee, Virginia, and Washington. *See id.* Washington D.C. is also in this category. *Id.*

31. *See* Legislative Tracker: Sports Betting, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> (last visited Oct. 8, 2020).

32. *See, e.g., USA State Casinos*, ONLINE U.S. CASINOS, <https://www.onlineunitedstatescasinos.com/states/> (last visited Oct. 8, 2020) (explaining the history of casino gambling began in 1822, but that by 1989, only three states had legalized it).

33. Jennifer Roberts & Greg Gemignani, *Who Wore It Better?: Federal v. State Government Regulation of Sports Betting*, 9 U.N.L.V. GAMING L.J. 77, 86 (2019).

34. *See, e.g.*, 18 U.S.C. § 1952 (2018) (effective Dec. 18, 2014) (The Travel Act); 18 U.S.C. § 1953 (The Wagering Paraphernalia Act); 18 U.S.C. § 1955 (The Illegal Gambling Business Act).

the interstate nature of these operations.³⁵ The greater resources of the federal government, as well as the broad jurisdiction it could exercise, supplemented state efforts to control illegal gambling. But states still had the primary, if not sole, responsibility for deciding what gambling could be conducted within their respective borders, as well as discharging the traditional functions of gambling regulation such as licensing, enforcement, and audit.³⁶

This concept of state-federal cooperation in defeating criminal gambling operations can also be applied to sports betting. However, several federal laws have displaced or constrained state regulation of that activity, and these laws have not always had positive effects. No better example exists than PASPA itself. When Congress forbade states from authorizing sports betting, they not only violated this principle of cooperation, they did so in a way that offended the Constitution.

A more successful federal initiative is the Interstate Horseracing Act (IHA),³⁷ a law enacted in 1978 that governs interstate, off-track wagering on horse races,³⁸ which can be thought of as a particularized form of sports betting. The IHA requires that race books obtain the “consent” of the tracks and horse owners whose events and horses are the object of the wagering the race book wants to offer.³⁹ However, this “consent comes with a price,” with the law having “the intent of assuring that the tracks receive a fair share of interstate wagers on races conducted at its track.”⁴⁰ The legislative history of the IHA indicates clearly that Congress believed this system of revenue sharing of interstate off-track wagering was necessary to the success, or even survival, of the horse racing industry.⁴¹ There is a strong consensus that the IHA met its original objective of “spreading the wealth” of wagering on races among the horse tracks, the owners and trainers, and the race books,⁴² although there are also many voices asserting a need to reform the law.⁴³

35. G. Robert Blakey & Harold A. Kurland, *Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 960-61 (1978).

36. CABOT & MILLER, *supra* note 14, at 78.

37. 15 U.S.C. §§ 3001-3007 (2018).

38. The law was reauthorized in 2001. See Pub. L. No. 106, 553, § 1(a)(2), 114 Stat. 2762, 2762A-108 (2000).

39. 15 U.S.C. § 3004.

40. Anthony Cabot, *The Absence of a Comprehensive Federal Policy Toward Internet and Sports Wagering and a Proposal for Change*, 17 Jeffrey S. Moorad Sports L.J. 271, 280-81.

41. See S. REP. NO. 95-117, at 3-4 (1978).

42. See Douglas L. McSwain, *The Legalization of Sports Betting: A Federalism Framework and the Horse Racing Model*, 11 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 63, 83 (2018).

43. See, e.g., Joel Turner, *Update the 1978 Interstate Horse Racing Act—survival of the US industry depends upon it*, THOROUGHBRED RACING COMMENTARY (Feb. 17, 2015),

Despite PASPA being kicked to the curb and the IHA being limited to horseracing, threats remain to the health and growth of sports wagering in the United States. The main peril is a 1961 federal law—the Wire Act—which in its current form ominously looms over the head of sports betting.⁴⁴

IV. THE SPORTS BETTING MARKET POST-*MURPHY*

To appreciate the vulnerability of the U.S. sports betting market, it is necessary to appraise what has happened in the aftermath of the *Murphy* decision. The experience in a few states, where sports betting has taken root, is telling.

A. New Jersey

Although New Jersey was not the first state to seize the opportunity to offer sports betting after the Supreme Court’s decision, it acted swiftly.⁴⁵ Governor Phillip Murphy not only signed the sports betting bill into law on June 11, 2018,⁴⁶ he made the first legal wager at the Monmouth Park Racetrack on June 14th.⁴⁷ By any measure, sports wagering has been successful in the state. In 2019, the first full year of legal sports betting, the total sports wagering handle was nearly \$4.6 billion and sports books won (“held”) slightly more than \$293 million of the amount wagered.⁴⁸ A more detailed look at the amount of money wagered on sports, however, reveals a crucial detail: nearly eighty-five percent of the amount wagered on sports, over \$3.8 billion, was bet online, either through a mobile application or on a sportsbook’s web

<https://www.thoroughbredracing.com/articles/update-1978-interstate-horse-racing-act-%E2%80%93-survival-us-industry-depends-upon-it/>

44. See Daniel Smyth, *Sword of Damocles Hangs Over US Gaming as DOJ Files Wire Act Appeal*, CARDSCHAT NEWS (Aug. 19, 2019), <https://www.cardschat.com/news/doj-files-wire-act-appeal-84012>; see also 18 U.S.C. § 1084.

45. Delaware was first. Ahiza Garcia, *Delaware is first state to allow sports betting after Supreme Court ruling*, CNN BUSINESS (May 31, 2018, 4:50 PM), <https://money.cnn.com/2018/05/31/news/companies/sports-betting-delaware-sportspick/index.html>.

46. Rodenberg, *supra* note 3.

47. Wayne Parry, *Gov. Murphy places first wager as New Jersey begins taking legal sports bets*, WHYY (June 14, 2018), <https://whyy.org/segments/gov-murphy-places-first-wager-as-new-jersey-begins-taking-legal-sports-bets/>; Darren Rovell, *New Jersey governor Phil Murphy places state’s first sports bets*, ESPN (June 14, 2018), https://www.espn.com/chalk/story/_/id/23791949/new-jersey-governor-phil-murphy-places-state-first-sports-bets.

48. DGE Announces Results, *supra* note 5. *Handle* means “the total amount of money wagered by bettors.” *Sports Betting Handle vs. Revenue*, LINES (May 24, 2018), <https://www.thelines.com/sports-betting-handle-revenue/>.

site.⁴⁹ On-site sports betting made up less than fifteen percent of the total amount wagered.⁵⁰

The online wagering percentages for New Jersey may be largely a function of New Jersey's location next to New York. As of mid-2020, sports wagering in New York is limited to four upstate commercial properties and three tribal casinos.⁵¹ Moreover, all sports betting must be on-site, as no form of mobile sports betting is permitted in New York.⁵² In order for New Yorkers to bet on sports with New Jersey sportsbooks, they must be physically within New Jersey.⁵³ Geo-location technology, which uses data acquired from a person's mobile device to identify the user's actual physical location, assures that the bettor is in fact located in New Jersey.⁵⁴

Which is why New Yorkers are flooding west. But not too far west—44 percent of all mobile bets in New Jersey are made within two miles of the state border, according to GeoComply, with 80 percent made within ten miles. At a public hearing in May, FanDuel's COO said that as much as 25 percent of its business comes from New Yorkers crossing the border. For those carpetbagging gamblers

49. See DGE Announces Results, *supra* note 5.

50. See *id.* Sports wagering is often described as an "amenity" and is not a big revenue producer for casino properties. The hope is that patrons going to a casino to place sports wagers will also wager on other more profitable types of gambling, such as slot machines and table games. See Dar Danielson, *Casino managers look to sports betting to bring more customers*, RADIO IOWA (July 31, 2019), <https://www.radioiowa.com/2019/07/31/casino-managers-anticipate-new-customers-with-sports-betting/>.

51. See Jason Wolf, *Place your bets: Legal sports gambling arrives in New York*, BUFFALO NEWS (July 22, 2019), <https://buffalonews.com/2019/07/22/new-york-legal-sports-gambling-casino-online-betting-fanduel-draftkings-futures-mobile/>; Matt Rybaltowski, *New York Sports Betting*, USBETS (Sept. 20, 2020), <https://www.usbets.com/new-york-sports-betting/>.

52. See Matthew Kredell, *Governor Cuomo Ends Hopes of Mobile NY Sports Betting in Budget*, LEGAL SPORTS REP. (Mar. 25, 2020), <https://www.legalsportsreport.com/39371/ny-sports-betting-mobile-cuomo/>; Matt Rybaltowski, *New York Sports Betting*, USBETS (Sept. 20, 2020), <https://www.usbets.com/new-york-sports-betting/>.

53. *Id.*; David Hill, *The Sports Betting Capital of New York Is . . . Eastern New Jersey. Meet the Fanatics Who Make the Journey Each Weekend*, ESQUIRE (Oct. 24, 2019), <https://www.esquire.com/sports/a29329387/new-york-new-jersey-sports-betting-fan-duel-draft-kings-nfl/>.

54.

Out-of-staters have tried everything they can to get around these restrictions: deploying virtual private networks (VPNs) that mask users' IP addresses and therefore their location; trying to place bets from the Staten Island Ferry on its journey across New York Harbor; standing atop the Tri-States Monument in Port Jervis, their phones held high and oriented southward. Nothing has worked, thanks to the efforts of the aptly named GeoComply, which is licensed by the New Jersey Division of Gaming Enforcement to ensure all bettors comply with the state's geographical requirements. The company claims that in many cases it can locate users to within a few meters.

Hill, *supra* note 53.

without a car, Hoboken Terminal—which couldn't be closer to the state border without falling into the Hudson River—is a mecca.⁵⁵

B. Pennsylvania

New Jersey is not the only state where the online sports betting market has proven to be substantial. In Pennsylvania, sports betting was legalized in 2017,⁵⁶ and the first brick-and-mortar sportsbooks began operation in November of 2018, a few months after the *Murphy* decision.⁵⁷ The first online sportsbook in the state launched in May 2019 and as of January 1, 2020 there were eight online sportsbooks.⁵⁸ In January of 2019, Pennsylvania sports wagering generated a handle of \$32 million, with all wagering being on-site.⁵⁹ By December of 2019, the betting handle for the month was \$342 million, a ten-fold increase from January.⁶⁰ One explanation for the jump is that many sportsbooks began operating during 2019. However, the emergence of online sports betting was the driving force of the dramatic gains. Of the \$342 million wagered on sports in December 2019, eighty-six percent came from online betting.⁶¹ This handle of \$297.4 million dwarfed the on-site handle of \$45.1 million and is additional evidence of customer preference for the online product.⁶²

C. Indiana

The first on-site sportsbooks in the state began operation in September of 2019, with the online market launching the next month.⁶³

55. *Id.*

56. Sean Rohtla, *Pennsylvania governor signs bill expanding gaming and gambling*, JURIST (Nov. 1, 2017, 10:22 AM), <https://www.jurist.org/news/2017/11/pennsylvania-governor-signs-bill-expanding-gaming-and-gambling-to-increase-state-revenue/>. On October 30, 2017, Governor Tom Wolf signed House Bill 271 into law, enacting widespread gambling expansion. *Id.*

57. See Eric Ramsey, *PA Sports Betting Mobile Launches: Everything We Know Right Now*, LEGAL SPORTS REP. (May 28, 2019), <https://www.legalsportsreport.com/31876/pa-sports-betting-mobile-overview/>; *Pennsylvania Onlione Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/pa> (last visited Sept. 16, 2020).

58. Ramsey, *supra* note 57; *Pennsylvania Onlione Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/pa> (last visited Sept. 16, 2020).

59. PENNSYLVANIA GAMING CONTROL BOARD, MONTHLY SPORTS WAGERING REPORT, https://gamingcontrolboard.pa.gov/files/revenue/Gaming_Revenue_Monthly_Sports_Wagering_FY20182019.pdf (last visited Mar. 29, 2020).

60. *Id.*

61. *See id.*

62. *Id.*

63. Andrew Clark, *DraftKings, Rush Street Interactive launch Indiana's first online sportsbooks*, INDYSTAR (Oct. 3, 2019, 3:17 PM),

Though there are only a few months of data to evaluate, the online figures are again impressive. In January of 2020, the sports betting handle was \$170.8 million.⁶⁴ The online handle comprised seventy-two point two percent of that total.⁶⁵ Though Indiana's geographic neighbor Illinois enacted legislation in 2019 allowing sports betting, its launch of sports betting did not come until March of 2020.⁶⁶ It remains to be seen what effect Illinois sports betting will have on Indiana, but there is no reason to expect that online sports betting in Indiana would be diminished at a greater rate than on-site wagering.

D. Iowa

Iowa presents a helpful contrast to the states discussed above as its population is approximately 3.16 million, significantly smaller than Pennsylvania's 12.8 million, New Jersey's 8.88 million, and Indiana's 6.73 million.⁶⁷ Iowa legalized sports betting in May of 2019 and sportsbooks began operating on August 15, 2019.⁶⁸ As of February 2020, there are six online sportsbooks operating in the state.⁶⁹ The total sports wagering handle in the state in January of 2020 was slightly more than \$58 million, which was a two point one percent decrease from December of 2019.⁷⁰ Online sports wagering in January 2020 made up over fifty-eight percent of the handle.⁷¹ What makes this online handle figure particularly impressive is the barrier a bettor faces in placing an online sports wager. Iowa law requires bettors wanting to establish an

<https://www.indystar.com/story/news/politics/2019/10/03/draftkings-sportsbook-indiana-rush-street-interactive-indiana-sports-betting/3852774002/>.

64. Steve Bittenbender, *Indiana Sports Betting Handle Continues to Grow, Up By \$9 Million in January*, CASINO.ORG (Feb. 11, 2020, 10:21 AM), <https://www.casino.org/news/indiana-sports-betting-handle-continues-to-grow-up-9-million-in-january/>.

65. *Id.*

66. Mitchell Armentrout, *Illinois no longer off the board: Sports betting launches with wager at Rivers Casino*, CHI. SUN TIMES (Mar. 9, 2020, 10:37 AM), <https://chicago.suntimes.com/2020/3/9/21171479/illinois-sports-betting-launch-march-madness>.

67. See RESIDENT POPULATION OF THE U.S. IN 2019, BY STATE (INCLUDING THE DISTRICT OF COLUMBIA), STATISTA, <https://www.statista.com/statistics/183497/population-in-the-federal-states-of-the-us/> (last visited Oct. 15, 2020).

68. Rodenberg, *supra* note 3.

69. *Facility Licenses*, IOWA RACING & GAMING COMMISSION, <https://irgc.iowa.gov/facilities> (last visited Sept. 15, 2020); *Iowa Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/iowa/> (last visited Sept. 15, 2020) (explaining that thirteen casinos in Iowa allow for online betting through six websites).

70. Matthew Waters, *Iowa, Indiana Sports Betting Continue to Move in Opposite Directions*, LEGAL SPORTS REP. (Feb. 10, 2020), <https://www.legalsportsreport.com/37857/iowa-indiana-sports-betting-continue-to-move-in-opposite-directions/>.

71. *Id.*

account and wager through mobile applications or online to physically visit a retail sportsbook and register in person.⁷² This is in contrast to the states discussed above where one can establish and fund a mobile account from anywhere, though the person must be in the state to place an online wager. The Iowa provision, which will expire January 1, 2021,⁷³ suppresses demand for sports wagering generally, and online wagering in particular. Given this significant barrier to betting online, a fifty-eight percent figure for online sports betting is notable. This percentage will in all likelihood increase substantially once the in-person registration requirement expires.

The data from this array of states establishes clearly that the future of sports wagering will be in the online sphere.⁷⁴ Sports betting is a popular form of gambling for young men and conventional wisdom holds that young people favor conducting transactions on their devices, and this includes gambling.⁷⁵ The most predictable effect of trying to eliminate legal online sports betting, or to place significant restrictions on it, is that bettors will turn to the thriving, well-established illegal markets that exist globally. This creates a less secure environment for bettors, deprives governments of the revenue from taxing sports betting, and promotes criminal enterprises around the world.⁷⁶

One federal law in the United States poses a significant danger to regulated sports betting, as well as Internet gambling generally. The risks of this law extend far beyond a possible stunting of the growth of sports betting. In fact, the Wire Act undermines the very integrity of our sports contests themselves.

72. Danny Lawhon, *Iowa sports betting: What to do now that it's legal to wager*, DES MOINES REG. (July 30, 2019, 10:29 AM), <https://www.desmoinesregister.com/story/sports/2019/07/30/iowa-sport-betting-start-date-legal-sports-gambling-app-ncaa-college-football-spread-rule-how-to-bet/1857134001/>.

73. *Id.*

74. Other states with online sports wagering are Mississippi, Nevada, New Hampshire, Oregon, Rhode Island, and West Virginia. Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (May 29, 2020, 3:40 PM), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>. Mississippi allows mobile sports betting but only if the bettor is physically on the premises of the sports book. *Id.*

75. See Rebecca Jenkinson, Cassandra de Lacy-Vawdon & Megan Carroll, *Weighing up the odds: Sports betting and young men*, AUSTRALIAN INST. OF FAM. STUD. (2019), <https://aifs.gov.au/agrc/publications/weighing-odds-sports-betting-and-young-men>; Elijah McKown, *The new college student craze: Sports gambling*, STATE NEWS (Feb. 20, 2020), <https://statenews.com/article/2020/02/sports-gambling-and-college-students>.

76. See *Illegal Sports Betting*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/illegal-sports-betting> (last visited Sept. 13, 2020).

V. THE FEDERAL WIRE ACT

The 1961 Wire Act was championed by then-Attorney General Robert Kennedy as part of a package of laws designed to combat organized crime.⁷⁷ This nearly sixty-year-old provision, passed at a time when “wire communications” had a very limited scope, had confounded policy makers and the gaming industry and interjected considerable uncertainty into online gambling in the U.S.⁷⁸

Part of the controversy of the Wire Act relates to its tortured structure. In pertinent part, the law states:

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.⁷⁹

Commentators have been unsparing in their criticism of the law’s drafting.⁸⁰ The single sentence of this subsection has ninety-four words, several clauses, and leaves unclear such things as whether there is a difference between a “bet” and a “wager,” or between a “sporting event” or “sporting contest.”⁸¹ Nevertheless, at least a few things can be said about the law.

First, there is no question that its primary focus is on sports betting. The language makes that quite apparent. Second, the law is directed at bookies, that is, those “engaged in the business of betting or wagering,” and not individual bettors.⁸² Few contest the idea that, by targeting

77. 18 U.S.C. § 1084 (2018); see John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 581 (2020).

78. Brad Allen, *Will US Online Gambling Ever Be Free From The Wire Act?*, ONLINE POKER REP. (Apr. 6, 2020, 9:37 AM), <https://www.onlinepokerreport.com/40616/us-online-gambling-free-wire-act/>; *The Wire Act Explained*, COMPARE.BET (Jan. 24, 2020), <https://www.compare.bet/en-us/the-wire-act#:~:text=The%20Wire%20Act%20is%20a,illegal%20wagering%20across%20state%20lines.>

79. 18 U.S.C. § 1084(a) (2018).

80. See, e.g., Anthony Cabot, *The Absence of a Comprehensive Federal Policy Toward Internet and Sports Wagering and a Proposal for Change*, 17 JEFFREY S. MOORAD SPORTS L.J. 271, 282 (2010) (“The Wire Act, in its entirety, reads poorly and in parts, the Act is nearly incomprehensible.”).

81. 18 U.S.C. § 1084 (2018).

82. *Id.*; see *United States v. Southard*, 700 F.2d 1, 21-22 (1st Cir. 1983) (affirming language in a jury instruction that a “mere bettor” is not within the text of the law, regardless of the amount of the wager).

bookies, the Wire Act was meant to create a new federal offense directed at members of criminal groups who as part of their gambling operations took wagers by telephone.⁸³ Finally, activity involved had to constitute a “transmission” in interstate commerce.⁸⁴

The law’s shortcomings and imprecision took on a new dimension early in the twenty-first century when gambling on the Internet, including gambling on sports, became widespread. The growth of Internet gambling was rapid.⁸⁵ By the end of 1996, about fifteen online sites accepted wagers.⁸⁶ A year later, over 200 sites existed.⁸⁷ By 1999, this had increased to 650.⁸⁸ By 2002 it was approximately 1,800 sites.⁸⁹ This development was not regarded favorably in many circles, including the United States Department of Justice (DOJ).⁹⁰ Almost all of the companies offering online gambling to U.S. residents were operating outside the United States, and concerns about money laundering and other criminal activity were pervasive.⁹¹

The has federal government invoked a number of federal laws, including the Wire Act, to prosecute or threaten to prosecute online gambling businesses which operated poker sites or otherwise took wagers from American bettors.⁹² It is important to note that during this time, the legality of online poker was actively in dispute.⁹³ Many proponents of the activity asserted that it was predominately a game of skill and did not constitute gambling.⁹⁴

Questions regarding whether sports wagering constituted gambling were not part of this debate as PASPA clearly proscribed sports betting

83. See *United States v. Cohen*, 260 F.3d 68, 73-75 (2d Cir. 2001) (finding a violation of the Wire Act when a business took bets from New York residents over the phone but the actual bets were placed in Antigua); I. Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 659-60 (2012).

84. See Rose & Bolin, *supra* note 83, at 672.

85. Joseph J. McBurney, Note, *To Regulate or to Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry’s Future in the United States*, 21 CONN. J. INT’L L. 337, 344 (2006).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. See generally McBurney, *supra* note 85.

91. See generally Jon Mills, *Internet Casinos: A Sure Bet for Money Laundering*, 19 DICK. J. INT’L L. 77, 96 (2000).

92. See generally Jeffrey S. Moad, Note, *The Pot’s Right: It’s Time for Congress to Go “All in” for Online Poker*, 102 KY. L.J. 757, 759-760 (2014).

93. See, e.g., Mosi Secret, *Poker Is More a Game of Skill Than of Chance, a Judge Rules*, N.Y. TIMES (Aug. 21, 2012), <https://www.nytimes.com/2012/08/22/nyregion/poker-is-more-a-game-of-skill-than-of-chance-a-judge-rules.html>.

94. *Id.*

businesses outside of Nevada.⁹⁵ When it came to online sports betting the answer was even clearer. The Wire Act was fortified by the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA),⁹⁶ which, among other things, provided that those “engaged in the business of betting or wagering” could not “knowingly accept” any form of payment in connection with “unlawful Internet gambling.”⁹⁷ UIGEA also took aim at the funding of online gambling accounts, forbidding financial institutions from knowingly accepting or processing payments for wagers that were illegal according to federal or state law.⁹⁸ These three laws—PASPA, the Wire Act, and UIGEA—put sports betting outside of Nevada on ice for years.

VI. THE WIRE ACT—PART 2: THE FATEFUL YEAR OF 2011

Three developments made 2011 an important milestone in the history of Internet gambling and sports betting.

First, on April 15, 2011, a day known in the online gambling industry as “Black Friday,” the U.S. government unsealed an indictment against the top executives of three leading online poker sites, in addition to civil complaints against the companies themselves.⁹⁹ The defendants were alleged to have engaged in massive fraud and money laundering, deceiving some banks and bribing the officials of others, all in an effort to “assure the continued flow of billions in illegal gambling profits.”¹⁰⁰ The effect on the online gambling market was swift. According to one person, “it completely annihilated what was a flourishing industry in the United States.”¹⁰¹ In other words, “the booming online poker scene ground to a halt.”¹⁰²

95. Jill R. Dorson, *What Is PASPA, The Federal Ban on Sports Betting?*, SPORTS HANDLE (July 1, 2020), <https://sportshandle.com/what-is-paspa-sports-betting-ban-professional-amateur-sports/>.

96. 31 U.S.C. §§ 5361-5367 (2018).

97. *Id.* § 5363.

98. *Id.* § 5364.

99. Moad, *supra* note 92, at 757.

100. Press Release, U.S. Attorney’s Office, Southern District of New York, Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses, and Laundering Billions in Illegal Gambling Proceeds (Apr. 15, 2011), <https://www.fbi.gov/newyork/press-releases/2011/manhattan-u.s.-attorney-charges-principals-of-three-largest-internet-poker-companies-with-bank-fraud-illegal-gambling-offenses-and-laundering-billions-in-illegal-gambling-proceeds>.

101. Adrienne Jeffries, *Online poker industry still reeling two years after federal ‘Black Friday’ crackdown*, VERGE (Apr. 15, 2013, 11:30 AM), <https://www.theverge.com/2013/4/15/4226358/poker-black-friday-two-year-anniversary> (quoting poker agent Brian Balsbaugh).

102. *Id.*

Second, New Jersey voters set in motion the overthrow of PASPA in 2011 when they approved a legislatively-referred state constitutional amendment that permitted the legislature to legalize sports betting in the state.¹⁰³ The state legislature wasted no time acting on this authorization, sending Governor Christie a bill he signed on January 17, 2012 allowing sports betting at casinos and racetracks.¹⁰⁴ By August of 2012, the state was ready to launch sports betting when the sports leagues sued to prevent the implementation of the new Sports Wagering Act.¹⁰⁵ Thus, began the litigation that culminated nearly six years later in the Supreme Court declaration that PASPA was unconstitutional.¹⁰⁶

Finally, on December 23, supporters of online gambling got an unexpected “Christmas present”¹⁰⁷ from the Department of Justice’s (DOJ) Office of Legal Counsel (OLC).¹⁰⁸ For years, the DOJ had maintained that the Wire Act forbade Internet gambling of all types,¹⁰⁹ and had aggressively applied the law in prosecutions against operators of Internet poker sites.¹¹⁰ In a Memorandum Opinion, the OLC changed its previous legal assessment of the Wire Act and declared that the law only applied to sports betting, and not to other forms of Internet

103. *Murphy v. NCAA*, 138 S. Ct. 1461, 1471 (2018).

104. *Id.*; *NCAA v. Christie*, 926 F. Supp. 2d 551, 553, 556 (D.N.J. 2013).

105. *Murphy*, 138 S. Ct. at 1471; *Christie*, 926 F. Supp. 2d at 553.

106. Ultimately, the New Jersey law that came under challenge as the basis for the Supreme Court decision was a 2014 provision that sought to respond to the Third Circuit’s decision in *Christie I* that upheld PASPA and had held the New Jersey law was invalid. *See Murphy*, 138 S. Ct. at 1472-73.

107. I. Nelson Rose, *A Christmas present from the DoJ: Internet lotteries (and poker?) are legal*, CALVINAYRE.COM (Dec. 25, 2011), <https://calvinayre.com/2011/12/25/business/present-from-doj-internet-lotteries-and-poker-are-legal/>.

108. Memorandum from Virginia A. Seitz, Assistant Attorney General on 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 to Assistant Attorney General, Criminal Division (Sept. 20, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion_0.pdf [hereinafter 2011 Opinion].

109. *See, e.g.*, *United States v. Ayo*, 801 F. Supp. 2d 1323, 1325 (S.D. Ala. 2011); *see generally* Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, in CTR. FOR GAMING RESEARCH OCCASIONAL PAPER SERIES, (Univ. of Nevada, Las Vegas, Ctr. for Gaming Research: Occasional Paper Series No. 29, 2014) (signifying the reversal of the previous interpretation of the Wire Act’s scope used by the Bush Administration).

110. After the Unlawful Internet Gambling Enforcement Act (UIGEA) was enacted, it was often used in tandem with the Wire Act to prosecute Internet poker and other Internet betting operators. *See, e.g.*, *United States v. Elie*, No. S3 10 Crim. 0336 (LAK), 2012 WL 383403, at *1 (S.D.N.Y. Feb. 7, 2012); *accord* *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 860-63 (S. Ct. 1999) (applying federal violations in a case otherwise prosecuted under state law).

gambling.¹¹¹ Although the Opinion was issued in response to questions from state lotteries regarding the legality of online sales of lottery tickets, it effectively opened the door for states to offer all forms of Internet gambling, so long as it did not involve sports betting.¹¹² Internet gambling found new life.

In the period after the 2011 Opinion, however, there was little growth in the online gambling market. Until mid-2019, only Nevada, Delaware, and New Jersey had passed laws authorizing Internet gambling, and Nevada limited the activity to poker.¹¹³ Pennsylvania's online gambling market, authorized by legislation enacted in 2017, rolled out gradually.¹¹⁴ Online lottery and sportsbooks led the way, with the first online casinos launching on July 15, 2019.¹¹⁵ However, it was not until November of 2019 that online poker was offered.¹¹⁶

In 2014, Delaware and Nevada took advantage of the 2011 Memorandum Opinion and reached an agreement to share their poker liquidity, that is, to permit interstate games between players from the two states.¹¹⁷ New Jersey joined the pact with Nevada and Delaware in 2017.¹¹⁸ While Pennsylvania law allows for pooling of players, Pennsylvania has not yet joined the pooling agreement of Nevada, New Jersey, and Delaware. The failure of Pennsylvania to join an interstate compact is understandable. It is the same force that threatens the continued existence of online poker in most states, as well as online casino games in many. Most relevant to this discussion, it is the same development that threatens not only the growth and financial health of sports betting, but the integrity of the athletic contests themselves.

111. 2011 Opinion, *supra* note 108. Oddly, although the opinion is dated September 2011, it was not released until December of that year.

112. I. Nelson Rose, *What the Department of Justice Announcement Means*, 16 GAMING L. REV. & ECON. 259 (2012).

113. Associated Press, *Pennsylvania joins Nevada, New Jersey and Delaware as states where online gambling is legal*, MARKETWATCH (July 15, 2020, 3:02 PM), <https://www.marketwatch.com/story/pennsylvania-joins-nevada-new-jersey-and-delaware-as-states-where-online-gambling-is-legal-2019-07-15>; *Nevada Online Poker Sites*, POKER SCOUT (Sept. 26, 2020, 9:32 PM), <https://www.pokerscout.com/nevada/>.

114. Ramsey, *supra* note 57.

115. Andrew Maykuth, *Parx, SugarHouse, Hollywood casinos set to launch online gambling this week*, PHILA. INQUIRER (July 15, 2019), <https://www.inquirer.com/business/pennsylvania-casinos-launch-online-internet-gaming-parx-sugarhouse-hollywood-20190715.html>.

116. Andrew Maykuth, *Pennsylvania casino launches online poker games, a first in the state*, PHILA. INQUIRER (Nov. 4, 2019), <https://www.inquirer.com/business/fox-bets-pokerstars-first-to-launch-pennsylvania-internet-poker-20191104.html>.

117. MULTI-STATE INTERNET GAMING AGREEMENT, at 1 (Sept. 27, 2017), <https://www.nj.gov/oag/ge/2017news/MSIGA%20signed%20by%20all.pdf>.

118. *Id.* at 2-3, 12.

VII. THE WIRE ACT—PART 3: THE RAW POLITICS OF GAMING

For many years, polls suggested that Internet gambling was regarded less favorably than casino gambling. Even in 2013, when New Jersey began to allow Internet gambling, support for the activity was tepid.¹¹⁹ While support for Internet gambling has gradually increased over the past few years, the results are certainly mixed.¹²⁰

Political intrigue in the debate about Internet gambling became quite evident with the founding in 2014 of the online advocacy group, Coalition to Stop Internet Gambling.¹²¹ The web site of the group warns that, “Internet [g]ambling crosses the line of responsible gaming by bringing gambling into our living rooms and onto our smartphones, tablets and home computers twenty-four hours a day without necessary protections,” and that it “[t]arget[s] the young, the poor and the elderly where they live.”¹²² The driving force behind the opposition to online gambling was billionaire Sheldon Adelson, CEO of Las Vegas Sands, and a generous supporter of Republican Party political candidates.¹²³

The anti-Internet gambling cause came to Washington, D.C. in 2014 with the introduction of a bill called the “Restoration of America’s Wire Act” (RAWA).¹²⁴ The bill, partially drafted by a lobbyist for Adelson, was introduced by legislators who had been recipients of Adelson’s political contribution largesse.¹²⁵ In short, the bill would “restore” the meaning of the 1961 Wire Act by reversing the 2011 OLC Memorandum Opinion and extending the law’s application to all forms

119. Only thirty-two percent were in favor, and fifty-seven percent were opposed. Press Release, Farleigh Dickinson University Public Mind Poll, Interest in online gambling is blunted while support for marijuana lights up (Feb. 3, 2014), <http://publicmind.fdu.edu/2014/vice/> [hereinafter Online Gambling Blunted].

120. Online Gambling Blunted, *supra* note 119; Nicholas Garcia, *New Poll Says NY Online Sports Betting Is Not a Slam Dunk with Voters*, LEGAL SPORTS REP. (Feb. 12, 2019), <https://www.legalsportsreport.com/29016/ny-split-on-online-sports-betting-debate/> (showing forty-four percent both support and oppose online sports betting in New York).

121. See Anna Palmer, *Battling Adelson on online gambling*, POLITICO (Feb. 4, 2014, 10:45 PM), <https://www.politico.com/story/2014/02/sheldon-adelson-internet-gambling-coalition-for-consumer-and-online-protection-103135> (“Adelson . . . formed the Coalition to Stop Internet Gambling in January [2014] . . .”).

122. *Our Mission to Pursue*, COALITION TO STOP INTERNET GAMBLING, <https://stopinternetgambling.com/about-the-coalition/> (last visited Mar. 29, 2020).

123. See Palmer, *supra* note 121.

124. RAWA was first introduced into Congress in 2014 and was re-introduced the following year. H.R. 707, 114th Cong. (2015); H.R. 4301, 113th Cong. (2014).

125. See Admin, *Will Lindsey Graham’s Las Vegas Trip Trigger RAWA Jackpot For Sheldon Adelson?*, ONLINE POKER REP. (Apr. 27, 2015, 4:36 PM), <https://www.onlinepokerreport.com/16738/graham-las-vegas-trip-and-online-gambling-ban/>; Kevin Bogardus & Kate Tummarello, *Adelson finds allies in gambling crusade*, HILL (Mar. 20, 2014, 12:55 PM), <https://thehill.com/business-a-lobbying/business-a-lobbying/201289-adelson-finds-allies-on-gambling-ban>.

of Internet gambling.¹²⁶ The proposal split the gaming industry; the industry's advocacy group, the American Gaming Association, took no position on the bill while many members of the gaming industry strongly objected to this attempt to extinguish the online gambling market.¹²⁷ Despite an impressive list of lobbyists and Congressional supporters of RAWA, the bill did not reach the floor of either legislative body.¹²⁸

The presidential election of 2016 added a new dynamic to the political debate. Was the election of Donald Trump good news for online gambling? After all, he had been a casino owner and one might expect he would favor additional gambling markets.¹²⁹ The opposing view was that his presidential campaign had been supported by contributions from Adelson, directly or indirectly, and an expectation of support for RAWA was likely.¹³⁰ Critics of the bill predicted the bill wouldn't fare any better in Congress after Trump's election than it had before.¹³¹

VIII. THE WIRE ACT—PART 4: MORE THAN ONE WAY TO SKIN A CAT

Some of the bloom on the rose of the *Murphy* case was lost on January 14, 2019 when the Office of Legal Counsel of the Department

126. The proposal didn't apply to horseracing or fantasy sports. See H.R. 707, 114th Cong. §§ 2, 3 (2015).

127. See Bogardus & Tummarello, *supra* note 125. Adelson had reportedly threatened to withdraw from the AGA due to its support for online gambling. The Association subsequently took a neutral position on the issue. See Nicholas Confessore & Eric Lipton, *Seeking to Ban Online Betting, G.O.P. Donor Tests Influence*, N.Y. TIMES (Mar. 27, 2014), <https://www.nytimes.com/2014/03/28/us/politics/major-gop-donor-tests-his-influence-in-push-to-ban-online-gambling.html>. Steven Stradbrook, *Freeman challenges Adelson to a duel; California tells Nevada to get real*, CALVINAYRE (Jan. 19, 2014), <https://calvinayre.com/2014/01/19/business/freeman-challenges-adelson-to-a-duel/>; AGA Backs Away, GLOBAL GAMING BUS. MAG. (Apr. 25, 2014), <https://ggbmagazine.com/article/aga-backs-away/>.

128. *Cosponsors: H.R. 707—114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/707/cosponsors?searchResultViewType=expanded> (last visited Sept. 13, 2020); Cliff Spiller, *Restore America's Wire Act Is Shelved in Congress for the Remainder of 2014*, LEGALUSPOKERSITES.COM (Nov. 19, 2014), <https://www.legaluspokersites.com/news/restore-americas-wire-act-is-shelved-in-congress-for-the-remainder-of-2014/3966/>.

129. See Walter T. Champion, *PASPA's Got a Brand New Bag: President Trump's States' Rights Bias for Gambling Calls the Winning Hand*, 49 STETSON L. REV. 39, 40 (2019).

130. See Peter J. Ferrara, *Department of Justice shouldn't end online gambling to appease Trump donor Sheldon Adelson*, USA TODAY (Feb. 7, 2019, 6:00 AM), <https://www.usatoday.com/story/opinion/2019/02/07/justice-department-online-gambling-gop-donor-sheldon-adelson-trump-column/2787194002/>.

131. See Trevor Burrus, *Gambling Away Federalism*, FORBES (Dec. 14, 2017, 2:26 PM), <https://www.forbes.com/sites/trevorburrus/2017/12/14/gambling-away-federalism/#349c4c57c18d> (noting the Act has been "floating around" Congress but never gone farther).

of Justice issued a Memorandum Opinion titled, “Reconsidering Whether the Wire Act Applies to Non-Sports Gambling.”¹³² The reconsideration amounted to a reversal of the 2011 Opinion issued by the same office.¹³³ In short, the 2018 Opinion concluded that the Wire Act was not limited to sports betting and applied to all forms of Internet gambling that involved interstate commerce.¹³⁴ While the reversal was not exactly a surprise,¹³⁵ it has far-reaching implications for online gambling and sports betting.

A detailed analysis of the Opinion is beyond the scope of this article.¹³⁶ There is no question that the 2018 Opinion strikes at the heart of Internet gambling. As no one questions that the language of the law as well as its legislative history targets sports betting, the 2018 Opinion changes nothing regarding the Wire Act’s basic application to that form of gambling. Still, in its details, the 2018 Opinion has the potential to undermine the opportunity states were given in the *Murphy* case.¹³⁷ Additionally, the Opinion reminds us that the Wire Act is an obstacle to a sports wagering market that benefits consumers and protects the integrity of the betting and the sports games themselves.

The 2018 Opinion construes the Wire Act’s language using a statutory rule of construction called the “rule of the last antecedent.”¹³⁸ The first part of § 1084(a) of the Wire Act prohibits using a “wire communication facility” to transmit “bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest”¹³⁹ The second portion of that statute also makes unlawful use of

132. See generally 2018 Opinion, *supra* note 9.

133. *Id.* at 23.

134. *Id.* at 1-2.

135. There had been persistent rumors that a change was being prepared. See Tom Hamburger, Matt Zapotosky & 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 (noting Jeff Sessions agreed to look into the 2011 Opinion, *supra* note 108, at his confirmation hearing and the acting head of the Justice Department’s criminal division asked the head of the Office of Legal Counsel to reconsider the opinion).

136. For an analysis of the 2018 Opinion, *supra* note 9, see Scott Balber & Steven Jacobs, *DOJ Goes All-In Against Online Gambling, But Can Wire Act Opinion Withstand Scrutiny?*, LEGAL SPORTS REP. (Jan. 28, 2019), <https://www.legalsportsreport.com/28179/doj-wire-act-opinion-scrutiny/>.

137. *Murphy v. NCAA*, 138 S. Ct. 1461, 1484-85 (2018) (holding that states were free to make their own decisions regarding sports gambling if Congress doesn’t act).

138. 2018 Opinion, *supra* note 9, at 7-8. “[T]he ‘last-antecedent rule,’ ‘reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it.’” *Id.* at 8 (quoting *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016)).

139. 18 U.S.C. § 1084(a) (2018).

the wire communication facility if it “entitles the recipient to receive money or credit as a result of bets or wagers”¹⁴⁰ Does the phrase “on any sporting event or contest” apply to both the first and second portions of the statute? The OLC Opinion, applying the “last antecedent” canon of statutory construction, stated that the “on any sporting event or contest” qualifier had application only to the conduct immediately preceding the phrase.¹⁴¹ Thus, a “wire communication facility” transaction where someone received “money or credit” was prohibited by the Wire Act for any “bets or wagers,” not just those involving sports.

The statutory construction issues did not end there, however, as there are two additional aspects to the Opinion that undermine one’s confidence in its correctness. First, the “last antecedent” canon is itself subject to the qualification that it doesn’t apply if “common sense shows that it was meant to apply to something more distant or less obvious.”¹⁴² The 2011 OLC Opinion had determined that “it is difficult to discern” why Congress would have disaggregated the statute in that way.¹⁴³ The 2018 Opinion, however, disagreed, and declared that “absent a patent absurdity, we must apply the statute as written.”¹⁴⁴

Second, it would seem that the context of the statute and portions of the law’s legislative history would inform the “absurdity” issue. However, the 2018 Opinion saw no need to do this as the statutory language was clear. For the plain meaning of the statutory language to be disregarded, the “absurdity” had to be one that “no reasonable person could intend.”¹⁴⁵

These assertions in the 2018 Opinion that no “patent absurdity” exists in its construction of the Wire Act, and that a statute whose relevant provision is a multi-clause, ninety-four word sentence has a “plain meaning” strain credulity.¹⁴⁶ Moreover, it would be unusual that a statute with a plain meaning would produce two diametrically opposite constructions by the same unit of the Department of Justice over a seven year period.¹⁴⁷

There was an immediate judicial challenge to the 2018 Opinion by the New Hampshire Lottery and a federal district court ruled that the

140. *Id.*

141. 2018 Opinion, *supra* note 9, at 8.

142. *See Last Antecedent Rule*, NOLO, <https://www.nolo.com/dictionary/last-antecedent-rule-term.html> (last visited Jan. 24, 2021).

143. 2011 Opinion, *supra* note 108, at 5.

144. 2018 Opinion, *supra* note 9, at 14.

145. *Id.*

146. *Id.*; *see* 18 U.S.C. § 1084(a) (2018).

147. *Compare* 2011 Opinion, *supra* note 108 *with* 2018 Opinion, *supra* note 9.

OLC's reading of the Wire Act's language was mistaken, as was its belief that the language was plain, making resort to the law's legislative history unnecessary.¹⁴⁸ This decision was appealed by the DOJ and the case is currently before the Court of Appeals for the First Circuit.¹⁴⁹ An appeal to the Supreme Court is certainly a possibility.

Despite all the uncertainty created, there is a valuable message in the Wire Act's role over the last twenty years as a political football.¹⁵⁰ The historical context of the Wire Act clearly indicates the law was meant to assist states in their efforts to eradicate organized crime from illegal horseracing and sports betting markets.¹⁵¹ Likewise, there is no indication the law was designed to prohibit a legal structure of sports betting that states established. Rather, the new federal law gave the states a powerful ally in their fight against organized crime that operated across state lines, with federal investigative and law enforcement resources playing an essential role.¹⁵² The legal drama generated by the Wire Act in the past twenty years serves to underscore that this 1961 law is a dangerous anachronism. As long as it remains in its present form, it will not only prevent the growth of legal sports markets in the United States, it may also undermine the integrity of sports betting itself.

IX. THE THREAT TO SPORTS BETTING PRESENTED BY THE WIRE ACT

The preceding discussion focused on the OLC's varying interpretations of the Wire Act's prohibitions on certain types of transactions involving "wire communication facilities." As noted, the OLC's 2018 Opinion declared that the law applied to all forms of

148. N.H. Lottery Comm'n v. Barr, 386 F. Supp. 3d 132, 152 (D.N.H. 2019), *appeal filed*, No. 19-1835 (1st Cir. Aug. 29, 2019).

149. *See id.*

150. Much of the focus of the meaning of the Wire Act has been the 2011 Opinion, *supra* note 108, and the 2018 Opinion, *supra* note 9, of the OLC. Prior to the 2011 Opinion, *supra* note 108, however, the Justice Department took the view that the Wire Act was "applicable to Internet gambling," and was not limited to sports. Letter from Michael Chertoff, Assistant Attorney Gen., U.S. Dep't of Justice: Criminal Div., to Dennis K. Neilander, Chairman, Nev. Gaming Control Bd. (Aug. 23, 2002), in INTERNET GAMING: PREPARED FOR THE MEETING OF THE GAMING POLICY COMMITTEE, Tab 3 (2012), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=28>.

151. *See* United States v. Yaquinta, 204 F. Supp. 276, 277 (N.D. W. Va. 1962) ("The 'purpose' of the [Wire Act] is succinctly stated in Report No. 588 of the Senate Judiciary Committee of the 87th Congress, on July 24, 1961, as '[T]o assist the several States in the enforcement of their laws pertaining to gambling and to aid in the suppression of organized gambling activities by restricting the use of wire communication facilities.'").

152. This is the same motivation that inspired other federal anti-gambling laws in the 1960s and 1970s, which created separate federal offenses based on violations of state anti-gambling laws. *See* 18 U.S.C. § 1952 (2018) (Travel Act); *id.* § 1953 (Wagering Paraphernalia Act); *id.* § 1955 (Illegal Gambling Business Act).

gambling and was not limited to sports betting.¹⁵³ At all times, however, it has been clear that the Wire Act statedly applies to sports betting.¹⁵⁴ This raises the question of why the OLC Opinion of 2018 presents any *additional* threat to sports betting.

To understand this, imagine that a bettor is in a state which has legalized sports betting. He has downloaded the software application that, as approved by state regulators, permits him to place sports bets with the sportsbook whose computer servers are in the same state as the bettor. The “migration” of New Yorkers across the state’s border into New Jersey to place sports wagers was noted earlier. If the New York bettor tried to place a sports wager at a New Jersey sportsbook while he was not in New Jersey, the “geo-fencing” technology that licensed sportsbooks are required to have would prevent him from doing so. Thus, the trip across the Hudson. Sports betting is legal so long as the betting market is *intrastate*; only Internet transmissions “in interstate or foreign commerce,” are subject to the Wire Act’s prohibitions.¹⁵⁵ It seems evident that so long as the bettor and the sportsbook computer servers are in the same state there is nothing to fear from the Wire Act. Or is there?

When our sports bettor referred to above connects with the sports book’s computer server and places a wager, both the origin of the bet and its destination are in the same state. However, the Internet is designed to seek the most efficient means of delivering the “data packets” (the wager) without regard to state borders.¹⁵⁶ Consequently, it is by no means guaranteed that the electronic communication between the bettor and the sportsbook did not at some point travel across state boundaries, even if neither the bettor nor the computer servers did.¹⁵⁷ Does this “intermediate routing” convert the apparently intrastate wager into an interstate wager prohibited by the Wire Act?

The Wire Act does not address this issue because after all, in 1961 only the most prescient could have envisioned our modern Internet.

153. 2018 Opinion, *supra* note 9, at 2. It is important also to note that courts have held Internet transactions fit within the Wire Act’s proscription of use of a “wire communication facility.” *See, e.g.*, United States v. Lyons, 740 F.3d 702, 716-17 (1st Cir. 2014) (applying the Wire Act to the Internet).

154. 18 U.S.C. 1084(a).

155. *Id.* (“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 . . .”).

156. *See* Pamela Fox, *Internet routing protocol*, KHAN ACADEMY, <https://www.khanacademy.org/computing/computers-and-internet/xcae6f4a7ff015e7d:the-internet/xcae6f4a7ff015e7d:routing-with-redundancy/a/internet-routing> (last visited Apr. 21, 2020).

157. *Id.*

However, another federal statute does offer guidance. The Unlawful Internet Gambling Enforcement Act, passed in 2006, sought to cut off the funding for “unlawful Internet wagering,” as defined generally by state or federal law.¹⁵⁸ In exempting certain conduct and transactions from the definition of “unlawful Internet gambling” UIGEA stated that, “[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.”¹⁵⁹ Of course, this provision applies only to UIGEA and another provision of that law makes it clear that it was not to “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.”¹⁶⁰ Nevertheless, it would be reasonable to refer to an anti-Internet gambling law like UIGEA when determining the scope of another federal law, like the Wire Act, which also sought to limit electronic gambling.

However, the 2018 Opinion cautions that UIGEA’s provision excluding, among other things, intermediate routing from the definition of “unlawful internet gambling,” did not apply to or limit the scope of the Wire Act.¹⁶¹ By leaving open the question of whether an otherwise legal online wager violated the Wire Act because the electronic signal carrying the wagering information incidentally travelled outside the state where the bet was initiated and accepted before returning, the 2018 Opinion takes a shot across the bow of online sports betting. Such a construction of the Wire Act, if upheld, would make an online *intrastate* betting market an impossibility.¹⁶² Whether this part of the Opinion is a type of executive department dicta and will not be enforced is beside the point. Interjecting such uncertainty into sports wagering markets in states disrupts planning, is contrary to the spirit of the *Murphy* case,¹⁶³ and is one reason among many others why the Wire Act needs to be changed.

X. AMENDING THE WIRE ACT WOULD BE GOOD FOR CONSUMERS AND LEGAL SPORTS BETTING MARKETS

Even if the Wire Act is not enforced against intrastate markets, the law clearly prohibits the establishment of interstate sports betting markets. By limiting the growth potential of sports betting markets, the

158. 31 U.S.C. § 5362 (10)(A) (2018).

159. 31 U.S.C. § 5362(10)(E) (2018).

160. 31 U.S.C. § 5361(b) (2018).

161. See 2018 Opinion, *supra* note 9, at 18.

162. See *id.*

163. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

Wire Act makes regulated markets less efficient and less attractive to bettors, and frustrates one of the primary justifications for regulated sports betting: to draw sports bettors away from illegal markets and have them migrate to legal, regulated ones.¹⁶⁴

Liquidity is an important part of gambling markets. In the sports betting context, liquidity refers to the amount of money wagered by bettors, also known as the handle.¹⁶⁵ When liquidity increases, it means more money is being bet and that the sportsbook can offer wagers at a more attractive “price” because its costs and risk are spread over a larger base.¹⁶⁶ Similarly, as liquidity grows sportsbooks are more willing to offer a wider range of bets, as well as larger wagers, again, because of their ability to spread risk.

Sportsbooks operating in lesser populated states are limited in the bets they can offer and the size of the wagers they will accept because the amount of money bet is smaller. That is, under the current intra-state arrangement dictated by the Wire Act, liquidity is generated only from the customers within that state.¹⁶⁷ In a state like New Jersey, with a population of nearly 9 million,¹⁶⁸ sports betting markets are going to be substantially larger than in Iowa, with a population of slightly more than 3 million.¹⁶⁹ This will predictably make the sports wagering “products” in Iowa less attractive than in New Jersey, creating incentives for Iowa bettors to seek more attractive sports betting opportunities elsewhere. Typically, it is the unregulated, unlicensed and illegally operating

164. See *Why The US Government Should Make Sports Betting Legal*, LEGAL SPORTS BETTING, <https://www.legalsportsbetting.com/why-the-us-government-should-make-sports-betting-legal/> (last updated Aug. 13, 2020). NBA Commissioner, Adam Silver, has said “[S]ports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.” *Id.* MLB Commissioner, Rob Manfred, commented that legalized sports betting makes “[league] rules . . . actually easier to enforce if it’s all aboveboard, regulated federally and everybody knows what’s going on. [Legal sports betting] can actually improve the integrity issue.” *Id.*

165. Betting Glossary, VEGAS.COM, <https://www.vegas.com/gaming/gaming-tips/betting-glossary/> (last visited Jan. 24, 2021).

166. The term “price” in the sports betting context can mean something as simple as how much money a bettor has to wager in order to win a certain amount. Traditionally, a sports bettor has to wager \$110 to win \$100. The objective of the sports book is to set a betting “line” at a level where an equal amount of money is bet on each side of a betting proposition. If \$1100 were bet on side A and \$1100 on side B, and side A won, those bettors would win \$1000 and be paid from the money wagered by the side B bettors. The additional \$100 would be retained by the sports book as their profit and is colloquially known as the “juice.” However, if a bettor were required to wager \$120 to win \$100 that is a less attractively priced product. See CABOT & MILLER, *supra* note 14, at 82.

167. 18 U.S.C. § 1084(a).

168. New Jersey, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/NJ/PST045219> (last visited Sept. 22, 2020).

169. Iowa, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/IA/PST045219> (last visited Sept. 22, 2020).

offshore sportsbooks that benefit from this.¹⁷⁰ These entities thrived for years because PASPA prevented states other than Nevada from offering sports betting.¹⁷¹ Even after the *Murphy* case was decided, however, the offshore markets have prospered, largely due to the limitations of the 1961 Wire Act.¹⁷²

Amending the Wire Act to allow for sports betting markets to exist across state lines, either by having a single national market or by permitting states to enter into compacts with other states to pool liquidity, would have two beneficial effects. First, consumers would benefit from better pricing and a wider range of products as sports books competed for their business; liquidity and product choice would not be dictated by the population of a state. Competition would be on a national scale, or at least a scale larger than the state “ring-fenced” markets.

Second, the more attractive products will assist in the “migration” objective of drawing sports bettors away from the illegal, unregulated, offshore markets. These entities already enjoy a considerable advantage over sportsbooks in the United States, as their costs of doing business do not include the high level of regulatory expenditures mandated in the United States for sports books operating legally here. It is also critical to note that imposing high taxes and preventing sportsbooks from sharing liquidity across state lines affects more than business profitability. Illegal offshore markets have no incentive to assist in investigations of sports corruption, they are often associated with criminal activity such as money laundering,¹⁷³ and they deprive the states

170. Bill Burt, *What happens now to the neighborhood bookie?*, SALEM NEWS (July 3, 2018), https://www.salemnews.com/news/local_news/what-happens-now-to-the-neighborhood-bookie/article_296741be-a145-5709-b0bd-d917c11c57a6.html; Brian Costa & Zolan Kanno-Youngs, *Your Neighborhood Sports Bookie Isn't Going Anywhere*, WALL STREET J. (June 26, 2018, 12:18 PM), <https://www.wsj.com/articles/your-neighborhood-sports-bookie-isnt-going-anywhere-1530029329>. The so-called “neighborhood bookie” might also be an attractive outlet for many sports bettors. Although these gambling businesses do not have the same opportunities to offer pricing and incentives like the offshore sportsbooks, they generally operate on credit, with the bettor not be required to have money on account with them. Burt, *supra*; Costa & Kanno-Youngs, *supra*. This is a desirable, though problematic, feature to many sports bettors. Burt, *supra*; Costa & Kanno-Youngs, *supra*.

171. CONG. RESEARCH SERV., RS22749, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT (UIGEA) AND ITS IMPLEMENTING REGULATIONS 1 (2012), https://www.everycrsreport.com/files/20120410_RS22749_5c3603b32f3159c6c154952f5f411f4788ab9c42.pdf.

172. One source estimates that the illegal sports betting market in the United States is between \$50-200 billion. Andrew J. Silver, *Legal Sports Betting Still Faces Competition From Illegal Market; Low State Taxes Could Turn The Tide*, FORBES (Apr. 7, 2020, 9:22 AM), <https://www.forbes.com/sites/andrewsilver/2020/04/07/legal-sports-betting-still-faces-competition-from-illegal-market-low-state-taxes-could-turn-the-tide/#346d9a2b23e3>.

173. See, e.g., Justin Story, *BG real estate attorney admits guilt in money laundering scheme*, BOWLING GREEN DAILY NEWS (Feb. 27, 2020),

and federal governments of tax revenue.¹⁷⁴ Amending the Wire Act to promote successful and attractive regulated markets in the United States would be beneficial in promoting these objectives of regulated gambling in the United States.

XI. AMENDING THE WIRE ACT OFFERS THE OPPORTUNITY TO PROVIDE
A ROLE FOR THE FEDERAL GOVERNMENT IN REGULATING SPORTS
CORRUPTION

One of the notable characteristics of regulated gaming in the United States is the wide acceptance of the concept that the existence and regulation of gambling in a state is historically a matter of state law.¹⁷⁵ When the federal government has intervened statutorily it has usually been to assist states in the enforcement of their own anti-gambling laws.¹⁷⁶ PASPA, in its ultimately unconstitutional directive to states that they could not authorize sports betting, is a notable exception to this principle.

Ironically, the Wire Act was passed by Congress not to hamstring the states when they sought to establish a system of regulated gambling, but in this same spirit of helping them eradicate the criminal elements that were preventing such legal, regulated systems from operating successfully.¹⁷⁷ The stingy and illogical construction by the 2018 OLC Opinion has turned the Wire Act on its head, thereby promoting the existence and growth of the illegal markets that the law was trying to wipe out.¹⁷⁸

The Wire Act recognized the need for federal involvement in helping states prevent a particular type of gambling—illegal sports

https://www.bgdailynews.com/news/bg-real-estate-attorney-admits-guilt-in-money-laundering-scheme/article_82a642df-5544-5a93-8b78-d7f6d692fb17.html.

174. See Silver, *supra* note 172; see *Sports Wagering*, IRS (Aug. 20, 2020), <https://www.irs.gov/businesses/small-businesses-self-employed/sports-wagering> (explaining that the federal government collects point twenty-five percent excise tax on all legal sports bets made in the U.S., and a two percent excise tax if the wagering is illegal in the state).

175. *California Gambling Laws*, FINDLAW (Nov. 26, 2019), <https://statelaws.findlaw.com/california-law/california-gambling-laws.html#:~:text=Gambling%2C%20whether%20it's%20horse%20racing,types%20of%20gambling%20are%20illegal>.

176. For example, the Travel Act (18 U.S.C. § 1952), the Wagering Paraphernalia Act (18 U.S.C. § 1953), and the Illegal Gambling Business Act (18 U.S.C. § 1955) are federal laws enacted during the 1960s and 70s that illustrate how Congress passes laws predicating federal offenses on a state law violation in order to assist states in investigating and prosecuting multistate criminal organizations. *But see* Interstate Horseracing Act, 15 U.S.C. §§ 3001-3007 (2018).

177. *Martin v. United States*, 389 F.2d 895, 898 n.6 (5th Cir. 1968).

178. Joey Connor, *Wire Act Opinion Could Strip Education, Social Services In Sports Betting States*, LEGAL SPORTS REP. (Jan. 31, 2019), <https://www.legalsportsreport.com/28300/effects-wire-act-opinion/>

betting using the “wire communication facility”¹⁷⁹ of the day, the telephone. The question now is whether federal involvement is necessary to address the threat of criminal influence of sports betting by our current “wire communication facility,” namely the Internet. Do states really need this assistance? While states have proven to be effective regulators of casino games, it is uncertain how well this will translate over time to sports betting. In regulating casino games state regulators can exercise nearly complete control over the mechanisms that determine who wins and loses a bet.¹⁸⁰ Through a variety of internal controls mandated by statute and regulation, casino games in regulated markets are widely regarded as being fair.¹⁸¹ The crucial distinguishing characteristic between casino games and sports betting is this: while casinos are able to insulate the process of determining outcomes from external influence with casino games, they lack that ability with the sports contests that determine who wins and loses bets.¹⁸²

Sports betting markets have become global in nature and with that comes increasing efforts by criminal elements to corrupt the sports events they bet on.¹⁸³ These events may occur in the United States but often they do not. If there is a betting market in the United States for those events, however, the risk of corruption is real, substantial, and a threat to the reputation of regulated gambling in the United States as being fair and honest. All parties—bettors and sportsbooks alike—have an interest in rooting out this corruption. Monitoring sports integrity, however, requires a substantial amount of cooperation not just between the states themselves; with the increasingly global nature of sports betting, states must establish cooperative relationships with foreign jurisdictions where information is shared on suspicious betting as well as a variety of other measures.¹⁸⁴

179.

The term ‘wire communication facility’ means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.

18 U.S.C. § 1081.

180. See CABOT & MILLER, *supra* note 14, at 182-83.

181. *Id.* at 181-82.

182. *Id.*

183. *Id.* at 145-46.

184. See, e.g., *Casino Regulatory Authority of Singapore Signs Memorandum of Understanding with Nevada Gaming Control Board*, CASINO REG. AUTHORITY OF SING. (May 26, 2011), <https://www.cra.gov.sg/news-events/news-releases/Detail/casino-regulatory-authority-of-singapore-signs-memorandum-of-understanding-with-nevada-gaming-control-board>.

While states have some capacity to perform these necessary regulatory tasks, they face limitations that are both jurisdictional and a function of the substantial resources required. If the federal government were part of an enforcement process for sports betting corruption, federal bodies like the FBI would be able to deal with foreign governments in a more effective way than a state could.¹⁸⁵ Likewise, implementing the substantial measures necessary to counteract sports corruption is an expensive process, and might be beyond the financial means of many smaller jurisdictions. While the states are the proper regulatory locus for regulating many of the day-to-day aspects of gambling, even sports betting, it may take a national entity with more substantial resources and global expertise to investigate and prosecute threats to the integrity of sports contests.

When the Wire Act was enacted in 1961, the threat presented by organized crime was decidedly domestic in nature and the global nature of criminal operations was yet to be realized.¹⁸⁶ More significantly, sports betting over the Internet was not in anyone's imagination. As the means of wagering on sports increasingly becomes mobile in nature, however, reinventing a regulatory structure for sports betting will require fresh thinking about enhancing the role of the federal government.

XII. CAN CONGRESS BE TRUSTED TO AMEND THE WIRE ACT?

The messiness of the legislative process has been commented upon by many.¹⁸⁷ The problem with addressing the Wire Act's shortcomings is one of both process and substance, however, as Congress's record on drafting legislation in the sports setting is not reassuring. Moreover, current proposals before that body have features that likely make it politically unfeasible.

185. *International Operations*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/international-operations> (last visited Sept. 22, 2020).

186. Becky Little, *How Bobby Kennedy Started the War on Gangs*, HISTORY (Aug. 30, 2018), <https://www.history.com/news/robert-kennedy-started-the-war-on-mafia-gangs> (discussing efforts in the 1960s to target organized crime in the US); Office on Drugs and Crime, *Organized Crime*, U.N., <https://www.unodc.org/unodc/en/organized-crime/intro.html> (last visited Sept. 21, 2020) (explaining the United Nation's approach to global organized crime, including mention of the United Nations Convention against Transnational Organized Crime, adopted in 2000).

187. Many quote the line attributed to Otto Von Bismarck, "Laws are like sausages, it is better not to see them being made." See, e.g., Dennis Warden, *An idea to amend the U.S. Constitution*, GASCONADE COUNTY REPUBLICAN (Apr. 15, 2020, 10:03 AM), <https://www.gasconadecountyrepublican.com/stories/an-idea-to-amend-the-us-constitution,31350?>; William G. Herman, *Plan will hurt towns, taxpayers*, CONCORD MONITOR (May 6, 2010, 12:00 AM), <https://www.concordmonitor.com/Archive/2010/05/999801126-999801126-1005-CM>.

The shortcomings in the wording of the Wire Act have been pointed out, as have the efforts of the executive branch to apply that law in a way inconsistent with its intent.¹⁸⁸ One other law that is a reference point for how the federal government has formulated gambling policy is the Unlawful Internet Gambling Enforcement Act (UIGEA).¹⁸⁹ This law was the culmination of efforts by legislators to make it impossible for Internet gambling markets to operate.¹⁹⁰ One way of accomplishing that would be simply to declare that electronic gambling across state lines was illegal. Efforts to pass such legislation came up short, however, and attention was directed instead toward suffocating Internet gambling by prohibiting bettors' accounts from being funded.¹⁹¹ UIGEA set out a two-pronged approach.¹⁹²

First, those "engaged in the business of betting or wagering," were prohibited from knowingly accepting credit, an electronic funds transfer, check, or similar instrument in connection with unlawful Internet gambling.¹⁹³ Thus, betting sites could not accept funds from bettors that had any connection with the banking system. As for that industry, credit card companies, banks, and payment processors were prohibited from facilitating the funding of a bettor's account with those gambling businesses. Additionally, these entities would be subject to regulations promulgated by the Federal Reserve Board and the Attorney General that required them to identify and block transactions that funded unlawful Internet gambling.¹⁹⁴

Problems with UIGEA were evident as soon as it was enacted. The provision had been inseparably attached to a "must pass" anti-terrorism bill at the end of the legislative session in 2006 and debate on, or even awareness of, the Internet funding part of the bill was non-existent.¹⁹⁵ It was the reaction of the financial community that created the most drama, however. Members of the banking industry viewed the proposal as imposing a dramatic regulatory burden on them, especially the requirement that they had to determine whether a credit card charge was

188. See generally 2018 Opinion, *supra* note 9; Allen, *supra* note 78.

189. 31 U.S.C. §§ 5361-67 (2018).

190. UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT (UIGEA) AND ITS IMPLEMENTING REGULATIONS, *supra* note 171, at 1.

191. Gerd Alexander, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is a Bad Bet*, 7 DUKE L. & TECH. REV. 1, 2 (2008).

192. 31 U.S.C. §§ 5363-64 (2018).

193. 31 U.S.C. § 5363 (2018).

194. 31 U.S.C. § 5364 (2018).

195. See I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 537 (2006) ("[UIGEA] was rammed through Congress."); I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 667 (2012).

being directed toward unlawful Internet gambling.¹⁹⁶ The regulations governing these transactions were hotly contested and a final compliance date was finally set for 2010.¹⁹⁷ By then, the obligation of the companies was to use reasonable care in ascertaining whether unlawful Internet gambling was involved.¹⁹⁸

Other aspects of the law also indicate the slapdash manner in which it was enacted.¹⁹⁹ Because of the clandestine manner of its enactment and its cryptic substantive provisions UIGEA has rarely been referred to in a positive manner.²⁰⁰ Although other federal laws on gaming don't suffer from these maladies, it is a fact that any federal legislation seeking

196. See, e.g., Brant M. Leonard, *Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens*, 57 *DRAKE L. REV.* 515, 532-33 (2009); Jonathan Conon, Comment, *Aces and Eights: Why the Unlawful Internet Gambling Enforcement Act Resides in Dead Man's Land in Attempting to Further Curb Online Gambling and Why Expanded Criminalization Is Preferable to Legalization*, 99 *J. CRIM. L. & CRIMINOLOGY* 1157, 1166 (2009); Jason A. Miller, Note, *Don't Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions than Internet Gambling*, 12 *N.C. BANKING INST.* 185, 196 (2008).

197. J. Daniel Walsh, *Unlawful Internet Gambling Enforcement Act (UIGEA)—compliance deadline extended to June 1, 2010*, *LEXOLOGY* (Dec. 10, 2009), <https://www.lexology.com/library/detail.aspx?g=d5bc0d11-075b-4889-a362-3c0e59845f18>.

198. See *Compliance Guide to Small Entities, Regulation GG: Prohibition on Funding of Unlawful Internet Gambling*, FED. RES., <https://www.federalreserve.gov/supervisionreg/regggcg.htm> (last updated Mar. 1, 2017) (explaining businesses subject to the law must “establish and implement written policies and procedures that are reasonably designed to identify and block or otherwise prevent or prohibit payments related to unlawful Internet gambling that are restricted by UIGEA and are processed through your facilities”).

199. Despite reports that UIGEA had made Internet gambling illegal, the law made it clear that it was not intended to change any state or federal law. Consequently, the meaning of the phrase “unlawful Internet gambling” meant internet gambling “is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.” 31 U.S.C. § 5362 (10)(A) (2018). Another provision specifically exempted transactions involving fantasy sports. 31 U.S.C. § 5362(1)(E)(ix). This was included at the request of some of the major sports leagues that had garnered revenue from licensing deals with companies that operated season-long fantasy sports contests that the leagues wanted to protect. See Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 *J. MARSHALL L. REV.* 1195, 1198-1200 (2007). Ironically, the daily fantasy sports industry latched on to this part of UIGEA to assert that the activity was expressly authorized by federal law, even though the companies which popularized daily fantasy sports, FanDuel and DraftKings, didn't begin operating until 2009 and 2012 respectively. Daily fantasy sports didn't even exist until 2011 and drafters of UIGEA stated that was certainly not their intention. See *The evolution of the daily fantasy sports industry*, *ROTOGRINDERS*, <https://rotogrinders.com/static/daily-fantasy-sports-timeline> (last visited Oct. 30, 2020); Dustin Gouker, *UIGEA Author: 'No One Ever Conceived' that Law Would Allow Daily Fantasy Sports*, *LEGAL SPORTS REP.* (May 8, 2015), <https://www.legalsportsreport.com/1369/uigea-author-did-not-intend-daily-fantasy-sports-carveout/>.

200. See generally, e.g., Michael Blankenship, Note, *The Unlawful Internet Gambling Enforcement Act: A Bad Gambling Act? You Betcha!*, 60 *RUTGERS L. REV.* 485 (2008); Alexander, *supra* note 191, at 1-2.

to amend the Wire Act will have the unhappy legacy of UIGEA to contend with.

XIII. PROPOSALS ON SPORTS BETTING BEFORE CONGRESS

Within months of the *Murphy* decision, a bill was before Congress to create a federal presence in sports betting.²⁰¹ Initially put forward by Senators Hatch and Schumer in December 2018, Senator Romney became a sponsor of a version of that proposal when Senator Hatch left office in 2019.²⁰² This bill, known as the Sports Wagering Market Integrity Act, offers a peek into the types of issues that will emerge with that or any other legislation that amends the Wire Act.

Several elements of the bill would likely garner significant support, at least among those in the sports betting community. For example, the Wire Act would be changed to allow states to enter compacts with other states so that customers and liquidity could be pooled, and the “intermediate routing” concern is also specifically dispensed with.²⁰³ An important component of promoting regulated sports betting is to strengthen efforts against illegal wagering markets and the bill, without offering significant details, speaks to that issue as well.²⁰⁴

A notable provision of the bill calls for the creation of a National Sports Wagering Clearinghouse.²⁰⁵ This entity, which would be funded by proceeds collected through the federal excise tax on sports betting,²⁰⁶ would collect and disseminate data on sports wagering and be a resource for maintaining the integrity of sports and wagering integrity.²⁰⁷ For those who oppose *any* role for the federal government in sports betting, this Clearinghouse might represent the “camel’s nose under the tent.”²⁰⁸ No one can dispute, however, that a centralized body for collection of information on sports betting patterns is a step toward promoting sports betting integrity.

201. See Sports Wagering Market Integrity Act, S. 3793, 115th Cong. (2018).

202. Maeve Reston, *Utah Republican Sen. Orrin Hatch to retire, clearing way for Mitt Romney*, CNN (Jan. 2, 2018, 4:44 PM), <https://www.cnn.com/2018/01/02/politics/orrin-hatch-retires/index.html>.

203. S. 3793 § 301(1)(A)-(B).

204. S. 3793 § 302.

205. S. 3793 § 106.

206. S. 3793 § 106(g)(1)(B).

207. S. 3793 § 106(c).

208. Allowing a camel’s nose under the tent is “a metaphor for a situation where the permitting of some small act will lead consequently to a larger undesirable act or circumstance.” *Camel’s Nose*, YOUR DICTIONARY, <https://www.yourdictionary.com/camel-s-nose> (last visited Jan. 24, 2021).

It is likely that other provisions will be a flashpoint for disagreement, however, and could prevent a consensus from being reached. Two particular items illustrate this.

First, the proposed law bill creates an approval process of state sports wagering systems by the United States Attorney General.²⁰⁹ It could be that such a procedure would be somewhat pro forma with states being required simply to demonstrate compliance with a checklist of factors relating to matters such as problem gambling, geo-fencing measures, prohibiting certain persons from betting, and restricting betting on contests like high school sports. The review of the state's representations would not involve an adversary process or even one typically used by an overseeing regulatory body.²¹⁰

On the other hand, if the history of UIGEA and the meaning accorded the Wire Act by the OLC in its 2018 Opinion teaches anything, it is that the legislative process can be fluid and contentious. For example, if the Attorney General were given significant discretion in the determination of state compliance with the "checklist," the standards used were not transparent, or states lacked a means of appealing a denial, the states will not be easily placated. They would invoke variations of the constitutional arguments they raised when attacking PASPA and would likely present a formidable and united opposition.²¹¹

Another provision in the bill would also likely be disputed. This item requires sportsbooks to "determine the result of a sports wager only with data that is licensed and provided by the applicable sports organization . . . or an entity expressly authorized by the applicable sports organization."²¹² At face value, insisting that the winners and loser of sports wagers be resolved by reliable information seems not only reasonable but a core internal control standard that regulators would require. This provision, however, suggests that only data that is provided by or licensed by the major sports leagues is reliable.

The sports leagues have promoted the "official data" concept in states considering sports betting legalization as part of their effort to monetize the revenue that will be generated from expanded sports betting.²¹³ Sportsbooks already have a powerful incentive to contract

209. S. 3793 § 102(a)(1).

210. See S. 3793 § 102(b).

211. See Adam Candee, *Hatch, Schumer Preparing to Drop Federal Sports Betting Bill in Senate*, LEGAL SPORTS REP. (Dec. 19, 2018), <https://www.legalsportsreport.com/26901/federal-sports-betting-bill-drop/> (noting proponents of states' rights disapproved of the bill).

212. S. 3793 § 103(b)(5)(A)(i).

213. See *Official League Data*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/official-league-data/> (last visited Sept. 22, 2020).

with companies that can supply accurate information on results in a timely manner—the sportsbooks themselves could be exploited if they do not receive reliable information. Moreover, there is already a robust market for companies competing for this business and this provides a means of deterring corruption that is absent when there is only a single data source that would need to be compromised by those seeking to corrupt the process.²¹⁴ While the debate has been vigorous, and is likely to continue, few states to date have included this requirement.²¹⁵

XIV. CONCLUSION

The *Murphy* case changed the focus on the issue of sports betting in states. No longer is there a legal barrier to states creating a regulatory structure for sports betting. Rather, attention has now shifted to considering whether a state wants to offer sports betting, and if so, how that activity should be regulated. The issue transcends traditional notions of state control over gambling, however. The Wire Act has limited the ability for states to create more popular interstate betting products that will encourage the migration of customers away from illegal betting markets, allowing those illegal businesses to continue to flourish. These illegal markets threaten the integrity of sports betting. Moreover, the Wire Act has been a barrier to the consideration of larger issues relating to the role of the federal government in promoting sports integrity. As noted, there are ways a complementary federal presence could aid this endeavor.

The political realities of enacting legislation amending the Wire Act to allow an interstate market with the federal government playing a role in ensuring integrity are not exactly subtle. Two factors in particular coalesce to dim the prospect of such legislation.

First, Congress has not inspired confidence that it would address this matter in an even-handed manner. Its past record on gambling legislation has been a checkered one, at best, and the level of partisanship between the houses of Congress has brought almost all law-making to a crawl. This stalemate could ease, but no one could predict with any conviction that this is soon to be achieved or that Congress would turn its attention to this matter which members might not regard as being of critical significance. Even if Congress would consider this issue, the

214. See Matthew Kredell, *Official League Data Mandate Faces Opposition At Indiana Sports Betting Hearing*, LEGAL SPORTS REP. (Mar. 22, 2019), <https://www.legalsportsreport.com/30603/indiana-sports-betting-official-data/>.

215. Illinois requires the use of official league data for sports wagers while Tennessee limits the requirement to “live betting.” See *Official League Data*, *supra* note 213.

ability to reach a consensus on legislation is challenged by the politics of sports betting.

Second, the steady hum of state legislation allowing sports betting will continue. If the momentum in states accelerates this could doom any proposals for a hybrid Wire Act amendment that would give states interstate market opportunities while involving the federal government in monitoring and enforcement. In this respect, the “data issue” discussed earlier is significant not only for the discrete issue it raises, but as an illustration of how challenging it will be to define the federal government’s core functions in sports betting regulation. States will be key participants in the crafting of legislation, and few are clamoring for federal government participation. As the number with legal sports betting increases states will be emboldened to take a hard line.

Hoping for a streamlined law which clearly delineated a limited role for the federal government and acknowledged the traditional role of states in regulating gambling might be a futile wish. But, as this paper has argued, it would be unfortunate to continue on the current path. The Wire Act is singularly unsuited to a world where sports betting, perhaps all gambling, increasingly becomes dominated by mobile markets. Its continued existence dampens the growth of markets and threatens the integrity of our sports and our wagering on sports. At some point the recognition of these facts will produce the resolve to take action. As the law comes up on its sixtieth birthday, the time is now.