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The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling

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ABSTRACT: Recognizing the growing threat of organized crime, then U.S. Attorney General Robert F. Kennedy sought to get the “bankrollers and kingpins” by introducing the Federal Wire Act in 1961, which sought to target the mob’s most profitable racket—bookkeeping on horseracing and sports gambling by prohibiting such gambling on the nation’s communication system at the time (telephone and telegraph). More than 30 years later members of Congress sought to use the Wire Act to stop the rise of casino-style gambling on the Internet. However, the scope of the Wire Act has been disputed among lawmakers, courts, and federal agencies. In 2011 the Office of Legal Counsel in the Department of Justice announced its belief that the Act applied only to sports gambling, dispelling ambiguity and opening the door for states to legalize intrastate non-sport online gambling, such as lottery ticket sales and Internet poker. This paper examines the historical context in which Congress enacted the 1961 Wire Act and the interpretation of the Act over five decades and its implications for present-day regulatory proposals.

Keywords: Internet gambling, Wire Act, Department of Justice, sports gambling, federal legislation

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In 1961, then-Attorney General Robert F. Kennedy proposed a package of bills, including the 1961 Wire Act, in an attempt to get at the heart of mafia organizations: their money.

Soon after its passage, the Wire Act was superseded by other more effective tools to target organized

crime, such as the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970. It wasn’t until the late 1990s that the Wire Act sprang back into prominence as a tool to prosecute online gambling offenses. However, from the beginning of the Wire Act’s use in the online gambling arena there has been debate about the Act’s scope, including if it can be applied

to *Internet* gambling, and most importantly for this paper, whether or not its prohibitions extend beyond sports gambling. The debate on these issues reached a high-point in 2011, when the Office of Legal Counsel in the Department of Justice announced its opinion that Wire Act does not, in fact, apply beyond sports betting. Viewing this DOJ opinion as a “unilateral reinterpretation” of the Wire Act, some members of Congress have proposed legislation that would rewrite the 1961 Wire Act, editing the language of the law to turn it into a prohibition against all forms of online wagering, whether sports-related or not. However, the Wire Act was originally intended and long understood as a narrow and targeted weapon to assist the states in preventing organized crime from taking bets on sports—not as a broad federal prohibition that would prevent states from legalizing online gambling within their borders.

Reinterpreting the Wire Act

In 2009, New York’s lottery division and the Illinois governor’s office wrote to the Department of Justice Criminal Division seeking an opinion on the legality of online lottery sales. In particular, they wished to know if using out-of-state payment processors for such online purchases would violate the Wire Act. While the Criminal Division asserted that such intrastate online lotteries would run afoul of the Wire Act, they acknowledged that such an interpretation of the 1961 law created a conflict between it and another federal gambling law: the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). While UIGEA prohibits payment processors from processing transactions related to unlawful Internet gambling, it specifically excludes *intrastate* online gambling from its proscriptions. Additionally, UIGEA does not consider the “intermediate routing” of electronic data, which might temporarily cross state lines, when determining the location of transactions or whether they are interstate or intrastate. For example, if an online purchase of a lottery ticket is initiated and finalized within a state where such gambling is legal, it is not in violation of UIGEA. Thus, to interpret the Wire Act as prohibiting all online gambling, even if the betting begins and ends in one state, puts the Act at odds with this exception in UIGEA. In light of this apparent conflict, the Criminal Division requested an opinion from a higher office within the DOJ, the Office of Legal Counsel (OLC).

After a thorough consideration, OLC issued a memo in 2011 declaring, that because the online lotteries proposed by Illinois and New York did not involve sports, they fell outside the scope of the Wire Act. The opinion was hailed as a “game changer,” because, while OLC only considered the lottery schemes of New York and Illinois, it dispelled any ambiguity about the Wire Act’s gambling prohibitions, clearing the way for other states to legalize and regulate other forms of non-sports intrastate gambling.

In the wake of OLC’s 2011 memo, three states, New Jersey, Nevada, and Delaware, legalized and regulated online gambling in their borders and at least ten other states are considering doing the same. To stop the progression of legalized online gambling, Sen. Lindsey Graham (R-SC) and Rep. Jason Chaffetz (R-UT) introduced the Restoration of America’s Wire Act (RAWA, H.R. 4301) which would create a *de facto* federal prohibition on Internet gambling and thwart states’ attempts to legalize and regulate the activity. By amending the language of the Wire Act (deleting the Act’s references to “sports gambling” and inserting “Internet”) RAWA would create, for the first time, a federal prohibition on all forms of Internet gambling—even if the transactions occur entirely within a state that permits the activity.

Supporters of RAWA argue that their goal is simply to stop President Obama’s DOJ from unilaterally reinterpreting laws and that they want only to “restore the Wire Act to its interpretation pre-December 23rd of 2011,” as Rep. Chaffetz said. And as Sen. Mike Lee (R-UT), a co-sponsor of the bill, contended, “[w]e’re not trying to make other alterations ... [t]he Wire Act itself does, in fact, prohibit the very things we’re prohibiting with this legislation and so what we’re doing literally is restoring the status quo.” Yet the DOJ’s 2011 opinion is closer to the original intent of the law and the interpretation that held until 2002.¹

Camelot versus the Mob

For Robert Kennedy, the only way to tackle the Leviathan of the mafia was to cut off its profit stream. Kennedy believed that the most profitable activity for the mob was their gambling racket.² Just over two months after being sworn in as Attorney General, Kennedy announced a package of bills to fight organized crime. As *The New York Times* reported, the proposals targeted “the bankrollers and kingpins of the

rackets,” who “live luxurious, apparently respectable, lives in one state but return periodically to another state to collect from the rackets they run by remote control.” Among the proposals were five measures put forward by the preceding Attorney General, William P. Rogers, including “revised versions of proposals by Mr. Rogers to ban use of interstate telephone or telegraph wires for betting”—what would ultimately become the Wire Act.³

A primary argument that the prohibitions in the Wire Act were not meant to be limited to sports gambling is based on the wording of the law. The Wire Act’s penalties section reads as follows:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.⁴

While the Act’s first reference to “bets or wagers” is followed by “sporting event or contest,” the two subsequent prohibitions on “bets or wagers” make no reference to “sports.”⁵ Therefore, as discussed later, some, such as a District Court in Utah,⁶ contend that only the first proscription against using wire communications to transmit “information assisting in the placing of bets or wagers” is limited to sports betting, whereas the other clauses of the section apply to all bets or wagers.⁷ However, as the Department of Justice’s Office of Legal Counsel notes in its 2011 memo, to interpret the prohibition on “the transmission in interstate or foreign commerce of bets or wagers” as applying to all gambling is illogical when read in context with the Act’s other sections. Much of the confusion stems from the Wire Act’s lack of a definition of what constitutes a “sporting event or contest” or “bets and wagers.” However, one can identify the intention of the phrases by examining the language of the other bills considered alongside the Wire Act. Many of these specifically mention other gambling activities besides sports betting. In this context, the Wire Act was likely intended to target sports-related wagering, while its companion bills dealt with other forms of gambling.

For example, the Interstate Transportation of Wagering Paraphernalia Act, part of the same package

of bills backed by Kennedy, expressly lists wagering activities as bookmaking, wagering pools with respect to a sporting event, numbers games, policy games, bolita, or “similar games.”⁸ The Wire Act, on the other hand, references only bets and wagers on sporting events or contests.

As the Department of Justice Office of Legal Counsel noted in its 2011 memo:

Congress thus expressly distinguished these lottery games from “bookmaking” or “wagering pools with respect to a sporting event,” and made explicit that the Interstate Transportation of Wagering Paraphernalia Act applied to all three forms of gambling. 18 U.S.C. § 1953(a). Congress’s decision to expressly regulate lottery-style games in addition to sports-related gambling in that statute, but not in the contemporaneous Wire Act, further suggests that Congress did not intend to reach non-sports wagering in the Wire Act.⁹

Wary of the pitfalls that derailed earlier versions of the Wire Act, Kennedy carefully drafted the bill to be limited. Because, as Kennedy stated, “[p]ress information is not vital to the gamblers, but it is important to the American public,”¹⁰ his Wire Act contained an explicit exemption for “the legitimate news reporting of *sporting events*.” [Emphasis added]¹¹ It makes little sense to assume that Kennedy intended to prohibit all forms of gambling, but only write in an exemption for news reporting on *sports*.

This exception contained in subsection (b) of the law (section 1084) reads:

Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

This exemption bolsters the case for the narrow interpretation of the Wire Act. For, to interpret the law as broadly prohibiting wire transmissions related to *all gambling*, it follows that the *only* legal transmission of gambling-related information under the Wire Act are those which are related to sporting events or contests if such betting is legal in both states or territories. As attorney Mark Hichar wrote in his 2009 analysis of federal online gambling legislation:

[I]t strains credulity that the prohibitions in § 1084(a) would ban transmissions assisting in wa-

gering of any and all types, while § 1084(b) would exempt from those prohibitions wagering-related transmissions between two states where the underlying wagering is legal, only when the underlying wagering related to sporting events or contests.¹²

Textual analysis is not the only evidence supporting a narrow reading of the Wire Act. Discussions between Robert F. Kennedy, his assistants, and members of Congress in committee hearings on the Wire Act make it clear that the proposal was understood from the beginning, by both those who wrote and those who enacted it, as a prohibition only on sports-gambling transmissions.

Congressional Understanding of the Wire Act

In his statement before the subcommittee of the House Committee on the Judiciary on May 17, 1961, Kennedy described the purpose of the Wire Act (H.R. 7039) as to “to assist the various States in enforcement of their laws pertaining to gambling and bookmaking. It would prohibit the use of wire communication facilities for the transmission of *certain gambling information* in interstate and foreign commerce.” [Emphasis added] A reading of his testimony could lead one to conclude that the bill was indeed aimed at *certain* kinds of gambling and not *all* forms of gambling.¹³

While Kennedy’s testimony on his other bills before Congress described numerous types of specific wagering activities, including lotteries, sports gambling, and numbers games, his testimony in support of the Wire Act focused explicitly and exclusively on wagering related to “horse racing” and “such amateur and professional sports events as baseball, basketball, football and boxing”—with no mention of other forms of betting.¹⁴ Additionally, in his summary of the bill’s purpose, Kennedy uses the word “gambling” unmodified by sports or sporting, suggesting that he used the phrases interchangeably, but always with the intent of applying the bill’s prohibition to sports gambling alone.

Kennedy was not alone in his understanding of the bill as narrowly focused, as one can see, by examining the language used by members of Congress regarding the bill. For instance, the House Judiciary Committee’s report accompanying the Wire Act was titled, “Sporting Events—Transmission of Bets, Wagers, and Related Information.”¹⁵ On the other hand, the House version of the Wire Act was described as amending “Chapter 50 of

title 18, United States Code, with respect to the transmission of bets, wagers, and related information.”

The Senate hearings on the Wire Act also illustrate that the Attorney General’s office indicated to Congress that the Wire Act was intended to apply only to sports gambling. One exchange between Senator Kefauver and Assistant Attorney General Herbert J. Miller during the Senate hearing on Kennedy’s anti-crime package is particularly enlightening, Miller admitted that the bill was “limited to sporting events or contests.”

These interactions show that lawmakers and the Department of Justice both understood this version of the Wire Act to be similar to its predecessor from the 1950s, which addressed “two main activities—organized commercial gambling on horse racing and organized commercial gambling on other sporting events, such as baseball, basketball and football.”¹⁶

Furthermore, as Kennedy was careful to point out, the Wire Act was not intended as a broad federal gambling prohibition—whether conducted by states or by individuals—but instead as a way to enforce existing state laws to target “organized crime in this country without invading the privacy of the home or outraging the sensibilities of our people in matters of personal inclinations and morals.”¹⁷ Kennedy expressly noted that they were not “undertaking the almost impossible task of dealing with all the many forms of casual or social wagering which so often may be effected over communication facilities.”

Wire Act Expansion Attempts

Even more than the statements of the Wire Act’s author, the most convincing evidence that the Act was understood by *Congress* as narrow in its scope—and perhaps even inapplicable to Internet activities—comes from the attempts beginning only a year after the law’s enactment to broaden its scope to encompass new technologies not covered by the original Wire Act.

In March 1962, the Senate Permanent Subcommittee on Investigations for the Committee on Government Operations, also known as the McClellan Committee, again held hearings on organized crime, this time in response to Attorney General’s Robert Kennedy’s anti-crime proposals. Again, the hearing focused exclusively on *sports gambling*. The Committee also discussed the Act’s applicability to

emerging technologies of the time, such as wide area telephone service (WATS), which “provides unlimited long distance telephone calls within certain areas at a fixed rate. But no records are made of the calls.” The Committee noted that the mob’s bookmaking activities could migrate to these new services and that the Wire Act (now Public Law 87-216) would not apply to these new technologies:

The term “wire service” in its usual sense refers to legitimate agencies such as Associated Press and United Press International which gather news and disseminate it to daily newspapers and radio and television stations via teletype machines. In the context of the subcommittee’s investigation the term took on an entirely different meaning. To gamblers and bookmakers “wire service” means a horserace wire service and refers to a confederation of operators who supply and service the Nation’s bookmakers, usually on a telephonic network, with fast race results and other information on horseraces around the country as an accessory to bookmaking operations.¹⁸

Thus, while the Wire Act prohibited those “engaged in the business of betting or wagering” from using wire communications, “[t]here is a distinct possibility that many of the wire services which were the subject of the subcommittee’s investigations do not fall within the provisions of this statute since they are not in fact ‘engaged in the business of betting or wagering.’”¹⁹

While the Committee recognized the narrow scope of the Wire Act and recommended broadening it to account for advances in technology, Congress declined to take up the issue. However, when the Act reemerged as a tool for prosecutors of online gambling offense, few questioned whether its scope included gambling on the very new technology of the Internet.²⁰

On the other hand, with the advent of Internet technology and online gambling, members of Congress *did* appear to recognize that the Wire Act could reach only online *sports* betting as many sought to amend the Act to broaden its scope to casino-style games.

- In 1995 Sen. Jon Kyl (R-Ariz.) introduced the Crime Prevention Act, which included an amendment to the Wire Act that would broaden both the activities and technologies covered by the law. It excised the phrase “on any sporting event or contest,” and added the phrase “wire or electronic communication” expanding the Act’s reach to the Internet.²¹
- In 1996 Rep. Tim Johnson (D-S.D.) attempt-

ed to amend the Wire Act with his Computer Gambling Prevention Act, which also struck the words “on any sporting event or contest” and added “electronic communication.”²²

- In 1997 Sen. Kyl introduced the Internet Gambling Prohibition Act, which added a definition of “bets and wagers” that included contests, sports, and games of chance. He stated the bill was necessary because it “dispels any ambiguity by making it clear that all betting, including sports betting, is illegal. Currently, non-sports betting is interpreted as legal under the Wire Act.”²³
- In 1999 Sen. Kyl reintroduced his Internet Gambling Prohibition Act.²³
- And in 2002, Rep. Bob Goodlatte (R-Va.) introduced the Combating Illegal Gambling Reform and Modernization Act, which, like Sen. Johnson’s bill, added a definition of “bets and wagers” to the Wire Act that broadened it to all forms of gambling activities, including games of chance.²⁵

Due to conflicting interests within the brick-and-mortar casino industry as well as vocal opposition from Internet service providers (on whom the burden of blocking online gambling would fall) these Wire Act amendments did not pass and the Wire Act remained unchanged.²⁶ Still, tellingly, no prominent opponents of these bills contended that their amendments were unnecessary because the Wire Act already prohibited all online gambling—further underscoring the notion that members of Congress interpreted the Act as narrow in scope.

Department of Justice Reinterpretation of the Wire Act

While RAWA supporters claim that Obama’s DOJ unilaterally reinterpreted the Wire Act, the actual reinterpretation was made by the Department of Justice during the Clinton and Bush administrations.

Beginning in the 1990s,²⁷ some government attorneys began using the Wire Act to prosecute online gambling, including some that were not exclusively sports-related.²⁸ However, while some prosecutors used the Wire Act against non-sports gambling offenses, in all cases resulting in a conviction, sports betting was the only contested activity.²⁹

The Clinton Administration took the position that the Wire Act prohibited certain gambling activities online. For example, in a statement of Administration Policy, the Clinton Administration noted that it opposed the Internet Gambling Prohibition Act of 2000 (H.R. 3125) because it was “designed to protect certain forms of Internet gambling that currently are illegal,” and in particular “pari-mutuel wagering on activities such as horse races, dog races, and jai alai.” Despite claims that the DOJ under Clinton took the position that all online gambling was prohibited, there is no evidence the administration considered the Wire Act applicable to non-sports gambling or that it considered intrastate online gambling illegal. It wasn’t until 2002, during the administration of George W. Bush, that DOJ officially took the position that the Wire Act was applicable to *all* online gambling—a position that was at odds with Congressional action as well as the understanding of other DOJ officials at the time.³⁰

As discussed, the Wire Act was understood from its enactment to be a narrowly focused law that prohibited only sports gambling via telephone and telegraph. As Internet gambling grew in popularity among Americans, members of Congress scrambled to pass legislation prohibiting or regulating the activity. During a 1998 hearing on Rep. Goodlatte’s Internet Gambling Prohibition Act, Assistant Attorney General for the DOJ’s Criminal Division Kevin DiGregory testified that while existing federal legislation *could be* used to prohibit most forms of online gambling, it would require amendment to apply beyond sports betting:

The advent of Internet gambling may have diminished the overall effectiveness of the Wire Communications Act, in part, because that statute may relate only to sports betting and not to the type of real-time interactive gambling (e.g., poker) that the Internet now makes possible for the first time.³¹

While some State Attorneys General began utilizing the Wire Act during the 1990s to prosecute online gambling offenses³², the professional association, the National Association of Attorneys General (NAAG), questioned the Act’s applicability to non-sports gambling. A 1997 report from NAAG’s Internet Task Force recommended supporting “passage of the Internet Gambling Prohibition Act of 1997,” and resolved to support the amendments to 1084 and to “encour-

age the Department of Justice and the Federal Trade Commission to join with the Association” to “develop joint enforcement strategies to stop the spread of illegal internet gambling.” This indicates that the association might have believed that the Wire Act, as written, could not be used to prosecute online gambling offenses related to non-sports gambling—and that the DOJ might have held a similar opinion at the time.³³

In 2000 testimony before the House Committee on Banking and Financial Services, DiGregory urged Congress to enact “the Department of Justice’s proposed legislative amendments to 18 U.S.C. § 1084, which would extend the prohibitions of the existing Section 1084 to cover all forms of Internet gambling in a more technologically-neutral manner.”³⁴

Yet two years later, the Department of Justice, during the George W. Bush administration, officially took the position that the Wire Act’s prohibitions extended beyond sports gambling. The decision came as the result of a request from the Nevada Gaming Control Board and Nevada Gaming Commission which asked the DOJ for its opinion on the applicability of the Wire Act to the state’s recently enacted law legalizing intrastate online gambling, because, “the Department of Justice under the Bush Administration has yet to announce its policy on Internet gaming.”³⁵

On August 23, 2002 Michael Chertoff, then-acting Assistant Attorney General in the DOJ’s Criminal Division, responded to Nevada Gaming Control Board Chairman Dennis K. Neilander, stating: “[T]he Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling.”³⁶ However, Chertoff provided no rationale for this conclusion, other than citing the Wire Act itself. Chertoff’s statement was in direct conflict with legal scholars, court rulings, and other DOJ staff who continued to question the Wire Act’s applicability to non-sports gambling. Prior to this declaration, the Department of Justice had only used the Wire Act to prosecute strictly sports-related online gambling, reflecting the judicial precedent at the time.³⁷

Court Determinations on the Applicability of the Wire Act

In a 2002 case, *In re MasterCard Intern. Inc.*, the Fifth Circuit affirmed the Eastern District of Louisi-

ana’s holding that the Wire Act applied only to online wagers relating to sporting events or contests³⁸ The Fifth Circuit concluded that both the plain language and legislative history of the Wire Act made its application only to sports betting abundantly clear, agreeing with the lower court’s conclusion that “[e]ven a summary glance at the recent legislative history of Internet gambling legislation reinforces the Court’s determination that Internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084.”³⁹

The District Court of Utah departed from the Fifth Circuit’s interpretation of the Wire Act, in *U.S. v. Lombardo*, concluding that two out of three of the Wire Act’s prohibitions apply to all gambling and not just sports betting.⁴⁰ Specifically, the *Lombardo* court concluded that while the Wire Act clearly prohibits wire communications related to the transmission of actual bets only for sporting events, because the word “sporting event” does not appear in the next two clauses, prohibiting wire communications related to receiving money or credit for bets and receiving information about bets, those two prohibitions in the Wire Act apply to all gambling and aren’t limited to sports betting.⁴¹ The *Lombardo* court reasoned that reaching the Fifth Circuit’s conclusion would require them to assume Congress meant to include the “sporting” language in the two other parts of the Act but inadvertently forgot to do so.⁴² To date, it is the only published opinion to explicitly assert that the Wire Act’s prohibitions extend beyond sports gambling.⁴³ Similarly, a Magistrate Judge for the Eastern District Court of Missouri, in *U.S. v. Kaplan*, came to the conclusion that the Wire Act was not limited to sports gambling when recommending that the charges against Gary Kaplan, the founder of Beton-Sports.com, not be dismissed.⁴⁴ Kaplan ultimately pled guilty to violating the Wire Act, but only the counts related to sports gambling conduct.⁴⁵

As Mark Hichar noted⁴⁶—and the OLC in its 2011 memo concurred—interpreting the Wire Act to apply to non-sports gambling creates a conflict between the Wire Act and the intrastate exception in the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). This potential conflict prompted the New York State Division of the Lottery and the Governor of Illinois in 2009 to request the DOJ clarify its position on the Wire Act and its interplay with UIGEA.⁴⁷

UIGEA prohibits payment processors, such as credit card companies, from depositing funds related

to “unlawful Internet gambling,” but it contains an exemption from the prohibition for *intrastate transactions* if certain conditions are met.⁴⁸ Additionally, the exception stipulates that the gambling activity must not violate certain other federal gambling laws: the Interstate Horseracing Act of 1978, Professional and Amateur Sports Protection Act, Gambling Devices Transportation Act, or Indian Gaming Regulatory Act. Hypothetically, a state-licensed gambling platform, such as intrastate online lottery ticket sales, could be considered legal under the stipulations of UIGEA due to this exception. However, the Wire Act interpretation backed by the *Lombardo* court and the DOJ circa 2002 would make *illegal* all of these intrastate gambling activities that the language of UIGEA suggests are lawful. This casts doubt on the Department of Justice’s broad interpretation of the Wire Act beginning in 2002, a factor that helped convince the OLC to change its opinion on the law in 2011.

DOJ’s 2011 Restoration of the Wire Act

Despite claims that “a single person in the bowels of the Department of Justice”⁴⁹ decided to unilaterally reinterpret the Wire Act in 2011, the 13-page memorandum from the Office of Legal Counsel (OLC) for the Department of Justice shows that a thorough consideration of legislative history and case law brought the Criminal Division to the conclusion that “interstate transmissions of wire communications that do not relate to a ‘sporting event or contest,’ 18 U.S.C. § 1084(a), fall outside of the reach of the Wire Act,” thus restoring the law its original understanding.

In addition to a discussion of the history and case law, the OLC addressed arguments that the language of the Wire Act precludes a narrow reading of its scope. For example, OLC considered:

the possibility that, in the Wire Act’s reference to “any sporting event or contest,” 18 U.S.C. § 1084(a), the word “sporting” modifies only “event” and not “contest,” such that the provision would bar the wire transmission of “wagers on any sporting event or [any] contest.” This interpretation would give independent meaning to “event” and “contest,” but it would also create redundancy of its own. If Congress had intended to cover *any* contest, it is unclear why it would have needed to mention sporting events separately.⁵⁰

Additionally, OLC considered arguments that “sporting event and contest” applies only to the first prescription in the Act which it directly modifies. OLC

believed the phrase “sporting event and contest” was not included after each proscription as a form of short-hand; an interpretation that is bolstered by the fact that the phrase “in interstate and foreign commerce” is similarly omitted from the subsequent proscriptions even though Congress presumably intended all the prohibitions in the Wire Act, including those in the second clause, to be limited to interstate or foreign (as opposed to intrastate) wire communications. As OLC put it: “[t]his omission suggests that Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause.”⁵¹

Also considered was the DOJ Criminal Division’s assessment, which was detailed in its July 12, 2010 memo asking OLC for clarification. According to the memo, the Criminal Division advised OLC that it “has uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling,” and that “the Department has consistently argued under the Wire Act that, even if the wire communication originates and terminates in the same state, the law’s interstate commerce requirement is nevertheless satisfied if the wire crossed state lines at any point in the process.” This interpretation, however, only dates back to 2002. Furthermore, the Criminal Division highlighted the fact that since 2002 it had doubts about this interpretation which appeared to conflict with UIGEA.⁵² While the OLC’s decision specifically dealt with the question of whether intrastate online sales of lottery tickets would violate the Wire Act, its decision that the, “Wire Act does not reach interstate transmissions of wire communications that do not relate to a “sporting event or contest,” it effectively restored the original interpretation of the Act.⁵³

Endnotes

1. Press Conference, “Graham, Chaffetz introduce Legislation to Restore America’s Wire Act”, March 26, 2014 available at: <https://www.youtube.com/watch?v=xdt2q40DE1w#t=23>, last accessed August 6, 2014
2. Kennedy told Congress in 1961: “Organized crime is nourished by a number of activities, but the primary source of its growth is illicit gambling. From huge gambling profits flow the funds to bankroll the other illegal activities ... including the bribery of local officials.” “Congress Enacts Five Anti-Crime Bills,” CQ Almanac 1961 <http://library.cqpress.com/cqalmanac/document.php?id=cqal61-1373549>.
3. “Robert Kennedy Urges New Laws to Fight Rackets.”
4. 18 U.S. Code § 1084 - Transmission of wagering information; penalties section a., <http://www.law.cornell.edu/uscode/text/18/1084>.
5. Section (a) 18 USC 1084
6. In *United States v. Lombardo* 2007 WL 4404641 (D. Utah 2007), District Judge Ted Stewart interpreted the Wire Act as having three proscriptions on the use of a wire communication facility for (1) “The transmission...of bets or wagers or information assisting in the placing of best or wafer on any sporting event or contest”; (2) “for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers”; or (3) “for information assisting in the placing of best or wagers.” Because only the first proscription is modified by “sporting event or contest” the judge held that the Wire Act is “not confined entirely to wire communications related to sports betting or wagering.”
7. *Ibid.*
8. (S. 1657 or 18 U.S.C. § 1953)
9. *Ibid.*
10. Testimony before the House Judiciary Committee S. Rep. No. 588, 87th Cong., 1st Sess. 3, (1961).
11. “Prohibiting transmission of bets by wire communications,” Senate Report on S. 1656, July 24, 1961
12. Mark Hichar, “The Wire Act Should Not be Used to Prohibit Internet Gambling Carried out Under the UIGEA Intrastate Wagering Exception,” *Gaming Law Review and Economics*, Vol. 13, No. 2 (2009), <http://www.edwardswildman.com/files/News/830003b5-d4e6-4ecb-ae29-00e0b38568d4/Presentation/NewsAttachment/59409a83-593d-4e29-b788-03e833ccdf67/glre%202009%204%2027.pdf>.

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15. H.R. REP. 87-967, H.R. Rep. No. 967, 87TH Congress, 1st Session, 1961, 1961 U.S.C.C.A.N. 2631, 1961 WL 4794 (Leg. Hist.)*2631 P.L. 87-216, SPORTING EVENTS – TRANSMISSION OF BETS, WAGERS, AND RELATED INFORMATION
16. Senate Subcommittee of the Committee on interstate and foreign commerce hearing on s 3358 Statement of Hon. Wayne Coy, Chairman, Federal Communication Commission, April 24, 1950.
17. Ibid.
18. Ibid.
19. Ibid.
20. David G. Schwartz. *Cutting the Wire: Gambling Prohibition and the Internet*. Reno: University of Nevada Press, 2005. p. 108.
21. Crime Prevention Act of 1995, S. 1495, Title XV, 104th Congress (1996) 1st Session
22. Computer Gambling Prevention Act of 1996, H.R. 3526 104th Congress (1996) 2nd Session
23. Jon Kyl introductory remarks on The Internet Gambling Prohibition Act of 1997 See S. 474, 105th Cong., 1st Sess. <http://www.gpo.gov/fdsys/pkg/CREC-1997-03-19/html/CREC-1997-03-19-pt1-PgS2553.htm> last accessed on July 8, 2014
24. Internet Gambling Prohibition Act of 1999 (S. 692), 106th Congress, Second Session, <https://www.govtrack.us/congress/bills/106/s692>.
25. Combating Legal Gambling Reform and Modernization Act (H.R. 3215), 107th Congress, Second Session, <https://www.govtrack.us/congress/bills/107/hr3215>.
26. Edward C. Baig “Outlawing online betting? Don’t bet on it,” *BusinessWeek*, December 15, 1997 <http://www.businessweek.com/1997/50/b3557079.htm> last accessed on August 26, 2014
27. While the vast majority of cases involving the Wire Act were limited to sports, there are some cases where it was used to prosecute gambling offenses that were not sports related, *United States v. Chase*, 372 F.2d 453, 457 (4th Cir. 1967); *United States v. Manetti*, 323 F. Supp. 683, 687 (D. Del. 1971).
28. See: Tex. Priv. Ltr. Rul. DM-344 (May 2, 1995) in which Texas Attorney General Dan Morales was asked about the legality of online poker and other types of betting if the parties were all in Texas. He noted that such transmissions, even if entirely in Texas, may “under proper circumstances” violate the Wire Act. He contends that the activity might constitute “interstate commerce” as required by 18 U.S.C. § 1084, basing the position on previous case law, *United States v. Yaquinta*, 204 F. Supp. 276 (N.D. W. Va. 1962) for the proposition that, “where part of telephone facilities used for call between points in state were located in another state, transmission was in interstate commerce for purposes of section 1084.”
29. Anthony Cabot Internet Gambling Report II, Trace Publications, Las Vegas Nevada (1998) p 115
30. Letter from The United States Department of Justice, Criminal Division to Mr. Dennis K. Neilander, Chairman, Nevada Gaming Control Board August 23, 2002
31. Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division U.S. Department of Justice, Testimony before the House of Representatives Subcommittee on Crime Committee on the Judiciary, June 24, 1998, http://commdocs.house.gov/committees/judiciary/hju57230.000/hju57230_of.htm.
32. See e.g. *People of New York v. World Interactive Gaming Corp.* 185 Misc. 2d 852, 714 N.Y.S.2d 844 (N.Y. County Sup. Ct. 1999)
33. Harley J. Goldstein, “On-line Gambling: Down to the Wire?” *Marquette Sports Law Journal*, Vol. 8 No. 1 (1997), <http://scholarship.law.marquette.edu/sportslaw/vol8/iss1/3>.
34. Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division, Statement before the Committee on Banking and Financial Services, United States House of Representatives, June 20, 2000, <http://democrats.financial-services.house.gov/banking/62000dig.shtml>.
35. Letter from Dennis K. Neilander, Chairman of the Nevada State Gaming Control Board and Peter C. Bernhard, Chairman, Nevada Gaming Commission to Chris Huff Esq., United States Department of Justice, March 7, 2002
36. Letter from The United States Department of Justice, Criminal Division to Mr. Dennis K. Neilander, Chairman, Nevada Gaming Control Board August 23, 2002

37. In 1999 the Department of Justice submitted an amicus brief in *Coeur D'Alene Tribe v. AT&T*, in which the tribe sued the communications company for discontinuing service due to the tribe's telephone lottery. The DOJ said it believed the Wire Act applied because section (d) 1084 provides that, "no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier" for discontinuing service if they were instructed to do so by authorities who suspected the service was being used for gambling in violation of state or federal laws. Because the telephone lottery reached other states, the DOJ concluded that it was in violation of the Indian Gaming Regulatory Act and therefore the carrier, in compliance with section (d) of the Wire Act, acted lawfully. Thus, under the Wire Act, the lottery at issue was considered illegal because it violated state laws as well as IGRA, not due to violations of the Wire Act.
38. 313 F.3d 257, 262-63 (5th Cir. 2002).
39. 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002).
40. *United States v. Lombardo*, 639 F.Supp.2d 1271, 1278-82 (D. Utah 2007).
41. *Ibid*.
42. *Ibid* at 1281.
43. I. Nelson Rose and Rebecca Bolin, "Game on For Internet Gambling: With Federal Approval, States Line Up to Place Their Bets," *Connecticut Law Review*, Vol. 45 No. 2, December 2012, http://connecticutlawreview.org/files/2013/01/RoseBolin.GameOnforInternetGambling.45Conn.L.Rev_.653.pdf
44. *United States v. Kaplan*, (E.D. Mo. Mar. 20, 2008) (No. 4:06CR337CEJ (MLM)). The judge also quotes an Eighth Circuit court opinion: *United States v. Bala*, 489 F3d 334, 342 (8th Cir. 2007) in which the court did not decide whether or not the Wire Act applied to non-sports betting, but indicated that it would rule that the Act applies to all gambling were that the issue before the court.
45. *United States v. Kaplan*, No. 4:06CR337CEJ(MLM) (E.D. Mo., May 7, 2007)
46. *Hichar*.
47. DOJ Memorandum 2011.
48. 31 U.S. Code § 5362 – Definitions <http://www.law.cornell.edu/uscode/text/31/5362>.
49. *Casino Connection AC, Online Throw Down in DC*, April 2, 2014, <http://casinoconnectionac.com/issue/vol-11-no-4-april-2014/article/online-throw-down-in-d-c> Last accessed: August 19, 2014
50. Memorandum Opinion for the Assistant Attorney General, Criminal Division, U.S. Department of Justice, "Whether proposals by Illinois and new York to use the internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act" September 20, 2011 (see footnote 11)
51. *Ibid* at p 7.
52. OLC Memorandum, at 2 (quoting Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, DOJ, from Lanny A. Breuer, Assistant Attorney General, Criminal Division, DOJ (July 12, 2010)
53. *Ibid*.



About the Author

Michelle Minton is the Competitive Enterprise Institute's fellow specializing in consumer policy, including regulation of food, alcohol, and Internet gambling.

She has authored and coauthored numerous studies on topics like sin taxes, alcohol privatization, and the online gambling. Her analyses have been published and cited by nationally respected news outlets like the *Wall Street Journal* and *USA Today* as well as industry blogs and publications. She also regularly appears on radio and television programs to defend peoples' right to "sin".

In her free time Ms. Minton she enjoys playing poker and studying the art and history of making beer.



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