STATEMENT FOR THE RECORD

ON BEHALF OF

THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

FOR THE

HEARING OF THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY AND INVESTIGATIONS

MARCH 25, 2015

"H.R. 707, THE RESTORATION OF AMERICA'S WIRE ACT"

My name is Lyle Beckwith. I am the Senior Vice President, Government Relations for the National Association of Convenience Stores (NACS) and I appreciate this opportunity to present NACS' views regarding Internet gambling law and regulation.

NACS is an international trade association representing more than 2,200 retail and 1,600 supplier company members. NACS member companies do business in nearly 50 countries worldwide, with the majority of members based in the United States. The U.S. convenience store industry, with more than 150,000 stores across the country, posted $700 billion in total sales in 2012, of which $501 billion were motor fuels sales. The majority of NACS members are small, independent operators. More than 70 percent of our total membership is composed of companies that operate ten stores or fewer, and more than 60 percent of our membership operates a single store.

In the United States, the convenience store industry sells more lottery tickets than any other channel of trade. Those sales are an important part of the economic viability of convenience stores, not because the sale of tickets earns the store a lot of money—it doesn't—but because the sale of lottery tickets gives customers a reason to go into the store and, in the process, they often buy other items. Those ancillary sales are tremendously important. Convenience stores have profit margins of just more than one percent and an average store makes less than $40,000 per year in annual pre-tax profits. With these numbers, our members simply cannot afford to lose consumer foot traffic and resulting ancillary sales—indeed, for some of our members, it could make the difference between running a viable business or going under.

Unfortunately, our industry's sales and American consumers are threatened by an impending explosion of Internet gambling. In this testimony, I'd like to cover: how we got to this point; problems with the Department of Justice's change in its legal views on online gambling; what things will look like if Congress doesn't act; and the serious public policy ramifications of Congressional inaction. For all of the reasons discussed below, NACS strongly supports H.R. 707 (the Restoration of America's Wire Act) and urges every member of the Committee to support it as well.

I. Background

The Wire Act was enacted in 1961, and during the first fifty years the law was in effect, the U.S. Department of Justice took the view that gambling by use of the wires--everything from phone lines to the Internet--was illegal. All the while, the Department brought prosecutions to enforce the Wire Act and testified before Congress on this view of the law. Significantly, the Department maintained its view that the Wire Act prohibited gambling over the Internet during the early 2000s when Congress was considering legislation to create additional tools to curb illegal Internet gaming. Congress did pass such legislation in the form of the Unlawful Internet Gaming Enforcement Act (UIGEA). This Committee and Chairman Goodlatte in particular were central to the passage of that legislation. UIGEA did not define the universe of illegal Internet gaming because Congress understood that the Department of Justice had fully formed its view on the issue; namely, that other than some limited exceptions (e.g., for off-track betting on horse

races, which was dealt with specifically in a separate law), the Wire Act clearly prohibited nearly all forms of Internet gambling.

From 2006, when UIGEA passed, to 2011, the only questions surrounding illegal Internet gaming involved enforcement (effectiveness of enforcement efforts and how to make them stronger). Then, in December 2011, the Department of Justice abruptly reversed its long-held position on the Wire Act and undercut the law that Congress had passed (UIGEA) relying upon the Department's 50-year-old legal interpretation. This remarkable move by the Department of Justice turned Internet gambling law and regulation on its head.

Overnight, we went from a nation in which gambling on the Internet was illegal under federal law to one in which individual states could authorize any and every form of gambling on the Internet, other than sports betting. Now, several states allow gambling on the Internet and many more are actively considering such a move. And, according to the Department of Justice, federal law does not bar these activities and we are left without any federal regulation to limit what states can do with respect to Internet gambling. This is a remarkable, and perhaps unprecedented, turn of events. The Internet, of course, does not recognize state boundaries, which means that we are moving toward every home, office and smart phone in the nation becoming a gambling hall.

II. Problems with the 2011 Department of Justice Opinion

Before looking at the implications of bringing gambling to every corner of the country, it may be helpful to examine what the Department of Justice actually did in 2011. First, the 2011 opinion from the Department's Office of Legal Counsel amounts to an end run around Congressional authority. The opinion, which does not carry the force of law but impacts enforcement of Internet gaming laws, effectively gutted multiple acts of Congress. The Department of Justice's move had a drastic impact on the law without going through official channels or the legislative process. Of course, legislating is not supposed to be the province of the Department of Justice.

The impropriety of the Department of Justice's action is only compounded by the fact that the Department got the law wrong in 2011. Exhibits A and B to this testimony are brief white papers detailing the legal issues involved, but I'd like to highlight a few points here. The first, which is the focus of Exhibit A, is that the Department's 2011 opinion runs afoul of well-established cannons of statutory construction and mischaracterizes (where it does not ignore) the Wire Act's legislative history and purpose. The Wire Act was part of a package of anti-crime legislation developed by Congress over a decade, and was passed after Congress heard hours upon hours of testimony on the operations of organized crime and its reliance on revenues derived from illegal gaming operations, including sports and non-sports wagering. Indeed, as enacted, the Wire Act reflects a committee rewrite of certain provisions to clarify that the Act applies to use of the wires for "numbers" games, not just sports wagering. While the Wire Act was enacted pre-Internet, its fundamental purpose remains the same: to serve as a tool for federal prosecutors to combat gambling activities operated or otherwise advanced across state lines. A thorough review of the Wire Act, its legislative history, and its purposes demonstrates the deficiencies and incorrect conclusion in the Department of Justice's 2011 opinion.

Second, as discussed further in Exhibit B, the Department ignored other laws that grew up around the Wire Act to reinforce the illegality of Internet gambling—particularly the illegality of Internet lotteries. For example, the Interstate Transportation of Wagering Paraphernalia Act ("ITWPA") of 1961 bars records, data, items, devices and other materials used in lotteries and other types of gambling from being sent through interstate commerce. And federal courts have ruled on more than one occasion that any communication over the Internet—even if that communication is initiated and received in the same state—is a communication through interstate commerce. *See, e.g.,* U.S. v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004); U.S. v. Kammersell, 196 F. 3d. 1137, 1139 (10th Cir. 1999). In other words, the Internet is inherently interstate and therefore, lotteries conducted on the Internet trigger bans like those in the ITWPA.

Additionally, the Anti-Lottery Act and Interstate Wagering Amendment of 1994 (together, the "ALA") makes Internet lotteries illegal in the United States. Unfortunately, the Department did not deal with either the ITWPA or the ALA in its 2011 opinion on the Wire Act, and consequently left the false impression that Internet lotteries are legal if they are authorized by a state when they clearly are not. Of course, the interplay between these laws and the Wire Act may itself have led the Department to a different conclusion on the Wire Act. To abruptly reverse a fifty-year-old legal position and undercut Congress' work is one thing, but to do so without even considering other relevant laws undermines the Department's credibility.

The upshot of the Department of Justice's 2011 opinion is that federal prosecutors have been given bad guidance. Unfortunately, no one is in a position to challenge that bad guidance because the Department has significant prosecutorial discretion. With one fell swoop the Department struck down its position on the Wire Act and essentially expunged the ITWPA, the ALA, and UIGEA from the U.S. Code. Now it is up to Congress to restore those laws.

III. The Current Trajectory for Internet Gambling in the United States

Without Congressional action, the Department of Justice has set the country on a course for widespread gambling on the Internet. We need only look to Europe for a sense of where we're headed. For example, the United Kingdom's lottery has been online for years; Exhibit C to this testimony provides a clear picture of what the UK "lottery" looks like now. The UK "lottery" website offers gambling of virtually all sorts imaginable. Not only does the website offer people the chance to pick numbers for a lottery, play instant-win games and the like, it offers games called "Monopoly," "Snakes and Ladders," "Scrabble," "Hangman," "Connect Four," "Tetris," and many more. Not only is the variety of gambling games available on the "lottery" website remarkable, but it is difficult not to notice that a great many of the games are named after popular children's games. Is that the model we want in the United States?

With every state able to authorize any and every gambling game on the Internet and without federal regulation or limitations, the UK model is likely where we are headed. In fact, we are already getting close. The Delaware lottery already promotes "table games" on its website. These games are offered on other websites - those for the Delaware Park Racetrack, Dover Downs, and the Harrington Raceway - but the official Delaware lottery website lists the

games and prominently links to those websites. Oregon, which has not yet puts its games on the Internet, has electronic "lottery" terminals that allow people to play slots and poker. Indeed the Oregon lottery makes more than 80% of its money from video slots and video poker—it is far more casino than lottery. While this approach is Oregon's prerogative and non-Internet video lottery terminals are legal, they help demonstrate how easy it will be for Internet "lotteries" to evolve into full-blown gambling websites very quickly.

Some argue that the Department of Justice opinion limits Internet gambling so the games can only be played in the states where they are authorized. While that is what the opinion says, the practical reality is more complicated than that. Things on the Internet are there for everyone to see, and while gambling websites might try to verify where someone is located to stop out-of-state gambling, there are methods available now (that will only multiply with more Internet gambling) to provide false locations. The simplest search on how to do this yields articles like, *How to Fake Your Location in Google Chrome* (at http://www.labnol.org/internet/geo-location/'), *How to Disable or Fake Your Location in Firefox, Internet Explorer & Chrome*" (at http://www.makeuseof.com/tag/disable-fake-location-firefox-internet-explorer-chrome/), and *Fake GPS Location* (at https://play.google.com/store/apps/details?id=com.lexa.fakegps). And this is just the tip of the iceberg. There are specific articles on the Internet with instructions on how to fake your location on android phones, iPhones, iPads and other devices.

This raises serious questions about the ability of gambling websites to accurately determine where customers are when they gamble. Of course, there are many questions about just how diligent gambling websites will be in trying to limit gambling to a particular state. After all, more gamblers mean more revenue for the website, even if those gamblers are outside the state where the gambling is supposedly legal. This issue is even more troubling if state-run lotteries are involved. While states might credibly enforce the law against private gambling websites, will state lotteries really police themselves as effectively? It doesn't seem likely. Nor does it seem likely, given the Department of Justice's legal opinion, that the federal government can be counted on to police state-run lotteries and keep them from luring out-of-state gamblers.

In sum, all signs point to widespread gambling of all types across the United States—regardless of individual states' policy decisions with respect to gambling—if Congress does not restore the Wire Act. Currently, two states do not allow gambling of any sort, and eight states do not have lotteries. Most states prohibit some types of gambling. However, with Internet gambling, states that have adopted restricted gambling policies will be powerless to maintain them because people within their borders will be able to go online to gamble. Longstanding objections to Internet gambling from states like Utah, Virginia, and others will be rendered moot as people gamble from wherever they like. Failing to restore the Wire Act will directly and inescapably undercut states' rights to set their own limits on gambling within their borders. And no part of any state – including houses of worship and schools – will be off-limits to people gambling on smartphones, tablets and similar devices.

Internet gambling is not necessarily a win-win for lottery states either. Inevitably, as lottery players are able to play whichever lottery they choose from wherever they are, some states will be winners and some will be losers. Money will flow to favored state lotteries and

away from less popular state lotteries. States' lottery revenue will be at significant risk as people become able to spend their money in other states without having to travel outside their homes to do so.

IV. Public Policy Problems with Internet Gambling

Gambling on the Internet presents a number of public policy problems. For NACS members, putting state lotteries online not only moves gambling into people's homes and offices as well as public places, it also makes the states direct sellers of gambling activities to individual consumers. That is not the role the states play today. Making states direct sellers and putting them in competition with the private sector is something new. This type of government competition will hurt the private sector and reduce tax revenues as private companies lose ancillary sales that they would otherwise earn from lottery customers coming into their stores.

But the problems with Internet gambling don't stop there. Verifying age—and thereby preventing children from gambling—is a difficult problem on the Internet. Our industry spends millions of dollars every year training clerks on how to properly check identification. Some of our members conduct their own internal sting operations to make sure employees are taking the proper steps to check IDs, and impose discipline (even firing) if they don't perform proper checks.

Our industry is uniquely qualified and equipped to perform the important function of age verification. Convenience stores check driver's licenses and other forms of identification more than any other sector in the U.S. economy. Our industry handles about 160 million transactions every day and a significant number of those are for age-restricted products. In fact, our industry checks more IDs each day than the Transportation Security Administration, which checks about 2 million IDs every day.

By contrast, it is worth noting that the history of age verification on the Internet is a woeful one. In 2008, the Court of Appeals for the Third Circuit found: "there is no evidence of age verification services or products available on the market to owners of websites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor." ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008) (quoting ACLU v. Gonzales, 478 F. Supp. 2d 775, 800 (E.D. Pa. 2007)). In comments submitted to the FDA in 2012 regarding non-face-to-face sale of tobacco products, the National Association of Attorneys General cited the findings of the above cases and a 2008 report issued by the Internet Safety and Technical Taskforce, which concluded: "Age verification and identity authentication technologies are appealing in concept but challenged in terms of effectiveness. Any system that relies on remote verification of information has potential for inaccuracies. For example, . . . it is never certain that the person attempting to verify an identity

is using their own actual identity or someone else's."[1] The Attorneys General then noted that, as of 2012, they had not seen anything to refute that finding.[2]

Internet sales of tobacco products, which have been going on for some time, provide important lessons with respect to online age verification problems. State attorneys general conducted sting operations on such sales and found that children as young as 9 years old were easily able to purchase cigarettes online.[3] And a sting operation in New York found that twenty-four out of twenty-six websites allowed minors to purchase cigarettes.[4] One study found that only 14 percent of cigarette orders placed by children online were rejected.[5] A study published in the Journal of the American Medical Association found that more than 96 percent of minors aged 15 to 16 were able to find an Internet cigarette vendor and place an order in less than 25 minutes, with most completing the order in seven minutes.[6] And a 2006 study of more than one hundred websites found that not a single one of them complied with California's requirements for age verification.[7]

For years, many tobacco-selling websites checked age by making someone click a button "verifying" that he or she was eighteen years old--and that was the full extent of age verification. It took years for Congress to pass legislation to make some impact on the problems with age verification for online tobacco sales. Allowing similar problems to flourish with respect to Internet gambling could allow children to fall into addiction and create financial debts that nobody wants them to incur. Experience overseas demonstrates that these problems will accompany online gaming. A 2009 study commissioned by the National Lottery Commission for the United Kingdom found that a fifth of schoolchildren are gambling illegally, even though online gaming companies are required to carry out stringent checks to prevent children from playing their games.

The simple fact is, proper in-person verification of age will always work better than online verification. There are inherent difficulties with confirming that a person at a computer

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[1] National Association of Attorneys General, Comments to Food and Drug Administration, at 7, *available at* http://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0467-0110 (Jan. 19, 2012).

[2] *Id.*

[3] Unger, JB, et al., "Are adolescents attempting to buy cigarettes on the Internet?," Tobacco Control 10: 360-63, December 2001 (citing Sherer, R, "States crack down on Web tobacco sales," The Christian Science Monitor (Nov. 8, 2000) & ABC News, "Getting smokes online: Children buying cigarettes with click of mouse," (Mar. 6, 2001)).

[4] *Id.*

[5] Rubin, R., et al., "Online Tobacco Sales Grow, States Lose," Forrester Research, Inc. (Apr. 27, 2001).

[6] Jensen, JA, et al., "Availability of tobacco to youth via the Internet," JAMA 291(15): 1837 (Apr. 21, 2004).

[7] Williams, RS, et al., "Internet cigarette vendors' lack of compliance with a California state law designed to prevent tobacco sales to minors," Archives of Pediatrics and Adolescent Medicine 160:988-989 (2006).

matches the identification being entered online. And with illegal youth gambling on the rise in the U.S., age verification is more important than ever.

Research from the Harvard School of Public Health and the Annenberg Public Policy Center shows a nearly 600% increase in gambling in post-secondary institutions between 2001 and 2005, with over 15% of students engaging in gambling each week in 2005. The reasons cited by the study are the spread of legalized casino gambling and Internet gambling. Notably, the study was conducted before UIGEA was enacted--an era to which the Department of Justice is retaking us.

Young people are often drawn to the video-game style of Internet gaming sites and, these days, are perfectly comfortable playing (and paying) online. Another study found that youths with gambling problems reported having a preference for lottery tickets compared to other forms of gambling. The study also found that purchasing lottery tickets is an addictive activity that introduces youth to the exciting properties of gambling.[8] A Connecticut Council on Problem Gambling study found that one out of ten high school kids were compulsive gamblers, and the rate of problem gambling among high school students was more than twice the rate of adult problem gambling. The Connecticut Council study also found that lottery was among the most popular forms of gambling for these kids.[9]

Internet gambling presents a serious threat to young people and also threatens to exacerbate issues for problem gamblers. It is far easier to gamble excessively in the privacy of one's home, office, or car than it is to go to a store (in the case of lottery tickets) or travel to a casino in order to gamble. Gambling in the brick-and-mortar context entails some inherent social and logistical limitations, which can be helpful in reducing the amount of problem gambling. There are virtually no impediments to problem gambling on the Internet, especially once payment information is stored electronically and gambling requires—literally—the touch of a button on a phone or computer.

According to the 2014 annual report of the Problem Gamblers Help Network of West Virginia, from 2000 to 2013, 7,819 people called the gambling help hotline and reported problems with lottery gambling (including lottery tickets and lottery video terminals), compared to 1,517 who reported problems with slot machines, 129 with poker, 121 with horse races, 100 with cards, and 16 with roulette.[10] Additionally, allowing online gambling (especially lotteries) would have a disproportionate impact on lower income families. The annual amount spent, or per capita play, by gamblers is highest for lower income households ($597 per year), exceeding any other income category and more than double the amount spent on gambling by the highest earners ($289 per year, on average). In addition, households earning just $10,000 spend twice the

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[8] Jennifer Felsher, Jeffrey Derevensky, Rina Gupta, "Lottery participation by youth with gambling problems: are lottery tickets a gateway to other gambling venues?," International Gambling Studies, Vol. 4 (Nov. 2004).

[9] Rani A. Desai, et. al., "Gambling Behavior among High School Students in the State of Connecticut," CT Council on Problem Gambling (May 15, 2007).

[10] Annual Report, The Problem Gamblers Help Network of West Virginia, *available at* http://www.1800gambler.net/data.html (2014).

amount on gambling as households earning $90,000. Put another way, the lowest-earning households spend about 10.8 percent of income on gambling, versus 0.7 percent of income for the highest earners.[11]

While some will cynically argue that nothing can be done to reduce gambling online, the facts show otherwise. A survey published by the Gambling Commission, for example, found that one-third of gambling websites allowed underage betting. UIGEA, however, reduced the prevalence of youth gambling. In fact, one year after the passage of UIGEA, the University of Pennsylvania found that Internet gambling among college students significantly declined.[12] Unfortunately, the Department of Justice, with a single ill-constructed legal opinion, has undermined UIGEA and several other acts of Congress, and opened the doors to widespread and unchecked Internet gambling.

Proponents of Internet gambling tend to ignore all of these serious policy problems. They also tend to overstate (and sometimes invent) any benefits associated with Internet gaming. For example, proponents of putting lotteries online commonly emphasize the importance of Internet gaming for education funding. However, as a general rule, lotteries do *not* boost state spending on education. In September 2007, CBS News investigated 24 states that dedicate lottery funds for education and found that the percentage of state spending on education was down or flat in 21 of those states. CBS News also found that "even when proceeds are earmarked for education, lotteries generally cover only a fraction of state education spending"[13] Similarly, in 2007, the *New York Times* found that lotteries accounted for less than 1 percent to 5 percent of the total revenue for K-12 education in the states that use lottery revenue for schools.[14]

Evidence suggests that non-lottery states are actually better off in terms of education spending than lottery states. States without lotteries, however, increase their spending over time and end up spending 10 percent more of their budgets, on average, on education compared to lottery states.[15] Furthermore, running a lottery can cause long-term budget imbalances for education and other public services. According to the Nelson A. Rockefeller Institute of Government, while lottery revenues increase almost every year, revenue growth has been trending downward since 1986. Therefore, expenditures and demands on education and other public programs grow faster than gambling revenue over time. And spending on lottery tickets is

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[11] National Center for Policy Analysis Task Force on Taxing the Poor, "Taxing the Poor" (June 22, 2007).
[12] "Card Playing Down Among College-Age Youth: Internet Gambling Also Declines," Annenberg Public Policy Center of the University of Pennsylvania (Oct. 18, 2007).
[13] "Is the Lottery Shortchanging Schools?," CBS News, *available at* http://www.cbsnews.com/news/is-the-lottery-shortchanging-schools/ (Sept. 17, 2007).
[14] "For Schools, Lottery Payoffs Fall Short of Promises," New York Times, http://www.nytimes.com/2007/10/07/business/07lotto.html?_r=0 (Oct. 7, 2007).
[15] McAuliffe, Elizabeth, "The State Sponsored Lottery; a Failure of Policy and Ethics," ASPA, 2006, *available at* http://stoppredatorygambling.org/wp-content/uploads/2012/12/The-State-Sponsored-Lottery1.pdf.

not stable over time, so it is not a dependable source of revenue for vital social programming like education.[16]

The fact is, lotteries spend most of their money keeping their games running. Across lottery states, on average, only 34 cents of every dollar spent on a lottery ticket goes to public programs after the lottery pays administrative and advertising expenses, and winner pay-outs.[17] According to the New York Times, "most of the money raised by lotteries is used simply to sustain the games themselves, including marketing, prizes and vendor commissions. And as lotteries compete for a small number of core players and try to persuade occasional customers to play more, nearly every state has increased, or is considering increasing, the size of its prizes — further shrinking the percentage of each dollar going to education and other programs."[18]

In the end, the only real winners with Internet gaming are vendors seeking to boost their bottom line. Given the significant small-business and social policy concerns surrounding Internet gaming, a few vendors' profits simply are not sufficient reason to undo 50-plus years of sound law and policy under the Wire Act.

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For all of the foregoing reasons, the time for Congress to do something about this problem is now--before the problem grows out of control. The window for Internet gambling, opened by the Department of Justice's 2011 opinion, must be closed.

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[16] *Id.*

[17] "Why State Lotteries Never Live up to Their Promises," Think Progress, *available at* http://thinkprogress.org/economy/2014/02/25/3326421/state-lottery-education/ (Feb. 25, 2014).

[18] "For Schools, Lottery Payoffs Fall Short of Promises," New York Times, http://www.nytimes.com/2007/10/07/business/07lotto.html?_r=0 (Oct. 7, 2007).

EXHIBIT A

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MEMORANDUM

TO: Co-Chairs, Coalition to Stop Internet Gambling

FROM: Darryl Nirenberg
David Fialkov

DATE: December 6, 2014

RE: *Legal Analysis of the Department of Justice's Reinterpretation of the Wire Act*

I. OVERVIEW

This memorandum analyzes Section 1084(a) of the Wire Act and concludes – based on well-accepted canons of statutory construction and on the legislation's purpose and history – that the Department of Justice, in its memorandum reversing its long-standing interpretation of that law, was wrong in concluding the Act proscribes sports-related wagering only, and thereby erred in opening the door for the introduction into the United States of licensed Internet gambling.

In December 2011, the Department of Justice's Office of Legal Counsel ("OLC") made public an opinion concluding the Wire Act covered only gambling pertaining to a sporting event or contest (referred to hereinafter as the "Opinion"). The Opinion effectively reversed the Department of Justice's long-standing interpretation that found the statute covered *all* types of bets or wagers – an interpretation based largely on the statute's language, purpose, and legislative history.

The Opinion was signed by the head of the Office of Legal Counsel, who subsequently stated that "it is just that – an opinion."[1] Nevertheless, the Opinion has had significant consequences. Three states have enacted legislation authorizing non-sports gaming over the Internet, and others have waded into the offering online of lotteries.[2] Reportedly, as a result of the OLC opinion, the Justice Department ("DOJ" or "Department") and the Federal Bureau of Investigations ("FBI") have "ceased cracking down on online gambling."[3]

In America's constitutional scheme, Congress enacts laws which are interpreted by the Judiciary and implemented by the executive branch. The Opinion, then, having emanated from the executive branch, does not carry the force of law. The courts could, based on the Wire Act's language,

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[1] Goodman, Leah McGratch, "How Washington Opened the Floodgates to Online Poker, Dealing Parents a Bad Hand." Newsweek, August 14, 2014, *available at* http://www.newsweek.com/2014/08/22/how-washington-opened-floodgates-online-poker-dealing-parents-bad-hand-264459.html.

[2] New Jersey, Delaware and Nevada have authorized non-sports gambling over the Internet. Minnesota, Illinois and Georgia have authorized online lotteries.

[3] Goodman, Leah McGratch, "How Washington Opened the Floodgates to Online Poker, Dealing Parents a Bad Hand." Newsweek, August 14, 2014, *available at* http://www.newsweek.com/2014/08/22/how-washington-opened-floodgates-online-poker-dealing-parents-bad-hand-264459.html.

purposes, and legislative history (as set forth herein), conclude the Wire Act proscribes all forms of gambling over the Internet. This state of affairs leads to substantial uncertainty.[4] As such, the Wire Act is likely to remain in limbo unless the DOJ restores its traditional interpretation of the statute, or until Congress or the courts act to clarify the Act's reach.

This memorandum provides background information on the OLC opinion and its practical and policy consequences. It analyzes the Wire Act's history and purpose, as well as the text of the operative subsection of the statute, employing several fundamental canons of statutory construction, leading to the conclusion that the Act should be read and interpreted as it had for 50 years leading up to the Opinion – as covering all forms of wagering; sports and non-sports alike.

This memorandum does not address other federal statutes which may proscribe certain forms of online gambling aside and apart from the Wire Act.[5] It also is not intended to serve as, and should not be relied upon as, a "formal legal opinion" for the purposes of engaging in transactions or litigation.

II. BACKGROUND

In December 2011, the OLC[6] issued an opinion that reversed the Department's position on the application of Section 1084(a) of the Wire Act to gambling that does not relate to a "sporting event or contest."[7] Prior to the Opinion's issuance, the DOJ had interpreted Section 1084(a) to cover to all forms of gambling. As a practical matter, this operated as a barrier to widespread gambling, including on lottery and casino games, over the Internet in the United States. The Opinion reversed this position and narrowly interpreted the Wire Act as covering gambling that pertains to a sporting event or contest only.

Armed with this assurance that the DOJ no longer considers online gambling for non-sports related wagers as violating the Wire Act, several states have acted to authorize forms of Internet gaming, while others are actively considering following suit. The presence of state-regulated and illegal unregulated gaming sites online could well proliferate in coming months in the face of reports that the DOJ has "ceased cracking down on online gambling and will leave it up to the states."[8]

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[4] For example, the Opinion does not necessary shield payment processors from processing "bets or wagers" that are prohibited under the Unlawful Internet Gambling Enforcement Act; only Congress and the courts can determine what conduct is prohibited under that law.

[5] Indeed, the Interstate Transportation of Wagering Paraphernalia Act of 1961 (18 U.S.C. 1953(a)) bars Internet lotteries. *See U.S. v. Baker*, 241 F. Supp. 272 (M.D. Pa. 1965), *aff'd* 364 F.2d 107 (3d Cir. 1966); *U.S. v. Fabrizio*, 385 U.S. 263 (1966); *U.S. v. Stuebben*, 799 F.2d 225 (5th Cir. 1986); *U.S. v. Norberto*, 373 F. Supp. 2d 150 (E.D.N.Y. 2005); *FTC v. World Media Brokers*, 415 F.3d 758 (7th Cir. 2005).

[6] The DOJ's Office of Legal Counsel provides "authoritative" or "controlling" legal advice to the President and all executive branch agencies. Legal Counsel's opinions do not have the force of law, but they are generally considered binding on the executive branch, including the President.

[7] *See* Section 1084(a) of the Wire Act, *codified at* 18 U.S.C. 1084(a).

[8] Goodman, Leah McGratch, "How Washington Opened the Floodgates to Online Poker, Dealing Parents a Bad Hand." Newsweek, August 14, 2014, *available at* http://www.newsweek.com/2014/08/22/how-washington-opened-floodgates-online-poker-dealing-parents-bad-hand-264459.html.

III. THE WIRE ACT'S HISTORY AND PURPOSE

A. Section 1084(a) of the Wire Act was Enacted to Curb Gambling Activity Conducted by Organized Criminal Enterprises

The DOJ Opinion is deficient in that it examines the Wire Act's legislative history without examining the statute's "purpose." The statute's purpose, both as Congress explicitly stated in the legislative history and when analyzed in the historical context in which it was enacted, indicates that it was designed to target *all* gambling activity utilized by organized crime entities.

The purpose language in the Wire Act's House committee report states:

> *The purpose of the bill is to assist various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.*[9]

The DOJ Opinion contradicts this language stating the purpose of the bill. The purpose language is not limited to "bookmaking." Instead, it includes "gambling" and "like offenses." If the Opinion were correct, the references to "gambling" and "like offenses" would be inaccurate statements of the purpose of the bill. The reference in the purpose language to "organized gambling activities" also supports a broader reading of the bill than the Opinion allows. As documented in Senate hearings in the 1950s and 1960s, "organized" gambling activities came in many forms – including those unrelated to sporting events. The Committee report, then, strongly supports the conclusion that the Wire Act covers all forms of gambling – not just gambling on sporting events.

Viewing the Wire Act in the historical context in which it was enacted also supports the conclusion that it covers all forms of gambling. Prior to enacting the Wire Act, various congressional committees – specifically, the "Kefauver Committee" in the early 1950s, the "McClellan Committee" in the late 1950s, and the Senate Permanent Subcommittee on Investigations in the early 1960s – had conducted exhaustive hearings into, and reviews of, the tactics and illicit activities of organized crime in the United States.[10] While the McClellan Committee was primarily focused on mob infiltration into labor unions, these committees spent substantial amounts of time investigating gambling, specifically on horseracing, sports, and "numbers" (which operated like lotteries), the role such gambling played in providing essential revenues to organized crime entities, and the impact gambling had on citizens – especially on the most vulnerable. The Wire Act was designed to combat the evils these committees uncovered.[11]

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[9] H.R. Rep. No. 967, 87th Cong. 1st Sess. (1961).

[10] The Kefauver Committee and the McClellan Committee were named after their respective chairmen: Senators Estes Kefauver (D-TN) and John L. McClellan (D-AR).

[11] *See also* Attorney General's Conference on Organized Crime, Department of Justice, February 15, 1950, at 78 for an early instance of a recommendation for federal legislation prohibiting the use of telephone, telegraph, or radio facilities for illegal gambling purposes. While discussion of telecommunications in the report focused on their use for illegal betting on horseracing, the Conference and its report were focused on means to combat organized crime, a fundamental stated purpose of the Wire Act.

i. *The Kefauver Committee*

In late 1949, numerous articles in newspapers and magazines warned that a national crime syndicate was gaining control of many American cities by corrupting local government officials. Cities requested federal assistance to combat organized crime, only to find that federal law offered few weapons against this form of criminal activity.[12]

In 1950, the United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce, commonly known as the Kefauver Committee, was formed to study and investigate "whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law . . . and, if so, the manner and extent to which, and the identity of the persons, forms, or corporations by which such utilization is being made."[13]

The Kefauver Committee issued four reports, concluding that nationwide organized crime syndicates did exist and that they relied largely on revenue generated through gambling operations, including numbers games. For example:

> *The committee lately exposed another interstate gambling empire of impressive proportions, which has grown up in defiance of the old lottery law by decentralizing its operations and attenuating its interstate ties: The Treasury balance lottery racket.*
>
> . . .
>
> *The committee's survey of conditions in the area of Scranton, Pa., included some investigation in nearby Wilkes-Barre and Hazleton. The committee concentrated on the ramifications of a multi-million-dollar Treasury-balance lottery . . . .*
>
> *The Treasury-balance lottery, according to testimony obtained by the committee, operates in most of the Eastern States and in sections of the Midwest. Tickets are sold for 25 cents and 50 cents, with occasional "specials" during the year selling for $1. The last five figures of the daily balance issued by the United States Treasury determine the winners. The ticket plays for 5 days, and top prize in most instances is $3,000. The odds against the betters are extremely heavy, and the profit of the racketeers who run the lottery is enormous.*
>
> *A special service of the Western Union Telegraph Co. speeds the number daily from Washington to 51 subscribers who have been identified either as the principals or chief agents in the operation of the racket throughout the East...*[14]

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[12] "Records of Senate Select and Special Committees, 1789-1988," Guide to Federal Records in the National Archives of the United States: Bicentennial Edition, National Archives and Records Administration, 1989. *Available at* http://www.archives.gov/legislative/guide/senate/chapter-18-1946-1968.html#18E-2.

[13] *Id.*, quoting S. Res. 202, 81st Congress.

[14] *See,* U.S. Senate Special Committee to Investigate Organized Crime in Interstate Commerce, Section E. *See also* Section VII(C)(c) (detailing the complex lottery scheme requiring the use of the wires of which famed mobster Louis Cohen was believed to be the ruler).

In light of these and other findings related to the use of interstate telecommunications by organized crime for gambling purposes, the Kefauver Committee ultimately recommended Congress pass a law prohibiting use of the wires to facilitate gambling. Notably, the report did not qualify this recommendation to limit its application to sports-related wagers.[15]

As discussed below, when the Senate Judiciary Committee held hearings on the Wire Act in 1961, Senator Kefauver expressed consternation that the proposed Wire Act as initially introduced – specifically its subsection 1084(a) -- was expressly limited to sports-related wagers and appeared not to cover "numbers" games. The Committee, during markup, struck the subsection flagged by Kefauver (other than language establishing sanctions for violations), and replaced it with the broader language which remains the law today.[16]

ii. *The McClellan Committee*

The United States Senate Select Committee on Improper Activities in Labor and Management, commonly known as the "McClellan Committee" studied the extent of organized crime's infiltration in the field of labor-management relations (*i.e.*, unions) in the United States. While the panel's findings and recommendations were largely focused on labor-management relations, testimony was received related to the continuing use by organized crime of gambling activities as a means to obtain revenue.

Also of note is that the Chief Counsel of the panel was Robert F. Kennedy, who would go on to serve as Attorney General when the Wire Act was enacted. Kennedy served as counsel to this panel from 1957 to 1960 and concluded that the criminal underworld was "a vast and malicious beast that threatened the United States even more than Communist aggression."[17] He subsequently wrote a book on the McClellan's Committee's findings ("The Enemy Within") and as Attorney General of the United States, considered defeating organized crime a top priority of his office.[18] "[F]or Kennedy, the Wire Act wasn't really about betting on horses or football. It was instead intended to strike at organized crime. To fight the enemy within, America would have to federalize criminal statutes previously enforced by states."[19]

After the McClellan Committee's original mandate expired, Senator McClellan and others pushed for the Senate to expand the jurisdiction of other Senate committees to, among other things, continue the Senate's investigations into organized crime. The Senate ultimately granted jurisdiction to the Committee on Government Operations.[20] That committee's Permanent Subcommittee on Investigations began investigating matters pertaining to organized crime, and held hearings on the topic in August, 1961, as Congress was debating – and acting upon – the Wire Act.[21]

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[15] *Id.* at Section III-A. ("[T]ransmission of gambling information across State lines by telegraph, telephone, radio, television, or other means of communication or communication facility should be regulated to as to outlaw any service devoted to a substantial extent on providing information used in illegal gambling.")

[16] *See* fns. 44-46 *infra* and accompanying text.

[17] Schwartz, David G. "Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose." *Gaming Law Review and Economics*, Vol. 14, No. 7 (2010).

[18] *Id.*

[19] *Id.*

[20] Senate Extends Rackets Inquiry: McClellan Gains 10-month Stand-By Authority but His Budget Is Slashed." The New York Times, April 12, 1960.

[21] *See* timeline in **Appendix C.**

iii. *Senate Permanent Subcommittee on Investigations*

The Senate Permanent Subcommittee on Investigations held hearings on organized crime over the course of four days in late August, 1961 – during the period immediately after the Senate had received the House-passed version of the Wire Act and before the Senate took up the bill and voted to send it to the President.[22] These hearings confirmed the continued widespread use of the wires by organized crime syndicates in the United States for the purpose of engaging in a wide range of illicit gambling; including in the form of lottery and numbers games.

To summarize a relevant portion of those hearings, the Subcommittee received testimony from Judge Goodman A. Sarachan, a commissioner of the New York State Crime Commission, who relayed how the numbers racket was a "serious type of gambling" throughout New York, and that it relied upon use of the wires.

Judge Sarachan added that the numbers games were overseen by organized crime syndicates and were played in a variety of ways, noting, for example, how horserace results often served as the source for a popular numbers game: "They take the numbers of the horses that win and combine them together...for example, if No. 2 horse wins the first race, No. 5 the second, and No. 7 the third, you either bet that your number will be 257, or you bet that your number will be any combination of that, like 527, and so on."[23] This scheme is very similar to the Treasury balance lottery ticket scheme that the Kefauver Committee discovered the previous decade.[24]

After hearing Judge Sarachan describe these numbers rackets, Senator Karl Mundt (R-SD) expressed his support for legislation to counteract the numbers rackets. "It seems to me that there is just something entirely incongruous about the fact that we set up a great communications system that tends to become a monopoly of the crime syndicate," Sen. Mundt said.[25] (**Appendix A** to this memorandum contains a longer excerpt from this discussion at the hearing.) Within days, the Senate would take up and pass the Wire Act, sending it off to President Kennedy for his signature.

As with the Robert Kennedy's role with the McClellan Committee, Jerome Alderman's position as the Subcommittee on Investigation's Chief Counsel is noteworthy. Mr. Alderman previously served with Robert Kennedy as counsel to the McClellan Committee.[26] Through his role on the McClellan Committee and then for the Permanent Subcommittee on Investigations when it received testimony on organized crime, Mr. Alderman was undoubtedly aware of organized crime's use of the wires for a wide range of illicit gambling – including on numbers games. He also presumably played a key role in enacting the Wire Act. Less than one month after hearing Judge Sarachan's testimony before the Subcommittee on Investigations, Mr. Alderman attended the White House signing ceremony where President Kennedy signed the Wire Act. (He was the only congressional staffer in attendance. *See* photograph in **Appendix B** to this memorandum.)

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[22] *See generally* Hearing Transcript, "Gambling and Organized Crime," Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate. Aug. 21-25, 1961.
[23] *Id.*
[24] *See supra* n. 14 and accompanying text.
[25] Hearing Transcript, "Gambling and Organized Crime," Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate. Aug. 21-25, 1961.
[26] *See also*, "Lawyer with Innocent Smile Helps McClellan Plan Inquiry," The Toledo Blade, October 1, 1963, *available at* http://news.google.com/newspapers?nid=1350&dat=19631001&id=U7FOAAAAIBAJ&sjid=PQEEAAAAIBAJ&pg=7241,5858751.

iv. *The Wire Act was one piece of a package of bills that the Kennedy-led DOJ developed targeting organized crime.*

After Robert Kennedy was sworn in as Attorney General, the DOJ developed a package of bills targeting organized crime. In addition to the Wire Act (targeting transmission of betting information across state lines), this package also included the Travel Act (targeting those who travel across state lines to advance their illegal enterprises) and the Gaming Paraphernalia Act (targeting those who ship gambling devices across state lines). Congress considered these bills contemporaneously with one another, and President John F. Kennedy signed them into law at a single ceremony on September 13, 1961.

The Travel Act[27] and Gaming Paraphernalia Act[28] both cover non-sports-wagers because it was well known, and was revealed during the Senate hearings of the 1950s, that organized crime engaged in the movement across state lines of individuals and equipment involved in non-sports gaming (such as lotteries) Viewed in this light, it would make no sense to conclude that the Wire Act, which was viewed as an integral piece of this trio of anti-organized crime legislation, did *not* cover numbers games and other non-sports wagers.

There is no reason for Kennedy's Justice Department to advocate for a *narrower* universe of prohibited conduct under the Wire Act (sports gambling) compared with the broader scope of the Travel Act and the Gaming Paraphernalia Act (which encompassed numbers and casino-style gambling in which organized crime was extensively involved).

Kennedy was undoubtedly well-versed in the Kefauver and McClellan Committee's conclusions and recommendations, including those pertaining to organized crime activity in numbers games and rackets. Indeed, Kennedy was focused on "bookmaking (dominated by horserace betting and wire transmissions of the same) *and numbers games* ...."[29]

As Attorney General, Kennedy authored an article about the threats posed by gambling published in *The Atlantic* six months after enactment of the Wire Act. While the article discussed in detail how organized crime conducted illegal sports betting, it also described the operations and ills of "policy games" and the "numbers racket."[30]

"A man purchases a ticket with three numbers on it, paying a dollar for the ticket," Kennedy wrote. "Since there are 999 such numbers, he should reasonably expect the odds to be 998 to 1. The numbers bank usually pays 600 to 1 on such a wager—or less—so you can see that the only gambler in this situation is the man who makes the bet. The operator pockets forty cents of every dollar bet – that is, if the game is run honestly. ...[But] if the play is too high on any one number, they manage through devious means to ensure that a number on which the play has been small will be the winner."[31] Such gambling activities finance corruption and racketeering, Kennedy wrote, which "are

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[27] 18 USC 1952(b)(1) (covering any "gambling" activity).
[28] 18 USC 1953(a) (covering bookmaking, wagering pools with respect to a sporting event, and "a numbers, policy, bolita, or similar game....")
[29] Schwartz, David G. "Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose." Gaming Law Review and Economics, Vol. 14, No. 7 (2010).
[30] Robert F. Kennedy, "The Baleful Influence of Gambling," The Atlantic, April 1962, *available at* http://www.theatlantic.com/magazine/archive/1962/04/the-baleful-influence-of-gambling/304909/?single_page=true.
[31] *Id.*

weakening the vitality and strength of this nation."[32]

The Attorney General wrote of the Kennedy's Administration success in securing enactment by Congress of a package of legislation authorizing "the Justice Department for the first time to deal with gambling activities."[33] The three bills, he explained, made it federal crimes "for any person to move in interstate travel to promote or participate in a racketeering enterprise," or "to transmit bets and wagers between states by wire or telephone or to transport wagering paraphernalia to another state."[34] Seeing that the Attorney General possessed a firm grasp of, and wrote of, the prevalence of numbers games, and the societal ills such games generated,[35] undermines any conclusion that he and his Justice Department intended or envisioned that one of three bills they pushed through Congress – the Wire Act – would somehow be limited to cover only sports bets and *not* cover numbers games.

IV. STATUTORY ANALYSIS

A. Section 1084(a) of the Wire Act Contains Two Broad Clauses

Section 1084(a) of the Wire Act 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.*[36]

This provision contains two broad clauses. The first clause bars anyone engaged in the business of betting or wagering from knowingly using a wire communication facility "for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest."[37] The second clause bars anyone engaged in the business of betting or wagering from knowingly using a wire communication facility to transmit communications that either (a) entitle the recipient to "receive money or credit as a result of bets or wagers" or (b) provide "information assisting in the placing of bets or wagers."[38]

Whether the Wire Act applies to gambling for non-sports-related wagers hinges on the following

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See also* The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings before the Committee on the Judiciary Committee, United States Senate, 87th Congress 101-102, statement of Roger Burgess, Associate General Secretary, General Board of Christian Social Concerns of the Methodist Church (stating to the Congressional committee drafting the Wire Act that gambling and the rackets are degrading to individuals and an economic parasite on the society, adding that "much of this money is coming from the pockets of those unable to sustain financially such economic losses...."
[36] 18 U.S.C. 1084(a).
[37] *Id.*
[38] *Id.*

question: Does the phrase "on any sporting event or contest" modify both the first and second clause in Section 1084(a), or does the phrase only modify the first clause in Section 1084(a)? The DOJ Opinion concluded the term modifies *both* clauses, and thus that the Wire Act only covers gambling on sports-related contests.

The conclusion is incorrect and the manner in which it was reached is flawed. When analyzed both on its face and in the contexts in which this law was enacted and has been enforced, it is clear the first clause of Section 1084(a) applies to sports-related wagers, and the second clause of Section 1084(a) applies to *all* wagers.

B. The First Clause in Section 1084(a) is Limited to Sports-Wagers; the Second Clause Applies to All Wagers

To properly read Section 1084(a), it is helpful to divide the clauses into different subsections, as follows:

"Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for:
(a) 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
(b) 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.

Read in this manner, it becomes clear that Section 1084(a)'s first clause applies to bets or wagers "on any sporting event or contest," and the second clause applies to all "bets or wagers," with no qualification. This reading is supported by both the historical context in which the Wire Act was enacted as well as traditional canons of statutory construction.

i. *Interpreting Section 1084(a) as applying to non-sports wagers is consistent with the historical context in which the Wire Act was enacted and has been enforced.*

Bifurcating Section 1084(a) in this manner – where the first clause outlines the universe of prohibited conduct for *sports-related wagers* and the second clause outlines the universe of prohibited conduct for *all wagers* – makes sense in light of the differences between those two types of gambling at the time of enactment.

In the 1950s, and early '60s, sports-related wagers, particularly for horseracing, could be – and usually were – placed from afar. They were rarely placed at the precise location at which the contest occurred. This made the telephone and/or wire services indispensable to placing actual wagers on sporting events.[39]

By contrast, non-sports bets (such as traditional casino games or numbers games) were commonly placed in-person and not remotely. For these types of wagers, the wires were not generally used to *place* bets; rather, they were used simply to transmit information regarding the outcome of bets and

[39] *See* The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings before the Committee on the Judiciary Committee, United States Senate, 87th Congress 284, statement of Herbert Miller, Assistant Attorney General. ("The type of gambling that a telephone is indispensable to is wagers on a sporting event or contest.")

to facilitate payments. For example, the U.S. Senate Special Committee to Investigate Organized Crime in Interstate Commerce detailed in its report issued in 1951 how a typical "numbers" racket utilized a "special service of the Western Union Telegraph Co." to speed transmission of winning lottery numbers to "subscribers."[40]

It is logical therefore that the first clause of Section 1084(a) (covering sports-wagers) prohibits both *transmitting information* pertaining to a wager (*e.g.*, informing a prospective gambler of the point-spread in a football game or the latest odds in a horserace) as well *actually placing* a wager. It is also logical that the second clause (covering *all* wagers) does not prohibit *placing* bets (since wires were not generally used to place non-sports-wagers), but does prohibit using the wires to *facilitate* placing bets (such as transmitting information regarding the winning numbers in a lottery game and facilitating payments).[41]

The DOJ until late 2011 interpreted the Wire Act in precisely this manner. Indeed, it was widely understood contemporaneously with Act's enactment that the Wire Act was not limited to only sports gambling. Congressional Quarterly's 1961 "Congressional Almanac," for example – widely regarded as the definitive contemporaneous account of Congress's annual activities – characterized the Wire Act as outlawing "use, supplying and maintenance of wire communications to aid betting...on races and other sports *as well as numbers games....*"[42]

Although there are limited examples of the Department using the Wire Act to prosecute non-sports gambling in the pre-Internet era (largely due to the fact that other federal laws – such as the Racketeer Influenced and Corrupt Organization ("RICO") statute and money laundering laws – better facilitated such prosecutions), the advent of the Internet made the Wire Act a useful tool in targeting non-sports gambling. Indeed, beginning in the late 1990s, the Department had on multiple occasions declared unequivocally that the Wire Act prohibits *all* forms of online gambling, and also confirmed that it had long held this view.[43]

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[40] *See generally* U.S. Senate Special Committee to Investigate Organized Crime in Interstate Commerce, Section VII(C)(c) (detailing a typical "numbers" racket whereby a "special service of the Western Union Telegraph Co. speeds the [winning lottery] numbers daily from Washington to 51 subscribers who have been identified either as the principals or chief agents in the operation of the racket throughout the East.").

[41] *Id.*

[42] Congressional Quarterly, 1961 CQ Almanac at pg. 383 (emphasis added).

[43] For example, in 2003, John G. Malcolm, Deputy Assistant Attorney General, testified before Congress that "The Department of Justice has long held, and continues to hold, the position that 18 USC 1084 applies to *all types of gambling, including casino-style gambling, not just sports betting.*" Unlawful Internet Gambling Funding Prohibition Act And The Internet Gambling Licensing And Regulation Commission Act: Hearing Before The Subcommittee On Crime, Terrorism, And Homeland Security of The House Judiciary Committee (April 29, 2003) (emphasis added).
Also in 2003, the Department advised the National Association of Broadcasters that media businesses were likely "aiding and abetting" violations of federal law when they circulated advertising on gambling sites. The letter noted that with very few exceptions federal laws prohibit internet gambling within the United States, and that "Notwithstanding their frequent claims of legitimacy, Internet gambling and offshore sportsbook operations that accept bets from customers in the United States violates [the Wire Act and other federal laws]". *DOJ Letter to NAB*, June 11, 2003, *available at* http://www.igamingnews.com/articles/files/NAB_letter-030611.pdf; *see also Letter from Assistant Attorney General Chertoff to Wayne Stenehjem*, March 7, 2005 ("As set forth in prior Congressional testimony, the Department of Justice believes that federal law prohibits gambling over the Internet, ***including casino-style gambling***. While several federal statutes are applicable to Internet gambling, the main statutes are Sections 1084 [and others]" (emphasis added); *see also Letter from Assistant Attorney General Chertoff to Dennis K. Neilander*, August 23, 2002 (same).

ii. *Traditional canons of statutory construction dictate that only the first clause of Section 1084(a) is limited to sports-betting*

Three fundamental canons of statutory construction support reading Section 1084(a)'s second clause to cover non-sports wagers.

1) *The rule against surplusage*

A basic principle of statutory interpretation is that effect should be given, if possible, "to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[44] The modern variant is that statutes should be construed "so as to avoid rendering superfluous" any statutory language.[45]

The rule against surplusage is based on the principle that each word or phrase in a statute is meaningful and useful, and thus, an interpretation that would render a word or phrase redundant or meaningless should be rejected.[46]

Reading Section 1084(a) as only applying to sports-related wagers (*i.e.*, reading the term "on any sporting event or contest" as modifying both the first and second clause in Section 1084(a)) would violate the rule against surplusage. Specifically, under this interpretation both the first and second clause contains language that prohibits using a wire communication facility for "the transmission [of] information assisting in the placing of bets or wagers" on any sporting event or contest.

This would render that phrase as it exists in the second clause redundant, and thus violate the rule against surplusage. Indeed, if the second clause was intended to be limited to sporting events or contests, there would be no need to insert the phrase "or for information assisting in the placing of bets or wagers" in that clause, since that phrase would prohibit conduct that is already plainly prohibited under the first clause.

By contrast, interpreting only the first clause in Section 1084(a) as being limited to sports-related wagers provides significance to the phrase "or for information assisting in the placing of bets or wagers" as used in the second clause. Specifically, it would extend that prohibition relating to "information" beyond just sports-betting to all forms of gambling.

If confronting two plausible interpretations, courts should construe a statute in a manner that gives effect to all its provisions,[47] so that no part is inoperative or superfluous,[48] void or insignificant.[49] This rule against surplusage precludes interpreting the second clause of Section 1084(a) as being limited to sports-related wagers.[50]

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[44] *Montclair v. Ramsdell,* 107 U.S. 147, 152 (1883).

[45] *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

[46] *See generally* Eskridge, William N. *et al*, "Cases and Materials on Legislation: Statutes and the Creation of Public Policy." West Group, 3rd Edition (2001).

[47] *See, e.g., Alden v. Holder*, 589 F.3d 1040 (9th Cir. 2009).

[48] *See, e.g., Corley v. U.S.*, 556 U.S. 303 (2009).

[49] *Id.*

[50] Of course, an inevitable consequence of this interpretation is that the phrase "or for information assisting in the placing of bets or wagers" is rendered redundant in the *first* clause. Indeed, if such conduct is prohibited for *all* bets or wagers under clause two, it is redundant to prohibit it specifically for sports bets or wagers in clause one. This can be explained, however, by viewing the first clause as outlining the universe of prohibited conduct for *sports bets,* and the second clause as outlining the universe of prohibited conduct for *all bets.* (*See* fns 33-35 *supra* and accompanying text.) By

2) *The Rule Prohibiting Implying Intent to Include Missing Terms*

Closely related to the rule against surplusage is the canon that when a legislature uses a term or phrase in one provision but excludes it from another, courts do not imply an intent to include the missing term in the provision where the term or phrase is excluded.[51] Instead, omission of the same provision is significant to show different legislative intent for the two provisions.[52]

Reading Section 1084(a) as only applying to sports-related wagers (*i.e.*, reading the term "on any sporting event or contest" as modifying both the first and second clause in Section 1084(a)) would patently violate this canon of statutory interpretation. As discussed above, this reading necessarily requires inserting the phrase "on any sporting event or contest" into the second clause simply because it was included in the first clause. It is inappropriate to assume Congress intended to include this missing term in the second clause.

3) *The Rule Requiring Consideration of Legislative Changes Prior to Enactment*

"Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to . . . comparison of successive drafts or amendments to the measure."[53] In reviewing an ambiguous statute's legislative history, courts should presume that "legislatures generally adopt amendments because they intend to change the original bill." Indeed, "adoption of an amendment *is evidence that the legislature intends to change the provision of the original bill.*"[54]

This widely accepted canon of statutory construction is particularly pertinent when analyzing Section 1084(a). As originally introduced, that provision would have imposed criminal penalties on anyone who "leases, furnishes, or maintains any wire communication facility with intent that it be used 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 . . . ."[55] In other words, the provision would have imposed penalties on *providers* of wire communication services (rather than users), and was clearly limited to sports-related wagers.

The Senate Judiciary Committee, after conducting multiple hearings on the topic, completely struck Section 1084(a) as it was introduced (other than language establishing sanctions), and replaced it with the version that ultimately became law.[56] This re-write changed the bill in three ways:

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contrast, there is no valid explanation for this phrase being repeated in the second clause if that clause is *also* limited to sports-related wagers. It should also be noted that because this phrase appears in the Section twice, no plausible reading of it could render the phrase completely non-redundant.)

[51] See, e.g., City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424 (2002); see also Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002); Chickasaw Nation v. U.S., 534 U.S. 84 (2001).
[52] *See, e.g., Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2001); *see also Zhu v. I.N.S.*, 300 F. Supp. 2d 77 (D.D.C. 2004).
[53] *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440, 464 fn8 (Brandeis, J); *see also U.S. v. Pfitsch*, 256 U.S. 547 (1921); *U.S. v. Great Northern Ry. Co.*, 287 U.S. 144 (1932); "Sutherland Statutory Construction," §48:18.
[54] *Miller v. Callahan*, 964 F. Supp. 939, 949 (D. Md. 1997).
[55] S. 1656, 87th Cong. §2 (1961).
[56] *See* Senate Report No. 588, July 24, 1961 (striking lines 4-8 on page two and replacing with language ultimately enacted into law); *see also* **Appendix C.**

- First, it changed the class of covered persons from those who *provide* wire communication facilities with the intent that it be used for illicit gambling to those who *use* wire communication facilities for illicit gambling purposes.

- Second, it included a clause not found in the original version prohibiting transmissions relating to "money or credit" as a result of bets or wagers.

- And third, it added a second clause, prohibiting "*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,*" that on its face is not limited to sports wagering, thereby expanding the universe of prohibited conduct.

Particularly instructive in understanding how the Senate Judiciary Committee developed these three changes to the original bill is an exchange between Senator Kefauver (who had previously chaired a special Senate committee investigating organized crime and was arguably the Senate's foremost expert on organized crime) and then-Assistant Attorney General Herbert Miller.[57] During that exchange – which is reproduced in **Appendix D** of this memorandum – Senator Kefauver expressed three concerns to Mr. Miller:

- First, Senator Kefauver expressed concern that communication companies could be unduly vulnerable to criminal liability.[58]

- Second, Senator Kefauver opined that the legislation should be expanded to include transmissions of money or credit.[59]

- And third, Senator Kefauver expressed concern that the bill as introduced was limited to sports betting and did not include other, non-sports wagers.[60]

In other words, the Senate Judiciary Committee struck the original version of Section 1084(a) and replaced it with language addressing all of the concerns that Senator Kefauver expressed in this exchange with Mr. Miller at the Committee's hearing examining the legislation.

The DOJ Opinion points to this exchange – specifically where Mr. Miller states that the legislation is limited to sports gambling – to support its claim that the Wire Act proscribes only sports gambling. However, in so doing, the Opinion deletes a relevant portion of the exchange and also fails to mention that the provision which Mr. Miller contended limited the bill to sports betting never became law – that it was struck by the Committee after the hearing and replaced with the broader language subsequently enacted into law.

(Previously in his testimony, Mr. Miller stated that the bill would hold telecommunications

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[57] The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings before the Committee on the Judiciary Committee, United States Senate, 87th Congress 284, at pgs. 275-279.

[58] *Id.* at 276-277.

[59] *Id.* at 278 ("Why should not S. 1656 be expanded to include transmission of money? Money is frequently sent by Western Union is it not?").

[60] *Id.* at 277, 278 ("Why do you not apply the bill to any kind of gambling activities, numbers rackets, and so forth? ... In 1951 we had quite an investigation . . . where a lot of telephones were used across State lines in connection with policy and the numbers games up there . . . .I can see that telephones would be used in sporting contests, and it is used quite substantially in the numbers games, too.")

companies criminally liable for violations of the Act; surely the DOJ would not argue that this supports reading the current statute as applying to telecommunications companies, since it was *subsequently re-written* to apply those who *use* communications facilities rather than those who *supply* them. The same principal applies to non-sports gambling.)

The DOJ Opinion states that "[N]othing in the legislative history of this amendment suggests that...Congress intended to expand dramatically the scope of prohibited [conduct]."[61] This statement is contradicted by the record. Senator Kefauver made clear during the hearing his concern about limiting the bill to sports gambling. The Judiciary Committee rewrote Section 1084(a) to address that concern -- as it did with other sections of the bill about which the Senator raised concerns. Courts frequently look to such indicia for clues as to how to interpret a statute.[62] The DOJ failed to do the same.

The DOJ Opinion also fails to recognize that the Judiciary Committee did not simply *revise* Section 1084(a), it *struck and re-wrote* that provision's core.[63] In analyzing the Section 1084(a), as it was reported by the Judiciary Committee and enacted into law, the DOJ Opinion argued that the commas around the phrase "or information assisting in the placing of bets or wagers" were deleted.[64] It then claims that because the legislative history does not specify that removing those commas was intended to broaden the bill's scope to include non-sports betting, that this could not have been the Committee's intent.[65]

The DOJ's analysis is based on the assumption that the Committee made minor "style" edits to the legislation. However, as evidenced in the reproduction of the Wire Act as reported by the Senate Judiciary Committee (reproduced in **Appendix C**), the Committee did not "delete commas", but rather rewrote the subsection -- striking all of Section 1084(a), other than provisions related to sanctions, and replacing it with the version of Section 1084(a) found in current law.

4) *Reenactment Doctrine*

The reenactment doctrine is a principle of statutory construction that when "reenacting" a law, Congress implicitly adopts well-settled judicial or administrative interpretations of the law. "In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has reenacted a statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is one intended by Congress."[66]

This doctrine comes into play for purposes of the Wire Act's application to non-sports gambling in light of Congress's passage of the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"). UIGEA does not criminalize gambling activities; rather, it incorporates existing laws defining illegal gambling activities – including the Wire Act – and prohibits acceptance of payment

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[61] DOJ Opinion at 6.

[62] *See, e.g., Bindczyck v. Finucane*, 342 U.S. 76, 83 (1951); *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931); *U.S. ex rel Bayarsky v. Brooks*, 154 F. 2d 344, 346-47 (3rd Cir. 1946); *First America Financial Life Insurance Company v. Sumner*, 212 F. Supp.2d 1235, 1240-41 (D. OR. 2002).

[63] *See supra* n.50 an accompanying text.

[64] DOJ Opinion at pgs 6-7.

[65] *Id.*

[66] *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974).

for those activities.

In passing UIGEA, Congress understood the Wire Act to apply to non-sports gambling, based largely on the DOJ's repeated, longstanding interpretation of the Act as applying to non-sports gambling. Indeed, leading up to enactment of UIGEA, the Department had previously written numerous letters and testified to Congress stating that the Wire Act applied broadly -- to non-sports, and sports betting alike.[67] In addition, the UIGEA Conference Report makes clear that Congress understood non-sports gambling over the wires to be illegal:

> *The safe harbor would leave intact the current interstate gambling prohibitions such as the Wire Act, federal prohibitions on lotteries, and the Gambling Ship Act so that casino and lottery games could not be placed on websites and individuals could not access these games from their homes or businesses.*[68]

Thus, the reenactment doctrine supports interpreting the Wire Act to apply to non-sports gambling because Congress passed subsequent legislation under the belief – based on DOJ's longstanding interpretation of the Wire Act – that the Wire Act covered such conduct.

V. CONCLUSION

To understand the Wire Act, its purposes, its reach, and how it should be interpreted, it is essential to review how and why it was enacted into law, and to utilize traditional legal canons of statutory interpretation. It is not clear whether, or the extent to which, the OLC engaged in such an analysis. The Opinion fails on these fronts.

The Wire Act was enacted as a part of a package of anti-crime legislation developed by Congress over the course of a decade during which hours upon hours of testimony was received on the operations of organized crime and its reliance on revenues derived from illegal gaming operations, including both sports and non-sports wagering, for which interstate telecommunications were utilized.

It was pushed through Congress after that decade of consideration by an Attorney General who, as Chief Counsel to one of the Senate Committees charged with investigating organized crime, had sat through hours of those hearings and who, as Attorney General, promoted the package of legislation as necessary to deprive criminal syndicates of needed revenues.

Fundamental canons of statutory construction support interpreting the Wire Act as covering all forms of gambling. Indeed, to interpret the statute to only apply to sports gambling, one would have to disregard several well-accepted tools that courts have long used to interpret ambiguous statutes.

The Wire Act, as enacted, reflects a rewrite of the relevant provisions of the Act crafted in the Senate Judiciary Committee to broaden the law's scope – modifications made after hearings in which the Chairman of one of the Senate Committees which had investigated organized crime,

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[67] *See supra* n.37.

[68] *Conference Report on H.R. 4954, Safe Port Act*, 152 CONG. REC. H8026, H8029 (Sept. 27, 2006) (statement of Rep. Leach).

raised concerns that the legislation as introduced applied to sports-related bets only and shared with the Judiciary Committee how he had previously received evidence of use of the wires for "numbers" games.

While the Wire Act was the product of a different time and era, its fundamental purpose remains the same to this day: To serve as a tool for federal prosecutors to combat gambling activities operating or otherwise advanced through activities occurring across state lines.

The present-day iteration of this activity is Internet gaming, and it is questionable how illegal offshore gaming websites can be effectively fought until the Wire Act is restored, especially in light of published reports suggesting federal law enforcement actions against such sites have ceased since the OLC Opinion was issued.

A thorough review of the Wire Act, its construction, its purposes, and its reach, demonstrate the deficiencies of the OLC Opinion. As such, the Opinion should not be allowed to stand.

APPENDIX A

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS of the COMMITTEE ON GOVERNMENT OPERATIONS
United States Senate

Hearing Excerpt – August 22-25, 1961.

you have that—if you don't have it, you may prepare it and submit it, if you will.

Mr. SARACHAN. Senator, in connection with this report, we have certain recommendations, but we were thinking primarily, of course, in our report, in terms of State laws. What, with your indulgence, we would prefer, would be to give us a little time to confer.

The CHAIRMAN. I didn't expect you necessarily to do it today. But you have been in this thing, you have experienced it, you have studied it, you know what the problem is from direct contact, so to speak. I don't know. Maybe a lot of other Members of Congress don't know. But we need counsel from people like you who have had to deal with it and live with it and try to work with it in your State. If you will do that, it will be very much appreciated. We will reserve some space in the record for you to submit a formal recommendation, if you will.

Mr. SARACHAN. We will be more than happy to do that.

The CHAIRMAN. Thank you very much.

(At this point Senator McClellan withdrew from the hearing room.)

Senator ERVIN. Senator Mundt?

Senator MUNDT. Judge, you haven't said anything this morning about a type of gambling which we read about in the paper a great deal called the numbers racket, or something like that. Is that a serious type of gambling?

Mr. SARACHAN. Yes.

Senator MUNDT. Would you dilate on that subject?

Mr. SARACHAN. We have gone into a great deal of study of every type of professional gambling. On the numbers or policy racket, as it is sometimes called, we devote a considerable part of our report to it. The numbers racket is the type of gambling that is indulged in by people to whom $2 is too much to bet at one time.

The minimum you can bet with a bookie is $2 on a horse race. So there is this widespread activity, and it runs into millions of dollars, but it starts with pennies, particularly in poor sections of the larger cities. For example, in the city of Buffalo, we had witnesses, one witness after another get up and say that there isn't anybody in that particular neighborhood, which is the poorest in the city, that doesn't buy a numbers ticket every single day, for 10 cents, 25 cents: 50 cents is a big ticket.

The numbers game is played in a large variety of ways, as we described. Frequently it is based on the results of the first three races, for example, in a particular track. They take the numbers of the horses that win and combine them together, and you can either bet on the exact—for example, if No. 2 horse wins the first race, No. 5 the second, and No. 7 the third, you either bet that your number will be 257, or you bet that your number will be any combination of that, like 527, or 752, and so on. Your chances of winning are 1,000 to 1, and you pay on the basis of 300 to 1. That means that for every $300 that is bet, the professional gambler gets $1,000 and makes a profit of $700. You can realize what that can run into, if it is done by thousands of people every day in one single city.

We find that to be—well, there isn't much of that in the smaller towns in our State, but in every large city that is, in many ways, the most tragic kind of gambling because it is indulged in by people who can't afford to spend a quarter or 50 cents every day.

Senator MUNDT. You say that sort of prey is upon the poor?

Mr. SARACHAN. That is right.

Senator MUNDT. At the other end of the structure, is it operated by little two-bit gamblers, or is it part of the operation in which the syndicate is involved?

Mr. SARACHAN. No; this is definitely operated by the syndicate, because all of the money eventually finds its way into what is called the bank, and the fellows who run the bank are the fellows who get all of the income from all of the various sources, and they are the ones who pay off to the winners. Lots of times they don't even pay off when you win, because frequently the numbers are fixed. They not only operate on the basis of horse race results.

Senator MUNDT. They are not satisfied with the 700 percent profit but sometimes they take it all?

Mr. SARACHAN. No; they want more. And we find that true all along the line, except, as I indicated before, the one exception, and it struck me very, very forcibly that the syndicate never will hedge. But as far as cheating is concerned, they never hesitate to do it, because they can get away with it.

Senator MUNDT. I think I misunderstood your testimony on hedging. I thought that this layoff that you were talking about was a form of hedge.

Mr. SARACHAN. Maybe I am misunderstanding the word "hedge."

Senator MUNDT. Maybe I am misunderstanding the word "layoff." In the grain trade you buy on both sides so you can minimize your loss.

Mr. SARACHAN. That is the purpose of the layoff. I didn't mean by hedging. I meant refusing to pay the winner. That is what I meant. They never refuse to pay the winner, even though they take a big loss. I misunderstood the way in which you used the word "hedge."

Senator MUNDT. Senator Curtis meant the kind of hedging you employ to minimize your losses.

Mr. SARACHAN. The purpose of the layoff is if a man has too much on one horse, so to speak, and he is afraid that if that horse should win it will break him, he will lay it off with the man higher up and that man will lay it off with the man higher up and so on.

Senator MUNDT. That is, I expect, part of the established modus operandi of the gamblers.

Mr. SARACHAN. That is just as much a part of the hierarchy as any part you can think of.

Mr. GRUMET. And the numbers game operates wide open. Senator Curtis said it wouldn't take much to detect these people. It wouldn't. It wouldn't take much if you had local law enforcement, but they operate with the cooperation of the police.

Senator MUNDT. The last time I read about the numbers game in the newspapers it was being operated in the Pentagon in Washington.

Mr. SARACHAN. It operates in almost every large factory in every large city in New York State. As a matter of fact, our agents, when we were investigating the police department in the city of Buffalo and gambling there, our agents walked into grocery stores, drug stores, cigar stores, every kind of little retail business, and there were the policy slips or number slips openly on the counters being sold to every-

Mr. LANE. I don't know whether you could charge it to that, Senator. I think in New York we have such a large population, and it is a heterogeneous population, of close to 9 million people in the city of New York, I think that has a great deal to do with it. Of course, we have a lot of poor people. Some of the figures also showed that the greater proportion of these narcotic addicts were in the lower income brackets, way down. Over 52 or 53 percent were people who I think were troubled by a lack of income.

Senator MUNDT. I would like to add my words of encouragement to those of Senator Ervin, as far as wiretapping legislation is concerned. It seems to me that there is just something entirely incongruous about the fact that we set up a great communications system that tends to become a monopoly of the crime syndicate. They can use it and the law enforcement officials cannot use it. I remember when I was in the House of Representatives where we spend a lot of time, the committee of which I was a member, working out evidence on espionage. I remember the Judith Coplon case, where she was caught redhanded. It was a question of actually catching the people passing the secret documents to the Russians. They let the whole case out of court because someplace along the line she had received a telephone call which had been listened to. It is just inconceivable that those conditions would continue.

I rather suspect that back of all these difficulties that you gentlemen have, back of the problem with the chief of police in Ithaca, N.Y., who wouldn't arrest the people in gambling who were not close to the Cornell University campus, and in back of these very small, insignificant penalties fixed by the courts, back of it all is a failure, somehow, for the public to alert itself to the necessity of doing something about wiretapping, doing something about the stepping up of these crimes, doing something about insisting that the police officers don't look the other way when crimes are committed. It is a great contribution your commission must be making when they let people realize, for example, that when you have legalized bingo you have brought in the racketeer. Some of them overlook something like that. They will not overlook any other opportunity to get a fast, dirty dollar.

Mr. SARACHAN. I agree that the fundamental nub of the problem is the public misinformation or at least lack of information, and that is something we are trying very hard in our State to overcome. The police officer, for example, wouldn't dream of accepting a bribe in connection with a rape case or a narcotics case or something like that, but seems to think "Well, this is only gambling," so he doesn't hesitate. That has been the opinion of the public and the opinion of the judges. That is what we are trying awfully hard to overcome.

Senator MUNDT. I want to congratulate you gentlemen not only on the very helpful testimony you have given this committee, but the very constructive job you are doing for the great State of New York. I think that certainly the public there must be coming closer and closer to a realization of the significance of this whole syndicated criminal operation. Since the reports that you issue are pretty widely distributed, they must know.

Mr. SARACHAN. They go to every law enforcement officer in the State, every district attorney, chief of police, and so on. They go

APPENDIX B.

Photograph of Wire Act bill signing.

Description: President John F. Kennedy signs S. 1656, S. 1657, and S. 1653 (bills to combat organized crime and racketeering) in the Oval Office, White House, Washington, D.C. Looking on (L-R): Senator Everett Dirksen of Illinois; Senator Olin Johnston of South Carolina; Senator Sam Ervin of North Carolina; Chief of the Organized Crime Section in the Department of Justice, Edwyn Silberling (partially hidden); Senator Kenneth Keating of New York; Director of the Federal Bureau of Investigation (FBI), J. Edgar Hoover; Attorney General Robert F. Kennedy; Chief of the Legislation and Special Projects Section of the Criminal Division in the Department of Justice, Harold D. Koffsky; Deputy Chief of the Legislation and Special Projects Section of the Criminal Division, Edward T. Joyce; **Chief Counsel of the Senate Judiciary Committee, Jerry Adlerman;** Assistant Attorney General for the Criminal Division, Jack Miller; Assistant Deputy Attorney General, William A. Geoghegan; Vice President Lyndon B. Johnson.

SOURCE: http://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHP-1961-09-13-A.aspx

APPENDIX C

- Timeline of Congressional Consideration of the Wire Act
- Comparison of the different versions of the Wire Act from time of introduction through time of enactment.

TIMELINE OF CONGRESSIONAL CONSIDERATION OF THE WIRE ACT

- April 18, 1961 -Introduced in the Senate as S. 1656.
  - *See pg. 24 within in this Appendix C.*

- June/July 1961 – Senate Judiciary Committee Hearings. (note: Kefauver-Miller exchange occurred on June 20, 1961).
  - *See Appendix D.*

- July 24, 1961 – Reported with Amendment [Senate Report 588]
  - *See pg. 26 within this Appendix C.*

- July 28, 1961 – Passed Senate with Report's amendments.
  - *See pgs. 27-30 within this Appendix C for redlined documents showing changes made by Senate Judiciary Committee to the legislation as introduced.*

- July 31, 1961 – Referred to House Committee on the Judiciary.

- August 17, 1961 – Reported with amendment August 17, 1961 [House Report 967]
  - Minor technical amendments; no changes to § 1084(a).

- August 21, 1961 – Passed House, as reported.

- August 22-25, 1961 – House Permanent Subcommittee on Investigation Hearings on Gambling and Organized Crime.

- August 31, 1961 – House amendment agreed to by Senate.

- September 1, 1961 – Sent to President.

- September 13, 1961 – Signed into law by President John F. Kennedy. [PL 87-216].
  - *See pg. 31 within this Appendix C.*

- September 13, 1994 – Pub. L. 103-322 enacted. Substituted "fined under this title" for "fined not more than $10,000". This is the only change to §1084(a) since enactment of Wire Act in 1961.

87TH CONGRESS
1ST SESSION

S. 1656

IN THE SENATE OF THE UNITED STATES

APRIL 18, 1961

MR. EASTLAND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend chapter 50 of title 18, United States Code, with respect to the transmission of bets, wagers, and related information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1081 of title 18 of the United States Code is amended by adding the following paragraph:

"The term 'wire communication facility' means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, and delivery of communications) used or useful in the transmission of writing, 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."

I

SEC. 2. Chapter 50 of such title is amended by adding thereto a new section 1084 as follows:

"§ 1084. Transmission of wagering information; penalties

"(a) Whoever leases, furnishes, or maintains any wire communication facility with intent that it be used 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 knowingly uses such facility for any such transmission, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"(b) 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.

"(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, territory, possession, or the District of Columbia."

SEC. 3. The analysis preceding section 1081 of such title is amended by adding the following item:

"Sec. 1084. Transmission of wagering information; penalties."

Calendar No. 560

87TH CONGRESS, 1st Session | SENATE | REPORT No. 588

PROHIBITING TRANSMISSION OF BETS BY WIRE COMMUNICATIONS

JULY 24, 1962.—Ordered to be printed

Mr. MCCLELLAN (for Mr. EASTLAND), from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1656]

The Committee on the Judiciary, to which was referred the bill (S. 1656) to amend chapter 50 of title 18, United States Code, with regard to the transmission of bets, wagers, and related information, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

AMENDMENTS

On page 1, in line 7, strike the word "and" and insert in lieu thereof the word "or".

On page 2, strike all of lines 4, 5, 6, 7, and 8, and down to the word "shall" in line 9 and insert in lieu thereof the words:

> 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,

81-564 O—62 S. Rept., 87-2, vol. 3 35

Calendar No. 560

87TH CONGRESS
1ST SESSION

S. 1656

[Report No. 588]

IN THE SENATE OF THE UNITED STATES

APRIL 18, 1961

MR. EASTLAND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JULY 24, 1961

Reported by Mr. MCCLELLAN (for Mr. EASTLAND), with amendments

[Omit the part struck through and insert the part printed in italic]

87TH CONGRESS
S. 1656

A BILL

To amend chapter 50 of title 18, United States Code, with respect to the transmission of bets, wagers, and related information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1081 of title 18 of the United States Code is amended by adding the following paragraph:

"The term 'wire communication facility' means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, ~~and~~ *or* delivery of communications) used or useful in the transmission of writing, 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."

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SEC. 2. Chapter 50 of such title is amended by adding thereto a new section 1084 as follows:

"§ 1084. **Transmission of wagering information; penalties**

"(a) ~~Whoever leases, furnishes, or maintains any wire communication facility with intent that it be used 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 knowingly uses such facility for any such transmission,~~ *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 not more than $10,000 or imprisoned not more than two years, or both.

"(b) 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.

"(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, territory, possession, or the District of Columbia."

"(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

SEC. 3. The analysis preceding section 1081 of such title is amended by adding the following item:

"Sec. 1084. Transmission of wagering information; penalties."

Wire Act as introduced in 1961:

"§1084. Transmission of wagering information; penalties

" (a) Whoever leases, furnishes, or maintains any wire communication facility with intent that it be used 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 knowingly uses such facility for any such transmission, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Wire Act as reported out by Senate Judiciary Committee:

"(a) 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 not more than $10,000 or imprisoned not more than two years, or both."

Redlined to reflect changes made by Senate Judiciary Committee:

"§1084. Transmission of wagering information; penalties

" (a) Whoever ~~leases, furnishes, or maintains any~~ being engaged in the business of betting or wagering knowingly uses a wire communication facility ~~with intent that it be used~~ 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 ~~knowingly uses such facility for any such transmission~~ 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 not more than $10,000 or imprisoned not more than two years, or both.

Public Law 87-216

AN ACT

To amend chapter 50 of title 18, United States Code, with respect to the transmission of bets, wagers, and related information.

September 13, 1961
[S. 1656]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1081 of title 18 of the United States Code is amended by adding the following paragraph:

Wagering information.
Transmission.
63 Stat. 92.

"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."

"Wire communication facility."

SEC. 2. Chapter 50 of such title is amended by adding thereto a new section 1084 as follows:

18 USC 1081-1083.

"§ 1084. Transmission of wagering information; penalties

"(a) 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 not more than $10,000 or imprisoned not more than two years, or both.

"(b) 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 where betting on that sporting event or contest is legal into a State in which such betting is legal.

"(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

"(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

SEC. 3. The analysis preceding section 1081 of such title is amended by adding the following item:

"1084. Transmission of wagering information; penalties."

Approved September 13, 1961.

APPENDIX D

EXCHANGE BETWEEN SENATOR KEFAUVER AND ASSISTANT ATTORNEY GENERAL MILLER

The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings before the Committee on the Judiciary Committee, United States Senate, 87th Congress 284, at pgs. 275-279.

Is there any other case besides national security?

Mr. MILLER. I do not know of any.

Senator CARROLL. Then Congress, itself, has not in the field of labor-management relations extended itself this power.

I am glad to get the record clear on this point. So congress has moved in the national security field and so has the Federal Government, has it not?

Mr. MILLER. That is correct.

Senator CARROLL. And you have indicated some others that you are going to furnish for the record?

Mr. MILLER. Yes, the administrative agencies.

Senator CARROLL. I thank you very much, Mr. Miller. We will stand in recess until 2 o'clock.

(Whereupon, at 12:20 p.m., the hearing was adjourned, to reconvene at 2 p.m., of the same day.)

AFTERNOON SESSION

(Present at this point: Senator Kefauver (presiding).)

Senator KEFAUVER. The committee will come to order.

I believe that we had gotten down to S. 1656 to amend chapter 15 of title 18, United States Code, with respect to the transmission of bets, wagers, and related information.

STATEMENT OF HERBERT MILLER, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE—Resumed

Mr. MILLER. Senator, as I listened to the comments which were made primarily by Mr. Marsh on behalf of the United States Independent Telephone Association, I think probably we can boil the objections down to two.

One, the communications common carriers feel that there should be an exemption from this proposed legislation, or there should be a bill whereby the common carrier, upon advice by a State or Federal official that the communications equipment is being utilized in violation of the law, could remove it and that the telephone company would be held harmless in the statute for any damages suffered.

The Department opposes both of these ideas for this reason. Senate 1656 prohibits the leasing or furnishing of communications facilities, and it also prohibits the use thereof, so there is, in fact, a burden on the telephone company that if it knowingly finds—if it finds that this equipment is being used for unlawful purposes, and it intentionally continues to furnish this communications service after that time, then they would be subject to the penalties.

Now, the stock answer of the telephone companies under these circumstances is that, "We are not policemen. We furnish facilities, and, therefore, we should merely be permitted to rely on a notification by a law enforcement official, and then be held harmless if the communications equipment is removed."

The difficulty with that position, as I see it, is this, Senator. To deprive a man of telephone service is, of course, a very serious blow to perhaps his profession, if he is a doctor, a stockbroker, or in any one of a number of businesses.

The loss of his telephone can inflict severe pecuniary damages. Therefore, I feel that if the telephone company does wrongfully take out the man's telephone, he should have some place to turn to recover damages which he has suffered and which, of course, would be the telephone company.

Now, as a practical matter, telephone companies have regulated rates. They are public utilities and they are required to furnish service, so that if there were any damage suits, these damage suits would, in effect, be prorated over the cost of their rate base and it would be like an insurance policy; it would be borne by all the subscribers, instead of the damage falling on just this one individual.

The second thing is there is no reason why the telephone company, if it should determine that the facilities are, in fact, being used in violation of law, that they should continue to provide this service.

Now, the other aspect would be, if the telephone company ascertained that the telephone service was being provided and used unlawfully, they try to cut off service, and if the individual receiving service went to the State regulatory body and got an injunction or a stay order from the regulatory body prohibiting the telephone company from taking out the telephone.

I would say that, very clearly, this would not be a violation of our proposed bill, S. 1656, because there the telephone company would be prohibited by an order of a regulatory State commission or by a court from removing the service.

The other question that I have down here that was raised——

Senator KEFAUVER. That is not provided in the bill?

Mr. MILLER. Sir?

Senator KEFAUVER. I say there is no exclusion, there is no exemption of that kind in 1656; that is, you do not say here:

Provided, however, if the telephone company is prohibited from removing the telephone by order of the court or by order of a utility board, that they will not be guilty of a violation?

Mr. MILLER. Senator, we believe that the language of subsection (*a*) covers this very clearly, because it says:

"Whoever leases, furnishes, or maintains any wire communications facility with intent that it be used for the transmission in interstate commerce," and I think it is very clear; I do not think there is any room for argument, Senator, that if the telephone company is enjoined from removing that facility by action of a State court or State regulatory body, they are outside the scope of this statute, and it would be impossible to bring any successful criminal prosecution based on a violation of the statute, because they are acting under duress, if you will, from an outside source.

Senator KEFAUVER. Mr. Miller, how would this alternative strike you?

Suppose you provide that the communication company shall be required to exercise diligence to ascertain if any of its facilities were being used for the purpose of transmission in interstate commerce of bets or wagers, and that, upon having such information, it shall be required to notify the Department of Justice and the appropriate State enforcement officials. Upon notifying the State officials, then provide that the State or Federal official may request that service be discontinued and they shall have to discontinue it, and then exempt them from liability.

Mr. MILLER. Starting with the last aspect of that first, if the telephone company discontinues service at the request of, for example, a local official of the police department, and if the man whose telephone service has been removed may not sue the telephone company for acting pursuant to this request, you very conceivably could have a situation where the man had been damaged substantially in his business. He had no chance to be heard. He had no chance to demonstrate that he was, in fact, not using the telephone facility for the transmission of wagering information, and the result would be that he would have nowhere to turn to sue for damages for compensation for the substantial business that he has lost.

Turning to the first part, namely, requiring the telephone company to use due diligence and to notify law enforcement officials, as a practical matter, by the imposition of the penal sanctions of this bill, they will, in fact, utilize due diligence to ascertain whether, in fact, their facilities are used.

Furtermore, I am sure they will have no problem in their calling it to our attention, when they find that it appears that the facilities are being used for an unlawful purpose.

I mean they have, I think, the same duty that any citizen would have in calling to the attention of law enforcement officials this information when it does come to their attention.

Senator KEFAUVER. There is no provision here to give the person whose telephone has been removed a procedure for judicial remedy. Is that inherent?

Would they have that, whether it is provided here or not? Could they secure an injunction or try to secure an injunction to prevent removal?

Mr. MILLER. Yes. Nothing in S. 1656 covers the removal of the equipment. I mean this just says that the utilization of it for certain prohibited purposes is a crime, or the furnishing of it.

Now, as a practical matter, individuals whose telephones are removed, or about to be removed, may resort in some States—and I am not familiar with all of the regulatory statutes of the various States—and seek an administrative remedy to have their service reinstituted, if the telephone company cuts it off, and, furthermore, in court they would probably have the opportunity to seek judicial review.

In some jurisdictions, I believe the District of Columbia is one, I recall a case, *Andrews* v. *Potomac Telephone Company*, the man's telephone was removed at the request of the local U.S. attorney, and they went to court attempting to have service reinstated.

Senator KEFAUVER. The bill on page 2 seems to be limited to sporting events or contests. Why do you not apply the bill to any kind of gambling activities, numbers rackets, and so forth?

Mr. MILLER. Primarily for this reason, Senator: The type of gambling that a telephone is indispensable to is wagers on a sporting event or contest. Now, as a practical matter, your numbers game does not require the utilization of communications facilities.

The bookmaker who is without adequate communication facilities has a very difficult burden, because he not only has to get his calls by the telephone, but he has to, when necessary, contact layoff bettors in order to protect himself. Otherwise, some lucky, or unlucky for him, horserace and he would be wiped out.

And this has to be done practically simultaneously with the operation of the horserace itself. I mean there is just a certain period in here, when he takes the bets and when he finds that he has to go for the layoff bet, that he has to call and, in effect, balance his books, and this is a continuing thing, and it is this type of gambling activity that the telephone is an absolute necessity.

Senator KEFAUVER. In 1951 we had quite an investigation up in New York and in New Jersey where a lot of telephones were used across State lines in connection with policy and the numbers game up there.

Mr. MILLER. I am not familiar with that information, Senator.

Senator KEFAUVER. I can see that telephones would be used in sporting contests, and it is used quite substantially in the numbers games, too.

How about laying off bets by the use of telephones and laying off bets in bigtime gambling? Does that not happen sometimes?

Mr. MILLER. We can see that this statute will cover it. Oh, you mean gambling on other than a sporting event or contest?

Senator KEFAUVER. Yes.

Mr. MILLER. This bill, of course, would not cover that because it is limited to sporting events or contests.

Senator KEFAUVER. Do you consider a boxing match a contest?

Mr. MILLER. That is a sporting event or contest, yes, sir, normally.

Senator KEFAUVER. How about a wrestling match?

Mr. MILLER. Yes, sir.

Senator KEFAUVER. I would think that would be more of a performance than a contest.

Mr. MILLER. I do not watch them on television, but I understand that is a fact, more actor than wrestler.

Senator KEFAUVER. Why should not S. 1656 be expanded to include transmission of money? Money is frequently sent by Western Union, is it not?

Mr. MILLER. I do not believe we would have any objection to that, Senator. It was our feeling that in this bill, it was aimed at a particular situation, gambling, a specific type of gambling, and the layoff bettor.

Senator KEFAUVER. Will you consider the advisability of that when you come before us next time?

Mr. MILLER. Certainly.

Senator KEFAUVER. Mr. Eisenberg, Senator Keating has not come. Do you have any questions?

Mr. EISENBERG (assistant to Senator Keating). I know Senator Keating was planning to ask further questions, but I am sure he will be glad to wait until the meeting tomorrow.

Senator KEFAUVER. What are you going to do about private social betting? I believe Mr. Kennedy conceded that S. 1656 would apply to just an individual at home calling up to see how a horse race went and maybe calling a bookie across a State line. Is it your intention to make this applicable to private social betting?

Mr. MILLER. The answer is: It was not our intent. There were two problems that faced us when we were drafting this particular piece of legislation.

One is that one of the biggest layoff bettors in the country, who had, I believe, showed a profit of something like $250,000 a year or two ago, when questioned about his betting activities, refers to the fact that he is merely a social bettor.

All he does is he just likes to bet a little bit now and then, and it is just that he makes big bets instead of the normal $2 bet.

We wanted to make certain that that type of conduct, when you get into the larger bets, would be prohibited. The other factor would be the problem of trying to define what type of bet or wager should be exempt under the statute, if, indeed, there should be any exemption under the statute.

It was felt that the Department of Justice should not sponsor a bill which, in effect, condoned or permitted this type of social betting.

And so, consequently, this was the proposal that was before the committee.

Senator KEFAUVER. So it is a matter of how you can draft the bill to take care of what is truly a small social bettor?

Mr. MILLER. That is correct.

Now I would suggest that under the tax statutes, the tax is applied to those who are engaged in the business of betting, and it might be that some type of an application of that approach to the problem would solve the social bettor problem, but would not permit the larger gambler to say that he was just a social bettor.

Senator KEFAUVER. Mr. Kirby calls my attention to the fact that in S. 1653 it only applies to a person who travels across the State line in furtherance of a business enterprise. Could you not write in the same concept in this?

Mr. MILLER. That same concept could be placed in this bill, and, as I say, this is the concept which is used under the current internal revenue laws on the wagering Stamp Tax Act. A man has to be engaged in the business of gambling before he is required to obtain a stamp.

Senator KEFAUVER. Do you think that would weaken the statute much?

Mr. MILLER. It would weaken the statute because we would have to prove the additional fact that the man was actually engaged in the business of gambling, but it might be an advisable change, because then the scope of the problem relating to the social bettor would be deleted.

Senator KEFAUVER. You will consider this?

Mr. MILLER. All right, sir.

Senator KEFAUVER. I think the best thing to do, since other Senators do want to be here to question you further, if it is satisfactory, we will take up again at 10 o'clock in the morning in this same room.

(Whereupon, at 2:20 p.m., the hearing was adjourned, to reconvene at 10 a.m., Wednesday, June 21, 1961.)

EXHIBIT B

Internet Lotteries Remain Illegal

I. Introduction

Online lotteries are illegal under federal law. For decades, federal anti-gambling laws have been interpreted to prohibit virtually all forms of Internet gambling because of the Internet's inherent interstate nature. Members of Congress, including architects of federal anti-gambling laws, have recognized and supported this longstanding interpretation. In a letter to Attorney General Holder dated July 14, 2011, Senators Harry Reid and Jon Kyl asked the Department of Justice to reiterate its "longstanding position that federal law prohibits gambling over the Internet, including intra-state gambling (e.g., lotteries)." Further, the Senators asked the Department to avoid "open[ing] the floodgates to Internet gambling."

The Department's recent opinion on Internet gambling[1] did not address or answer the central question with regard to online lotteries – are they legal under federal law? Instead, the opinion merely concluded that the Wire Act[2] applies only to interstate transmissions of wire communications related to a "sporting event or contest," and the *Wire Act* does not prohibit states from using the Internet and out-of-state transaction processors to sell lottery tickets.[3] The opinion did not address the legality of online lotteries under any other federal laws.

Despite the Department's opinion on the Wire Act, multiple legal barriers remain for states to operate online lotteries. A new interpretation by the Department of a single statute does not undo other federal laws or legislative history on this issue.

II. Interstate Transportation of Wagering Paraphernalia Act

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[1] Memorandum Opinion for the Asst. Att'y Gen., Criminal Division, "Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transactions Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act" (Sept. 20, 2011) [hereinafter State Lottery Opinion].
[2] 18 U.S.C. § 1084 (2006).
[3] State Lottery Opinion, at 1.

Internet lotteries are barred under the Interstate Transportation of Wagering Paraphernalia Act of 1961 (Interstate Act).[4] The Interstate Act reads:

> Whoever, except a common carrier in the usual course of business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.

Federal courts have interpreted "numbers, policy, bolita or similar game" to encompass lotteries.[5] Further, federal courts and the law's legislative history make clear that the Interstate Act applies to state-run lotteries as well as private lotteries. In *U.S. v. Fabrizio*, a case involving interstate transportation of purchase acknowledgments for a New Hampshire lottery, the Supreme Court stated, "Congress did not limit the coverage of the statute to 'unlawful' or 'illegal' activities."[6] The Court reasoned that an exemption for state-run gambling activities would "defeat one of the primary purposes of § 1953, aiding the States in suppression of gambling where such gambling is contrary to state policy."[7]

The Court's conclusion in *Fabrizio* – that the Interstate Act does apply to state-run gambling activities – is supported by the law's legislative history. During Senate hearings on the Act, Herbert Miller, Assistant Attorney General, was asked whether the

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[4] 18 U.S.C. § 1953(a) (2006).

[5] *U.S. v. Baker*, 241 F. Supp. 272 (M.D. Pa. 1965), *aff'd* 364 F.2d 107 (3d Cir. 1966); *U.S. v. Fabrizio*, 385 U.S. 263 (1966); *U.S. v. Stuebben*, 799 F.2d 225 (5th Cir. 1986); *U.S. v. Norberto*, 373 F. Supp. 2d 150 (E.D.N.Y. 2005); *FTC v. World Media Brokers*, 415 F.3d 758 (7th Cir. 2005).

[6] 385 U.S. 263, 268 (1966); s*ee also, Norberto*, 373 F.Supp.2d at 158-159 (relying on *Fabrizio* to conclude § 1953 applies to lottery run by Government of Spain); *Stuebben*, 799 F.2d at 228 (concluding § 1953 applies to materials related to state-run lotteries); *but see, Erlenbaugh v. U.S.*, 409 U.S. 239 (1972) (case involving Travel Act, 18 U.S.C. § 1952, where Court suggested in dicta that § 1953 applies to illegal gambling but § 1952 applies more broadly to "illegal activity").

[7] *Fabrizio*, 385 U.S. at 269.

law (as drafted by the Department of Justice) was meant to apply to gambling activities that are legal under state law. Mr. Miller responded that the law did cover wagering paraphernalia associated with state-run gambling operations.[8] He went on to explain: "[W]e feel that if we are going to attempt – and I hope successfully attempt – to eradicate what I think is a substantial evil in this country today by gambling, then I think that we should prohibit these items from interstate commerce, and it is the only way that it is going to be accomplished."[9]

In *Fabrizio*, the Court read several provisions in the Interstate Act to have broad application. For instance, "whoever, except a common carrier," according to the Court, covers quite literally everyone except a common carrier.[10] As the Court noted, "Congress painted with a broad brush and did not limit the applicability of § 1953."[11] Additionally, the items, devices, and other material covered under the Interstate Act are not limited. According to the Court, the law is "aimed not only at the paraphernalia of existing gambling activities but also at materials essential to the creation of such activities."[12] And finally, the "use" provision under the Interstate Act was read broadly. The acknowledgements of purchase (functionally equivalent to a receipt for purchase) at issue in *Fabrizio* satisfied the "use" requirement, even though the acknowledgment itself was not necessary to participate in the lottery or to win.[13] The Court found it sufficient that the acknowledgment "serves a significant psychological purpose by receipting the purchase and assuring the owner that his ticket is properly registered."[14]

The law's prohibition on carrying or sending gambling paraphernalia across state lines is not specific to any mode of transmission or transportation. For example, in *U.S v. Norberto*, the Court applied the Interstate Act where defendants illegally sold and

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[8] *Hearing on S. 1657 Before the S. Comm. on the Judiciary*, 87th Cong. 294 (1961) (statement of Herbert Miller, Asst. Att'y Gen., Dept. of Justice).
[9] *Id.*
[10] *Fabrizio*, 385 U.S. at 266.
[11] *Id.*
[12] *Id.* at 267.
[13] *Id.* at 271.
[14] *Id.*

promoted a lottery run by the Government of Spain in the United States via mail and the Internet,[15] and in *U.S. v. Stuebben*, the Court applied the Interstate Act where defendants were transporting gambling paraphernalia via plane and mail.[16] Internet transmissions of lottery-related data, transactions, or information across state lines are sufficient to trigger the law's interstate provisions.

Although there is no case law directly on point with regard to the Interstate Act itself, federal courts have addressed interstate Internet transmissions in the context of other federal criminal statutes. In *U.S. v. Kammersell*,[17] the question was whether an instant message sent from Utah, transmitted through Virginia, and received back in Utah was an interstate communication. *Kammersell* dealt with 18 U.S.C. § 875(c), which prohibits interstate communications containing threats to kidnap or injure another person. The Court's rationale and conclusion are applicable here.

In *Kammersell*, the Court addressed defendants' argument that the law was passed when the telegraph was the primary means of interstate communication and therefore was not meant to apply to new technologies like the Internet.[18] The Court found, however, that the literal meaning of the law still applies, even with dramatic technological advances.[19] The Court then noted that nothing in the law requires "that the threat actually be received or seen by anyone out of state;" rather, any interstate transmission, even one that wound up back in the same state as the sender, was sufficient.[20]

Similarly, in *U.S. v. Kelner*,[21] the Court found that the interstate requirement under 18 U.S.C. § 875(c) was satisfied when the defendant threatened to assassinate Yasser Arafat during a TV interview broadcast to three states while both defendant and

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[15] *Norberto*, 373 F. Supp. 2d 150 (E.D.N.Y. 2005).
[16] *Stuebben*, 799 F.2d 225 (5th Cir. 1986).
[17] 196 F. 3d. 1137 (10th Cir. 1999).
[18] *Id.* at 1138-39.
[19] *Id.*
[20] *Id.* at 1139.
[21] 534 F.2d 1020 (2d Cir. 1976).

Mr. Arafat were in New York. Ruling on the constitutionality of § 875(c) as applied to the defendant's case, the Court reasoned:

> [W]e do not feel that Congress is powerless to regulate matters in commerce when the interstate features of the activity represent a relatively small, or in a sense unimportant, portion of the overall criminal scheme. Our problem is not whether the nexus of the activity is 'local' or 'interstate;' rather, under the standards which we are to apply, so long as the crime involves a necessary interstate element, the statute must be treated as valid.[22]

Like § 875(c), the Interstate Act requires only "carrying" or "sending" prohibited items between states to satisfy its interstate requirement – nothing further. Nothing in the Interstate Act requires that messages or items be received, viewed, used, or otherwise acknowledged in a different state. Nor does it require analysis of the "local" or "intrastate" nature of the activity in question. Like § 875(c), all that matters under the Interstate Act is that prohibited information or items are carried or sent across state lines at some point.

Finally, the exceptions to the Interstate Act's general prohibition do not cover Internet lottery transmissions that are carried across state lines. In 1975, Congress amended the law by adding § 1953(b)(4). Section (b)(4) of the Interstate Act reads: "[section (a)] shall not apply to equipment, tickets, or materials used or designed for use within a state in a lottery conducted by that State acting under authority of State law." The Department's State Lottery Opinion suggests that § 1953(b)(4) serves as a general exemption for state-run lotteries from the law's restrictions.[23] However, federal courts have interpreted the (b)(4) exception more narrowly.

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[22] *See also, U.S. v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) ("The internet is an instrumentality of interstate commerce. Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce, and to prohibit its use for harmful or immoral purposes regardless of whether those purposes would have a primarily intrastate impact.") (citations omitted).

[23] State Lottery Opinion, at 11, n. 9.

First, courts have found that § 1953(b)(4) is not a general exemption for paraphernalia used in state-run lotteries. In *U.S. v. Stuebben*,[24] the Court interpreted the scope of § 1953(b)(4)'s exemption. There, the defendant was charged with violating the Interstate Act for transporting (via plane and mail) lottery betting slips for the Illinois State Lottery from Louisiana to Illinois. The defendant claimed that his actions fell within the § 1953(b)(4) exception because the materials were to be used in a legal, state-run lottery. The Court disagreed. The Court interpreted the exception and its legislative history narrowly, stating: "[T]he new law allowed the use of the mail, radio, and television within a state holding a lottery to provide information about that lottery. Then-existing restrictions were lifted, however, only to the extent necessary for *intrastate* publicity."[25] The Court went on to conclude: "Transportation of these betting forms between states . . . remains a crime under § 1953(a)."[26]

Second, the exception in § 1953(b)(4) distinguishes between the importation of materials necessary to operate a state-run lottery (e.g., lottery ticket machines, printed tickets, etc.) *into* a state that operates a lottery and the subsequent interstate transportation of lottery-related materials to customers. The language of the exception is clear – it exempts equipment and materials used or designed for use *within a state* in a lottery conducted by that state. In other words, § 1953(b)(4) of the Interstate Act allows states to buy from other states the necessary equipment and materials to operate a lottery; it does not allow states to turn around and send lottery-related materials back out into interstate commerce via the Internet or any other means.

In *U.S. v. Norberto*,[27] the Court addressed the scope of 18 U.S.C. § 1307(b)(2), an exception to another federal anti-gambling law that is almost identical to the § 1953(b)(4) exception. Section 1307(b)(2) reads: "The provisions of sections 1301, 1302, and 1303 shall not

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[24] 799 F. 2d 225 (5th Cir. 1986).
[25] *Id.* at 227.
[26] *Id.* at 228. Additionally, in *U.S. v. Norberto*, 373 F. Supp. 2d 150 (E.D.N.Y. 2005), the Court applied the Interstate Act where defendants transported lottery tickets internationally via mail and the Internet for a lottery run by the Government of Spain. Despite § 1953(b)(5), which mirrors (b)(4) except it applies to foreign commerce and lotteries authorized by foreign governments, the Court found the Act applicable even though the materials were associated with a legal, government-run lottery.
[27] 373 F. Supp. 2d 150 (E.D.N.Y. 2005).

apply to the transportation or mailing to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country." In *Norberto,* Defendants claimed that the § 1307(b)(2) exception barred their prosecution because the lottery tickets being sold and transported across borders via mail and the Internet were for a legal lottery run by the Government of Spain. The Court found, however, that § 1307(b)(2) is not that broad.[28] The Court, citing the Second Circuit's opinion in *U.S. Postal Service v. C.E.C. Services*[29] and § 1307(b)(2)'s legislative history, noted that the purpose of this section "was to allow United States *manufacturers* to export lottery-related materials for use in foreign countries ... not to attract players to on-going lotteries."[30]

The language of § 1953(b)(4) mirrors § 1307(b)(2) and the provisions were enacted at the same time. The reasoning in *Norberto* applies with equal force to both. Like § 1307(b)(2), § 1953(b)(4) allows states with legal lotteries to order and receive materials made out of state so that each state is not required to manufacture all of its own lottery equipment. The exception is not intended to relax the law's prohibition on interstate transportation of lottery-related paraphernalia to individual consumers – which Internet lotteries plainly would do.

Given the letter of the law, federal courts' interpretation of the law, and legislative history, the Interstate Act prohibits state-run Internet lotteries. Internet lottery transmissions are invariably routed to out-of-state processors and even if they are related to state-run lotteries, they do not fall within any of the Interstate Act's exceptions.

III. Federal Anti-Lottery Act and Interstate Wagering Amendment of 1994

Online lotteries are also illegal under the Anti-Lottery Act and Interstate Wagering Amendment of 1994 (Anti-Lottery Act).[31] Under the Anti-Lottery Act:

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[28] *Id.* at 157.
[29] 869 F.2d 184 (2d Cir. 1989).
[30] *Norberto,* 373 F. Supp. 2d at 157 (quoting *C.E.C. Services*, 869 F.2d at 186, n. 1).
[31] 18 U.S.C. § 1301 (2006).

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme . . . shall be fined under this title or imprisoned not more than two years.

Like the Interstate Act, the Anti-Lottery Act broadly prohibits items associated with lotteries and lottery tickets from being carried across state lines.

Due to the Acts' similar language and structure, federal courts' interpretation of the Interstate Act and its provisions can also be applied to the Anti-Lottery Act. In fact, federal prosecutors couple charges against defendants for violation of one Act with charges for violation of the other based on the same facts.[32]

As discussed above, the Anti-Lottery Act contains a similar exception to § 1953(b)(4) in the Interstate Act. Section 1307(b) under the Anti-Lottery Act reads:

> The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing (1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or (2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

Like the Interstate Act, this exception to the Anti-Lottery Act has not been read by federal courts as a general exemption for government-run lotteries. In *Stuebben* and *Norberto*, federal courts applied both Acts – despite their exceptions -- to cases involving government-run lotteries. Additionally, *Norberto's* discussion of the scope and intent of § 1307(b)(2) makes clear that the exception covers the importation of manufactured goods necessary to run a state lottery into that state, but does not allow interstate transmission of lottery paraphernalia to individual consumers.

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[32] *See, e.g., Norberto*, 373 F. Supp. 2d 150; *Stuebben*, 799 F.2d 225.

For all of the reasons discussed above with regard to the Interstate Act, state-run online lotteries are also prohibited under the Anti-Lottery Act.

IV. Unlawful Internet Gambling Enforcement Act of 2006

The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) prohibits acceptance of any financial instrument for unlawful Internet gambling.[33] UIGEA does not criminalize gambling activities; rather, it incorporates existing laws defining illegal gambling activities – like the ones discussed above - and prohibits acceptance of payment for those activities. The Department's State Lottery Opinion expressed concern "that the Wire Act may criminalize conduct that UIGEA suggests is lawful."[34] However, that concern is misplaced. UIGEA was passed with the express intent of not "altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."[35] In other words, UIGEA was not passed to make certain gambling conduct legal; it aimed to preserve the status quo.

UIGEA's language and legislative history demonstrate that Congress understood online lotteries to be "unlawful Internet gambling" and intended for them to remain classified that way with UIGEA's passage. This was made clear in the UIGEA Conference Report:

> The safe harbor would leave intact the current interstate gambling prohibitions such as the Wire Act, federal prohibitions on lotteries, and the Gambling Ship Act *so that casino and lottery games could not be placed on websites and individuals could not access these games from their homes or businesses*. The safe harbor is intended to recognize current law which allows states jurisdiction over wholly intrastate activity, where bets or wagers, or information assisting in bets or wagers, do not cross state lines. *This would, for*

[33] 31 U.S.C. §§ 5361-5367 (2006).
[34] State Lottery Opinion, at 3.
[35] UIGEA § 5361(b).

example, allow retail lottery terminals to interact with a processing center within a state, and linking of terminals between separate casinos within a state if authorized by the state.[36]

Congress clearly contemplated online lotteries when it passed UIGEA and expressly did *not* legalize them or in any way suggest that they should be legalized. Congress instead relied upon the longstanding position of the U.S. Department of Justice that online lotteries were illegal. If Congress intended to override the then-existing interpretation of the Wire Act and other federal law to allow online lotteries, it could have explicitly done so. For instance, as referenced in the Conference Report excerpt above, Congress could have included online lotteries in the law's exceptions from the term "unlawful Internet gambling." However, online lotteries are not among the exceptions.[37] In fact, as the Conference Report indicates, "lotteries placed on websites" were intentionally excluded from the list of exceptions.[38]

UIGEA cannot properly be used as a basis for legalizing online lotteries - the language of the law does not extend that far (to criminalize or legalize gambling activities). Such a move would directly contradict the language of the law and Congress's intent.

V. Conclusion

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[36] *Conference Report on H.R. 4954, Safe Port Act*, 152 CONG. REC. H8026, H8029 (Sept. 27, 2006) (statement of Rep. Leach) (emphasis added).

[37] UIGEA's exceptions to "unlawful Internet gambling" do include a bet or wager where: "the bet or wager is initiated and received or otherwise made exclusively within a single State," the bet or wager and the method of betting or wagering is authorized under state law, the state law includes appropriate age and location verification requirements, and data security standards prevent unauthorized access to the betting or wagering. § 5362(10)(B). Intratribal transactions and activity allowed under the Interstate Horseracing Act of 1978 are also listed as exceptions. § 5362(10)(C)-(D).

[38] "Intermediate routing of electronic data" mentioned under UIGEA § 5362(10)(E) covers the scenario described in the Conference Report – retail terminals interacting with processing terminals within the same state. Based on the Conference Report language and the longstanding legal interpretation that the Internet is an instrumentality of interstate commerce, the term should not be read more broadly.

Online lotteries have been illegal under federal law for decades. The Department's new interpretation of the Wire Act did not make online lotteries legal. Other federal laws still bar states from operating lotteries on the Internet. Federal case law and legislative history regarding federal anti-gambling statutes support this position. Consequently, states are not allowed to use the Internet to sell lottery tickets to consumers.

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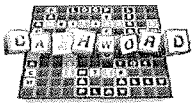

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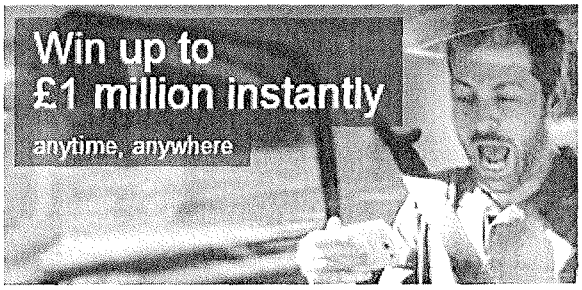

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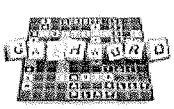

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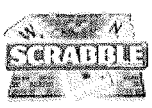

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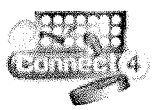

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