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# The Future of Online Sports Betting and Internet Gaming in the Wake of the Wire Act of 1961

Jordan Stefanacci\*

## I. Introduction

Gambling is both one of the most popular and controversial American past times, dating back hundreds if not thousands of years. Critics of gambling argue that it is harmful to individuals and to society because of the social ills associated with problem gamblers. Sports gambling specifically is one of the most heavily debated legislative topics and has been for decades. The controversy surrounding sports gambling began when a link grew between sports gambling and organized crime, and numerous scandals occurred in which college and professional sports were tainted by point-shaving and game-fixing scandals. The repercussions of sports gambling caught the attention of the federal government and prompted Congress to pass laws in an attempt to eradicate sports gambling in the United States and to insulate sports from organized crime.<sup>1</sup> Most notably, Congress passed the Wire Act of 1961, which prohibited interstate sports gambling,<sup>2</sup> and the Professional and Amateur Sports Protection Act (PASPA) in 1992, which prohibited states from enacting legislation authorizing intrastate sports gambling.<sup>3</sup> For decades the States and the Department of Justice (DOJ) interpreted the Wire Act to only prohibit interstate sports gambling, and many states relied on that interpretation in enacting non-sports related Internet gaming sites. But in 2018 the DOJ unexpectedly reversed their prior interpretation of the Wire Act to express

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<sup>1</sup> See *Wire Act of 1961*, ONLINE GAMBLING SITES, <https://www.onlinegamblingsites.com/law/wire-act/> (last visited Sept. 7, 2019).

<sup>2</sup> 18 U.S.C. § 1084(a) ([w]hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both”).

<sup>3</sup> 28 U.S.C. § 3702 (2018).

that it not only prohibits interstate sports gambling, but all interstate gambling. Therefore, this Comment addresses two uncertainties surrounding the Wire Act. First, this Comment discusses the legality of intrastate sports gambling, as practiced in many States and contemplated by many others, given the Supreme Court's finding that PASPA is unconstitutional, and given significant uncertainty about whether the Wire Act prohibits intrastate sports gambling over the Internet when communications incidentally cross state lines. Second, this Comment addresses what areas of gambling are meant to be implicated under the Wire Act, since the DOJ has interpreted the Act two different ways in the last ten years.

In 2018, the Supreme Court, in *Murphy v. NCAA*, struck down PASPA as violating the Tenth Amendment's anti-commandeering provision, holding that the statute could only be interpreted to directly command the states not to enact sports gambling legislation.<sup>4</sup> Following this decision, which struck down PASPA's prohibition of state enactment of intrastate sports gambling, the legality of even intrastate sports gambling under the Wire Act is still not entirely clear. The Wire Act, which appears to prohibit only interstate sports gambling, remains in effect today. The Wire Act makes some states hesitant to enact legislation to legalize even intrastate online gambling since wire transmissions that are sent when placing a bet through the Internet are not guaranteed to remain intrastate.<sup>5</sup>

This Comment addresses the different DOJ interpretations of whether the Wire Act prohibits only Internet, interstate sports gambling, or all forms of Internet gambling, and addresses which DOJ interpretation is more closely aligned with Congress's intent when it passed the statute. This Comment also addresses how the Wire Act should apply to intrastate online sports betting

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<sup>4</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1481 (2018).

<sup>5</sup> Brief for New Jersey as amicus curiae Supporting Plaintiffs, *New Hampshire Lottery Comm'n v. Barr*, 2019 U.S. Dist. LEXIS 92220, 7 (D.N.H. June 3, 2019) (No. 19-0163), <https://www.courthousenews.com/wp-content/uploads/2019/05/nj-amicus.pdf>.

that crosses state lines in the process of placing a bet. This Comment argues that the current state of the law is unclear and that Congress should therefore provide clarity by passing new legislation or amending the current Wire Act so that states have sufficient guidance to comply with federal law. Part II of this Comment addresses the history of sports gambling in the United States and provides background information to support the argument why the Wire Act was enacted. Part III provides background of *Murphy v. NCAA*, the Supreme Court's anti-commandeering decision, and how states reacted once the Court struck down PASPA. Part IV analyzes the Wire Act in depth and explains why the DOJ has interpreted the Act in two inconsistent ways in the last ten years. Part IV also explains why the DOJ's most recent interpretation of the Wire Act concludes that the Act prohibits not only online sports gambling but all forms of interstate Internet gambling. Part V addresses several states reactions to the DOJ's 2018 interpretation of the Wire Act, and Part VI addresses the two ambiguities in the Wire Act and argues which interpretations are more aligned with Congress's intent in 1961. Part VII provides recommendations to the States and Congress on how to deal with the ambiguities of the Wire Act as it currently exists, and Part VIII briefly concludes.

This Comment argues that the DOJ's 2011 interpretation is more consistent with Congress's intent when it enacted the Wire Act. This Comment ultimately argues that Congress should decide as a policy matter to amend the Wire Act to read that such intrastate sports gambling is legal, even if communications incidentally cross state lines. Furthermore, and more fundamentally, this Comment argues that Congress, whatever its policy judgment, should amend the Wire Act to clarify whether such intrastate sports gambling is prohibited. The current uncertainty and confusion is more counter-productive than any policy choice Congress could make. Congress should implement its policy preference by amending the Wire Act to resolve the

current Act's ambiguities and thus enable the States to make informed decisions about whether to permit intrastate online sports gambling.

## II. History of Sports Gambling in the United States

Throughout the mid-1900s, illegal sports gambling through organized crime thrived,<sup>6</sup> calling into question the integrity of amateur and professional sports.<sup>7</sup> During this time there were several instances where players and teams were accused of fixing games to make money off of sports gambling.<sup>8</sup> The first scandal was in 1919 when Major League Baseball's White Sox team fixed the World Series.<sup>9</sup> Other scandals included "the point-shaving scandals at CCNY in 1951, North Carolina and NC State in 1961, Boston College in 1978, and Tulane in 1985, as well as baseball's Pete Rose scandal."<sup>10</sup> These scandals only engineered more bad faith between sports gambling and organized sports.<sup>11</sup>

Congress became concerned about the repercussions of sports gambling and passed laws in an attempt to eradicate sports gambling,<sup>12</sup> most notably through Wire Act of 1961.<sup>13</sup> 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.<sup>14</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> Richard Johnson, *The Centuries-Old History of How Sports Betting Became Illegal in the United States in the First Place*, SBNATION (May 18, 2018, 8:00 AM), <https://www.sbnation.com/2018/5/18/17353994/sports-betting-illegal-united-states-why>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See *Wire Act of 1961*, ONLINE GAMBLING SITES, <https://www.onlinegamblingsites.com/law/wire-act/> (last visited Sept. 7, 2019).

<sup>13</sup> 18 U.S.C. § 1084(a).

<sup>14</sup> *Id.*

While the Wire Act banned sports gambling through interstate commerce, it did not altogether prohibit states from enacting legislation permitting intrastate sports gambling. In 1992, however, Congress passed the Professional and Amateur Sports Protection Act (PASPA), which prohibited states from enacting intrastate sports gambling legislation.<sup>15</sup> PASPA remained the law for thirty-six years before New Jersey successfully challenged the Act's constitutionality.<sup>16</sup> The Supreme Court held that PASPA unconstitutionally commandeered the states, which occurs when Congress forces states to adopt or comply with a federal law.<sup>17</sup> This decision, by overturning PASPA, appeared to pave the way for states to enact legislation authorizing intrastate sports gambling. But the Wire Act, which overtly prohibits interstate sports gambling, remains in effect and has made states hesitant to enact legislation to legalize even intrastate online sports gambling since wire transmissions that are sent when placing a bet through the Internet are not guaranteed to remain intrastate.<sup>18</sup>

Over the last ten years the DOJ has interpreted the Wire Act twice, once to prohibit interstate sports gambling, and later to prohibit all interstate gambling.<sup>19</sup> The Wire Act was first interpreted by the DOJ in 2011 as making it illegal to place a sports bet through interstate commerce, while stating that all other forms of betting through interstate commerce, not involving sports, were legal.<sup>20</sup> The DOJ then interpreted the Act in 2018 as prohibiting all forms of gambling

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<sup>15</sup> 28 U.S.C. § 3702.

<sup>16</sup> *See generally*, Murphy v. NCAA, 138 S. Ct. 1461 (2018).

<sup>17</sup> *Id.* at 1476 (citing New York v. United States, 505 U.S. 144, 178 (1992)).

<sup>18</sup> Brief for New Jersey as amicus curiae Supporting Plaintiffs, New Hampshire Lottery Comm'n v. Barr, 2019 U.S. Dist. LEXIS 92220, 7 (D.N.H. June 3, 2019) (No. 19-0163), <https://www.courthousenews.com/wp-content/uploads/2019/05/nj-amicus.pdf>.

<sup>19</sup> Virginia A. Seitz, *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION (Sept. 20, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>; Steven A. Engel, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL CRIMINAL DIVISION (Nov. 2, 2019), <https://www.justice.gov/olc/file/1121531/download>.

<sup>20</sup> Seitz, *supra* note 19, at 13.

through interstate commerce.<sup>21</sup> The new DOJ interpretation is binding on states because the DOJ has the power to enforce the Wire Act against them, but is not binding on the courts.<sup>22</sup> While sports gambling through interstate commerce is illegal under both interpretations of the Wire Act, the most recent interpretation has caused uncertainty for other types of gambling. Therefore, while Congress seemingly only intended for the Wire Act to apply to interstate sports gambling (explained below), the legality of other forms of Internet gambling is now open to question, as states are facing new barriers that did not exist before. In addition, the Wire Act fails to address the question of whether an online sports betting transaction, or any form of gambling transaction for that matter, that starts and ends within the same state, but that crosses state lines in the process of being transmitted, violates the Wire Act.

### III. The *Murphy* Decision

The Professional and Amateur Sports Protection Act of 1992 was enacted with the goal of stopping the spread of sports betting in the United States.<sup>23</sup> PASPA states:

It shall be unlawful for (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>24</sup>

The statute also contained a “provision granting professional and amateur sports leagues the authority to enforce the statute.”<sup>25</sup> The leagues’ authority was equal to the enforcement

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<sup>21</sup> Engel, *supra* note 19.

<sup>22</sup> *Id.*

<sup>23</sup> *Professional and Amateur Sports Protection Act – PASPA*, ONLINE GAMBLING SITES, <https://www.onlinegamblingsites.com/law/paspa/> (last visited Sept. 15, 2019).

<sup>24</sup> 28 U.S.C. § 3702.

<sup>25</sup> John Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 353 (2019).

authority of the Attorney General.<sup>26</sup> While the bill was being debated in the House and Senate, many of the Senate Judiciary Subcommittee's meetings had many professional and amateur athletes, coaches, and presidents testify that sports gambling took away from the integrity of sports and sent negative messages to youths in the country.<sup>27</sup> The purpose of the subcommittee's meetings were to consider whether sports were too "sacred" in the country to exclude them as a means of generating revenue for states.<sup>28</sup> While the proposed bill gained significant support from the House and Senate, the DOJ opposed the bill saying that this legislation would shift the responsibility of determining the legality of sports gambling from the states to the federal government.<sup>29</sup>

PASPA eventually passed but it contained exceptions within the statute.<sup>30</sup> The statute limited sports betting to the states who already offered it prior to the beginning of the congressional hearings.<sup>31</sup> The statute also gave New Jersey a window of one year to enact sports gambling legislation in Atlantic City, but New Jersey did not act during this period.<sup>32</sup> Prior to former Governor of New Jersey Chris Christie taking legal action against PASPA, a *pro se* plaintiff filed suit in the District Court of New Jersey against the U.S. Attorney for the District of New Jersey (The U.S. Attorney for the District of New Jersey at the time was ironically Chris Christie) arguing that PASPA violated the Tenth Amendment.<sup>33</sup> The Court dismissed the suit for lack of standing.<sup>34</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 340.

<sup>28</sup> *Id.* at 347.

<sup>29</sup> *Id.* at 350.

<sup>30</sup> *Id.* at 352–53.

<sup>31</sup> Holden, *supra* note 25, at 352–53.

<sup>32</sup> Holden, *supra* note 25, at 353.

<sup>33</sup> Flagler v. United States Atty., Civil Action No. 06-3699 (JAG), 2007 U.S. Dist. LEXIS 70916, at \*7 (D.N.J. Sep. 25, 2007).

<sup>34</sup> *Id.*

### A. *NCAA v. Christie* (2014)

In 2010, New Jersey held hearings to consider using a voting memorandum for citizens to vote on whether they wanted to legalize sports betting.<sup>35</sup> In 2011, the state issued the memorandum and New Jersey's citizens voted to amend the state's Constitution to legalize sports betting.<sup>36</sup> New Jersey amended its Constitution in 2012 by enacting New Jersey's Sports Wagering Law.<sup>37</sup> The NCAA and four other professional sports leagues sued New Jersey on the grounds that the New Jersey law violated PASPA.<sup>38</sup> New Jersey's counterargument was that PASPA was unconstitutional because it commandeered the states.<sup>39</sup> The anti-commandeering doctrine states that the federal government cannot force states to participate in enforcing their acts.<sup>40</sup> The District Court held in favor of the NCAA and Governor Christie appealed.<sup>41</sup> The Third Circuit affirmed the District Court's decision that PASPA was constitutional.<sup>42</sup> In its reasoning, the Third Circuit held that PASPA was constitutional because the Act was a valid exercise of Congress's commerce power and PASPA is "quintessentially economic."<sup>43</sup> The Third Circuit provided the following reasons as to why PASPA was a valid exercise of Congress's commerce power: (1) national sports wagering is an economic activity<sup>44</sup>; (2) professional and amateur sporting events "substantially effect" interstate commerce because the leagues are comprised of teams and members across the country in all fifty states<sup>45</sup>; and (3) because "[w]hatever effects gambling on sports may have on

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<sup>35</sup> *Gambling with SCOTUS: Christie v. NCAA*, THE NAT'L L. REV. (Jan. 9, 2018), <https://www.natlawreview.com/article/gambling-scotus-christie-v-ncaa>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> THE NAT'L L. REV., *supra* note 35.

<sup>42</sup> *NCAA v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013).

<sup>43</sup> *Id.* at 224–25.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 225.

the games themselves, those effects will plainly transcend state boundaries and affect a fundamentally national industry.”<sup>46</sup>

The Third Circuit also held that PASPA does not unconstitutionally commandeer the states.<sup>47</sup> The court reasoned that “when Congress passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do, it is barring them from doing something they failed to do.”<sup>48</sup> Since PASPA does not force states to take any action, the Third Circuit held that Congress did not commandeer the states.<sup>49</sup> Prohibiting action rather than forcing a state to take action is the distinction the court made. Governor Chris Christie appealed the Third Circuit’s decision to the Supreme Court who denied Certiorari.<sup>50</sup>

### **B. *Murphy v. NCAA* (2018)**

In 2014, New Jersey enacted a law and labeled it a “repealer” in an attempt to get around PASPA.<sup>51</sup> The Act repealed provisions of a New Jersey law “prohibiting sports gambling insofar as they concerned the ‘placement and acceptance of wagers’ on sporting events by persons 21 years of age or older at a horseracing track or casino or gambling house in Atlantic City.”<sup>52</sup> The law also stated that the repealer did not apply to sporting events involving a New Jersey college team or a college sporting event taking place in New Jersey.<sup>53</sup> The NCAA sued New Jersey arguing that New Jersey’s “repealer” essentially authorized sports gambling in the state and as a result violated PASPA.<sup>54</sup> The NCAA won at the Federal District Court who held that New Jersey’s

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 230.

<sup>48</sup> *Governor of N.J.*, 730 F.3d at 230.

<sup>49</sup> THE NAT’L L. REV., *supra* note 35.

<sup>50</sup> *Id.*

<sup>51</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1472 (2018).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> THE NAT’L L. REV., *supra* note 35.

2014 law was preempted by PASPA.<sup>55</sup> The Third Circuit held in favor of the NCAA as well.<sup>56</sup> The Third Circuit then granted a hearing en banc and decided in a 9-3 vote in favor of the NCAA reasoning that PASPA did not commandeer the states because it required no affirmative action.<sup>57</sup> The Supreme Court granted certiorari for the first time on this issue.<sup>58</sup>

The Supreme Court relied on the cases *New York v. United States* and *Printz v. United States* in analyzing the present case under the anticommandeering principle at issue.<sup>59</sup> The *New York* Court reasoned that even if there is a strong federal interest in a certain issue, Congress is never authorized to command states to enact regulations.<sup>60</sup> Congress lacks the power to directly compel states or require states to prohibit certain acts because that would be a violation of the anticommandeering principle.<sup>61</sup> In striking down PASPA as unconstitutional, the Court explained that “[t]here is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.”<sup>62</sup> The Court also held that the unconstitutional provisions in PASPA were not severable from the rest of the statute, which meant that all of PASPA was struck down.<sup>63</sup> Although the Court struck down PASPA, the Court did not question the fact that Congress does have the power to regulate sports gambling in the United States because the Court’s narrow holding was that the way in which Congress regulated sports gambling was simply unconstitutional.

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<sup>55</sup> *Murphy v. National Collegiate Athletic Association*, HARV. L. REV. (Nov. 9, 2018), <https://harvardlawreview.org/2018/11/murphy-v-national-collegiate-athletic-association/>.

<sup>56</sup> Holden, *supra* note 25; THE NAT’L L. REV., *supra* note 35.

<sup>57</sup> *Id.*

<sup>58</sup> *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1476 (citing *New York v. United States*, 505 U.S. 144, 178 (1992)).

<sup>61</sup> *Id.* at 1477 (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

<sup>62</sup> *Id.* at 1481.

<sup>63</sup> *Id.* at 1483.

One of the most controversial aspects of the Supreme Court’s opinion pertains to the Wire Act of 1961. The Supreme Court explained that under PASPA, “private conduct violates federal law only if it is permitted by state law. That strange rule is exactly the opposite of the general federal approach to gambling,”<sup>64</sup> because under the Wire Act, it is illegal to transmit through interstate commerce “information that assists in the placing of a bet on a sporting event.”<sup>65</sup> The Supreme Court explained in its opinion that the Wire Act will “apply only if the underlying gambling is illegal under state law.”<sup>66</sup> Through this text, it appears that the Court is suggesting that in order for the Wire Act to be implicated, there must first be an underlying violation of state law. Although the Supreme Court’s discussion of the Wire Act in *Murphy* is most likely only dicta, this could be a groundbreaking development.<sup>67</sup> If the Wire Act is interpreted in this way, states would not need to be concerned when someone within the state’s boundaries places an online bet where the wire transmission of that bet crosses another state’s lines before ending at the original state’s server.<sup>68</sup> But, the DOJ has never made a statement of whether it agrees with the language in the Supreme Court’s opinion in regards to enforcement of the Wire Act and it remains unclear whether that portion of the Supreme Court’s opinion is binding law or not. Additionally, the Supreme Court’s statement directly contradicts with the wording of the Wire Act which does not require a violation of state law to violate the Wire Act.<sup>69</sup>

Some say that the Supreme Court’s explanation of the Wire Act not applying when a state legalizes sports gambling is actually an interpretation of the Wire Act’s safe harbor provision,

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<sup>64</sup> *Murphy*, 138 S. Ct. at 1483.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Daniel Wallach, *Did The Supreme Court Reinterpret The Wire Act To Allow Cross-Border Internet Sports Betting?*, FORBES (Jul. 8, 2018, 10:05 PM), <https://www.forbes.com/sites/danielwallach/2018/07/08/did-the-supreme-court-reinterpret-the-wire-act-to-allow-cross-border-internet-sports-betting/#45ad7af746c5>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

which applies to the transmission of information assisting in the placing of bets or wagers, but not to the placing of bets or wagers themselves.<sup>70</sup> The safe harbor provision allows for sports betting “information” to be transmitted through wires from one state that has legalized sports betting to another.<sup>71</sup> Within the safe harbor provision, “information” means information about odds for a game would be allowed but not physically placing a bet itself.<sup>72</sup>

Since the Supreme Court invalidated PASPA and deemed the Act unconstitutional, eleven states legalized sports betting.<sup>73</sup> Those eleven states are: Delaware, New Jersey, Mississippi, West Virginia, Pennsylvania, Rhode Island, Arkansas, New York, Iowa, Indiana, Illinois (sports gambling was legal in Nevada prior to *Murphy*).<sup>74</sup> Of those twelve states, seven of them provide off-site online sports betting within their state’s borders (New Jersey, West Virginia, Pennsylvania, Iowa, Indiana, Nevada, and Illinois).<sup>75</sup>

#### IV. The Wire Act of 1961

The Wire Act was enacted in 1961 under then-Attorney General Robert F. Kennedy.<sup>76</sup> The Wire Act was in part enacted to attempt to put mobsters and members of organized crime

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Legislative Tracker: Sports Betting*, LEGAL SPORTS REPORT (Sept. 4, 2019, 10:02 AM), <https://www.legalsportsreport.com/sportsbetting-bill-tracker/>; Alexandra Licata, *42 States Have or Are Moving Towards Legalizing Sports Betting – Here Are the States Where Sports Betting is Legal*, BUSINESS INSIDER (Aug. 2, 2019, 1:51 PM), <https://www.businessinsider.com/states-where-sports-betting-legal-usa-2019-7#illinois-3>.

<sup>74</sup> *Id.*

<sup>75</sup> *New Jersey Sports Betting*, LEGAL SPORTS REPORT (Sept. 14, 2019, 6:32 PM), <https://www.legalsportsreport.com/nj/>; *West Virginia Sports Betting*, LEGAL SPORTS REPORT (Aug. 28, 2019, 1:34 PM), <https://www.legalsportsreport.com/wv/>; *Pennsylvania Online Sports Betting*, LEGAL SPORTS REPORT (Sept. 14, 2019, 6:32 PM), <https://www.legalsportsreport.com/pa/>; *Iowa Sports Betting*, LEGAL SPORTS REPORT (Aug. 16, 2019, 11:32 AM), <https://www.legalsportsreport.com/iowa/>; *Indiana Sports Betting*, LEGAL SPORTS REPORT (Sept. 5, 2019, 4:32 PM), <https://www.legalsportsreport.com/indiana/>; *Nevada Sports Betting*, LEGAL SPORTS REPORT (Sept. 4, 2019, 12:35 PM), <https://www.legalsportsreport.com/nevada/>; Alexandra Licata, *42 states have or are moving towards legalizing sports betting – here are the states where sports betting is legal*, BUSINESS INSIDER (Aug. 2, 2019, 1:51 PM), <https://www.businessinsider.com/states-where-sports-betting-legal-usa-2019-7#illinois-3>.

<sup>76</sup> *Wire Act of 1961*, ONLINE GAMBLING SITES, <https://www.onlinegamblingsites.com/law/wire-act/> (last visited Sept. 7, 2019).

communities in jail for longer sentences than was possible under state laws.<sup>77</sup> In addition, sports gambling was perceived by the government as making organized crime too powerful and it was believed that the federal government needed to take action.<sup>78</sup> The Wire Act's main objective, though, was to stop sports betting out of concern that black market bookmaking was compromising the integrity of sports.<sup>79</sup>

The Wire Act was intended “to address ‘the wire,’ that is, the telegraph wire services used by illegal bookies to obtain horserace results before their betters.”<sup>80</sup> The statute helped reduce illegal sportsbooks because illegal betting was mostly conducted over the telephone when the Wire Act was enacted.<sup>81</sup> The statute contains a safe harbor provision providing that it is not illegal to transmit information related to betting as long as the bet itself is not being placed and the transmission is lawful in the sending and receiving jurisdictions.<sup>82</sup> Commentators have argued that the safe harbor provision supports the conclusion that the Act's purpose was only to eliminate illegal gambling but not state-approved gambling.<sup>83</sup> But this perspective was not discussed in the legislative history of the Act and is not the most popular view today.<sup>84</sup>

Several aspects of the Wire Act have recently been called into question, as the Act is ambiguous in several respects. The first issue is whether the Wire Act applies to all forms of gambling or only to sports gambling.<sup>85</sup> While most states and scholars interpret the Wire Act as being limited to prohibiting interstate wire transmissions only in sports betting, the DOJ's most

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 44 CONN. L. REV. 653, 660 (2012).

<sup>81</sup> *Id.*

<sup>82</sup> 18 U.S.C. 1084(b)

<sup>83</sup> *The Wire Act*, FREE ADVICE LEGAL, <https://business-law.freeadvice.com/business-law/gambling-law/the-wire-act.htm> (last visited Sept. 7, 2019).

<sup>84</sup> Wallach, *supra* note 67.

<sup>85</sup> Nelson Rose & Rebecca Bolin, *supra* note 80, at 660.

recent 2018 interpretation construes the Wire Act to prohibit all forms of gambling through interstate commerce.<sup>86</sup> Another important and unresolved issue concerning the Wire Act is whether its prohibition of activity using “wire communication facility” applies to conduct over the Internet.<sup>87</sup> While the Wire Act was enacted before the Internet existed, the DOJ has made it clear that the Act applies to any online or Internet sports gambling.<sup>88</sup> But since the Wire Act was enacted prior to the Internet existing, the language of the Act is ambiguous when it comes to interpreting the legality of Internet wire transmissions that begin and end within a single state, but that pass through other states.

#### **A. The Fifth and First Circuit’s Interpretations of the Wire Act**

Only two circuits have interpreted the Wire Act since its enactment in 1961 and both the Fifth and First Circuits interpreted the Act to mean the same thing, that the Wire Act prohibits only interstate sports gambling, rather than intrastate gambling or interstate gambling unconnected to sports.<sup>89</sup> In 2002, the Fifth Circuit interpreted the Act in a case where the plaintiffs alleged that the defendants and an unnamed Internet casino operated a “Worldwide gambling enterprise” that facilitated illegal gambling on the Internet through the use of credit cards.<sup>90</sup> Along with the many other allegations, one of the accusations was that this Internet gambling violated the Wire Act.<sup>91</sup> The Fifth Circuit held that the Wire Act only applies to interstate online sports betting,<sup>92</sup> relying

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<sup>86</sup> See Kim Yuhl, *NJ Files Brief in New Hampshire’s Wire Act Case, Calls DOJ’s 2018 Opinion ‘Flawed,’* PLAY NJ, <https://www.playnj.com/news/nj-files-brief-wire-act/45197/>.

<sup>87</sup> *The Wire Act*, FREE ADVICE LEGAL, <https://business-law.freeadvice.com/business-law/gambling-law/the-wire-act.htm> (last visited Sept. 7, 2019).

<sup>88</sup> *Id.*

<sup>89</sup> See *In re Mastercard Int’l Internet Gambling Litig.*, 313 F.3d 257 (5th Cir. 2002), *United States v. Lyons*, 740 F.3d 702 (1st Cir. 2014).

<sup>90</sup> *In re Mastercard*, 313 F.3d at 260.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 263.

on “the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion.”<sup>93</sup>

The First Circuit reached a similar conclusion, limiting the Wire Act to sports betting, in a case involving defendants convicted of working for Sports Off Shore (SOS), a gambling business based in Antigua.<sup>94</sup> The jury convicted the two defendants on two counts under the Wire Act for conducting an illegal gambling business.<sup>95</sup> But on appeal the defendants argued that since they aided in the placing of bets for not only sports but also for other forms of gambling, the Wire Act did not apply to them.<sup>96</sup> The First Circuit affirmed the District Court’s conviction of the defendants and held that “[t]he Wire Act applies only to ‘wagers on any sporting event or contest,’ that is, sports betting.”<sup>97</sup> The First Circuit reached a proper decision in holding that the fact that the defendants engaged in other conduct not prohibited by the Wire Act did not immunize them from a conviction for having engaged in the interstate sports betting prohibited by the Act. In holding that the Wire Act applies to the Internet even though the Internet did not exist at the time the Wire Act was enacted, the Court explained that “we regularly apply statutes to technologies that were not in place when the statutes were enacted.”<sup>98</sup>

### **B. The Department of Justice’s 2011 Interpretation of the Wire Act**

In 2009, New York and Illinois wrote to the DOJ seeking an opinion on its interpretation of the Wire Act. The two states wanted to conduct online non-sports lottery sales but were not sure if their use of out-of-state-payment processors for the lotteries would violate the Wire Act

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<sup>93</sup> *Id.* at 262.

<sup>94</sup> *Id.* at 710.

<sup>95</sup> *Id.*

<sup>96</sup> *In re Mastercard*, 313 F.3d at 718.

<sup>97</sup> *Id.* at 718 (citing 18 U.S.C. 1804(a)).

<sup>98</sup> *United States v. Lyons*, 740 F.3d 702, 717 (1st Cir. 2014).

because the transmissions crossed state lines.<sup>99</sup> In 2011, the DOJ’s Office of Legal Counsel issued a memo interpreting the Wire Act. The DOJ interpreted the Wire Act and determined that the “Wire Act does not reach interstate transmissions of wire communications that do not relate to ‘a sporting event or contest.’”<sup>100</sup> Meaning, the DOJ interpreted the Wire Act in a manner consistent with the Fifth and First Circuit decisions, limiting the Wire Act to a prohibition on sports gambling. In making this determination, the DOJ analyzed the language and the legislative intent of the Act.<sup>101</sup> In regards to the language, the DOJ had to decide whether the term “on any sporting event or contest” modifies each statutory mention of “bets or wagers” or only the instance it directly follows.<sup>102</sup> The DOJ explained that the second part of the first clause clearly prohibits a person from “knowingly using a wire communication facility to transmit ‘information assisting in the placing of bets or wagers on any sporting event or contest’ in interstate or foreign commerce.”<sup>103</sup> But what is less clear is whether the “sporting event or contest” restriction also applies to the first part of the first clause that prohibits betting or wagering through interstate commerce.<sup>104</sup> The DOJ concluded that both provisions are limited to sporting events or contests.<sup>105</sup>

The DOJ came to its conclusion through analyzing the grammar of the Act, as well as looking into the historical context of the Act and its purpose. The DOJ reasoned that it would make little sense for Congress to have prohibited the transmissions of all kinds of bets or wagers,

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<sup>99</sup> Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, OCCASIONAL PAPER SERIES, 29, Las Vegas: Center for Gaming Research, University Libraries, 2 (2014).

<sup>100</sup> Seitz, *supra* note 19, at 13.

<sup>101</sup> 18 U.S.C. § 1084(a) (“[w]hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both”).

<sup>102</sup> *Id.* at 5.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

but only prohibit the transmission of information to assist in placing bets or wagers on sports.<sup>106</sup> The more reasonable construction of the overall purpose of the Act is for the prohibitions to be parallel in scope so that both the prohibition on placing bets or wagers (with ambiguous scope) and the prohibition on transmitting information to assist in placing a bet or wager (limited to sports betting) both pertain only to sporting events or contests.<sup>107</sup> Additionally, the DOJ concluded that the Wire Act's legislative history supports its interpretation.<sup>108</sup> The DOJ found support for this interpretation of the Act's legislative history through a House Judiciary Committee Report, which states:

Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present, the immediate receipt of information as to results of a horserace permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events. The availability of wire communication facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a particular sporting event begins.<sup>109</sup>

Following the DOJ's 2011 interpretation, several members of Congress were dissatisfied with the way the DOJ had interpreted the Act and reasoned that it went against the intended meaning of the statute. "To stop the progression of legalized online gambling, Sen. Lindsey Graham (R-SC) and Rep. Jason Chaffetz (R-UT) introduced the Restoration of America's Wire Act (RAWA, H.R. 4301) which would create a *de facto* federal prohibition on Internet gambling and thwart states' attempts to legalize and regulate the activity."<sup>110</sup> The RAWA would delete the Act's references to sports gambling and insert the word "Internet" to ban all forms of gambling,

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<sup>106</sup> *Id.*

<sup>107</sup> Seitz, *supra* note 19, at 5.

<sup>108</sup> Seitz, *supra* note 19, at 8.

<sup>109</sup> Seitz, *supra* note 19, at 9.

<sup>110</sup> Minton, *supra* note 99, at 2.

even if a state’s law legalizes the activity.<sup>111</sup> Supporters of the Bill stated that their goal was to stop President Obama’s DOJ from reinterpreting Congress’s Statute.<sup>112</sup> Many said that Sheldon Adelson, the founder of Las Vegas Sands Corporation which owns casinos around the country, was a main driver of the RAWA.<sup>113</sup> Adelson through the years has made his dislike of online gambling known, as online gambling would decrease his personal revenue because it would drive business away from brick and mortar casinos.<sup>114</sup> Adelson was so involved that there were reports that an identified lobbyist of Adelson’s was labeled as an author of one of the drafts of the bill.<sup>115</sup> While the RAWA never passed, Adelson is still influencing the government when it comes to the Wire Act.<sup>116</sup>

### **C. The Department of Justice’s 2018 Interpretation of the Wire Act**

After the DOJ interpreted the Wire Act in 2011 to only prohibit online sports gambling and no other forms of gambling, many states enacted online gambling legislation in areas other than sports.<sup>117</sup> But in 2018 the DOJ’s Office of Legal Counsel (OLC) reinterpreted the Wire Act after Sheldon Adelson, a casino owner, led the group “Coalition to Stop Internet Gambling” that gained millions of followers.<sup>118</sup> The DOJ explained in its reinterpretation that they were reversing their 2011 interpretation because the plain reading of the statute prohibits all forms of interstate gambling, not just gambling on sporting events or contests.<sup>119</sup> The interpretation was based on

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Chris Grove, *The Restoration of America’s Wire Act- Inside The Proposed Ban on Regulated Online Gambling*, ONLINE POKER REPORT (Jul. 22, 2019, 3:08 PM), <https://www.onlinepokerreport.com/11725/graham-chaffetz-introduce-anti-online-gambling-bill/>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Julio Rodriguez, *Sheldon Adelson Gets His Way, Department Of Justice Says All Online Gambling Illegal*, CARD PLAYER (Jan. 5, 2019), <https://www.cardplayer.com/poker-news/23543-sheldon-adelson-gets-his-way-department-of-justice-says-all-online-gambling-illegal>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See Engel, supra* note 19.

analyzing the grammar and punctuation in the statute itself. As in 2011, the DOJ had to decide whether the term “on any sporting event or contest” modifies each instance of “bets or wagers” or only the instance it directly follows. The DOJ now reads the Act to say that the prohibition on transmitting information to assist in the placing of a bet or wager only applies to bets or wagers on a sporting event or contest because the phrase “on a sporting event or contest” is not repeated in Section 1084(a).<sup>120</sup> In contrast to that specific prohibition, however, the DOJ concluded that the three other statutory prohibitions lacking any direct reference to sports are naturally read to prohibit bets or wagers on all forms of gambling and not just to gambling related to sporting events or contests.<sup>121</sup>

The DOJ’s reinterpretation of the Wire Act in 2018 did not change anything for the legality of interstate online sports gambling because both the 2011 and 2018 interpretations state that placing a sports bet or wager through interstate commerce is prohibited. But the practical ramifications of the 2018 interpretation were meaningful as the Wire Act remains an obstacle in the online sports gambling world. The Wire Act, which many people hoped Congress would amend to allow online sports gambling through interstate commerce after the *Murphy* decision had instead been interpreted by the DOJ to become even more restrictive of online gambling.<sup>122</sup> Many politicians argue that since the Wire Act of 1961 was originally enacted to combat organized crime, the Act should not apply to hinder gambling legalized by the states on the Internet.<sup>123</sup> But the DOJ does not find this argument to be persuasive given their most recent interpretation.

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Wallach, *supra* note 67 (arguing that legalizing interstate sports betting will provide an alternative to illegal offshore betting).

<sup>123</sup> *See* Rodriguez, *supra* note 116.

The DOJ's 2018 interpretation of the Wire Act is not, however, binding on the courts. The DOJ's opinion states "[w]hile the possibility of judicial review cannot substitute for the Department's independent obligation to interpret and faithfully execute the law, that possibility does provide a one-way check on the correctness of today's opinion, which weighs in favor of our change in position."<sup>124</sup> The DOJ went on to say that the OLC opinion is an exercise of authority delegated by the Attorney General which provides binding legal advice within the Executive Branch.<sup>125</sup> It is not clear however what deference the DOJ's opinion is entitled to. New Jersey's amicus brief in the *New Hampshire Lottery* case (discussed below) argued that the opinion is not entitled to *Chevron* deference.<sup>126</sup> New Jersey reasoned that while ordinarily an agency's reasonable construction of an ambiguous statute is entitled to *Chevron* deference, that is not the case when the agency exceeds their rule-making authority.<sup>127</sup> New Jersey cited to *Gonzalez v. Oregon*, which held that when Congress grants the Attorney General rule-making authority, "the Attorney General's more general authority to interpret criminal laws for purposes of enforcement did not suffice to require *Chevron* deference."<sup>128</sup> The state argued that *Gonzalez* controls here because the "Wire Act confers no special rule-making authority upon the DOJ, and the DOJ's 2018 Reinterpretation reflects only its general authority to interpret criminal laws, which *Gonzalez* makes clear is not a basis for deference."<sup>129</sup> The issue regarding whether or not the DOJ's opinion is entitled to *Chevron* deference also depends on whether the statute is ambiguous or unambiguous. While New Jersey stated in their amicus brief that the Wire Act is ambiguous but found another

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<sup>124</sup> See Engel, *supra* note 19, at 22.

<sup>125</sup> Engel, *supra* note 19, at 19.

<sup>126</sup> Brief for New Jersey as amicus curiae Supporting Plaintiffs, *New Hampshire Lottery Comm'n v. Barr*, 2019 U.S. Dist. LEXIS 92220, 10-12 (D.N.H. June 3, 2019) (No. 19-0163), <https://www.courthousenews.com/wp-content/uploads/2019/05/nj-amicus.pdf>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

reason why the DOJ's opinion should not be afforded *Chevron* deference,<sup>130</sup> the DOJ, in their most recent interpretation, explained that the statutory language is plain and therefore unambiguous.<sup>131</sup>

Therefore, it is not clear what deference, if any, the DOJ's opinion is entitled to. But, the DOJ can enforce the Wire Act consistently with their new interpretation until and unless courts rule on this issue. The Fifth and First Circuit cases are binding law to districts in those circuits and are persuasive throughout the other circuits where there is no binding circuit court precedent regarding the scope of the Wire Act.<sup>132</sup> But the Fifth and First Circuits are not bound to their previous holdings and might reconsider now that there is a contrary DOJ interpretation.

## V. States' Reactions to the Wire Act and Online Gambling

Tennessee wants to become the first state to allow for exclusive online gambling (the state does not have casinos). But the bill has yet to pass because many lawmakers are hesitant about the possible implications of the Wire Act.<sup>133</sup> Stuart Scott, a lawyer in Nashville who handles sports betting issues in Nevada and other parts of the country said that "the U.S. Justice Department's recent reinterpretation of the Wire Act gives him pause about passing any mobile betting legislation."<sup>134</sup> Scott explained there are flaws in the technology at the moment that would allow for the potential of wires to cross state lines and thereby violate the Act.<sup>135</sup>

West Virginia, which now has online sports betting, had to delay its launch date for online sports gambling in order to be as sure as possible that it would be in compliance with the Wire

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<sup>130</sup> *Id.*

<sup>131</sup> Engel, *supra* note 19, at 7.

<sup>132</sup> Tamara Savin Malvin, *Online Gambling and the DOJ's Wire Act Reinterpretation*, AKERMAN (Jan. 25, 2019), <https://www.akerman.com/en/perspectives/whats-next-for-online-gambling-with-the-doj-about-face-on-the-wire-act.html>.

<sup>133</sup> ASSOCIATED PRESS, *States' Push to Legalize Sports Betting Differs by Region*, U.S. NEWS (June 23, 2019, 12:28 PM), <https://www.usnews.com/news/best-states/articles/2019-06-23/regional-divide-opens-up-in-sports-betting-legislation>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

Act. The state had to resolve issues over the location of two DraftKings' data servers that caused interstate wire concerns.<sup>136</sup> To allow for online sports betting, a state needs two servers: one to process wagering data and a second to oversee customers' digital wallets.<sup>137</sup> The wallet server that West Virginia was originally going to use is located in New Jersey and therefore the state decided to use its processing wagering data server to also serve the second function of being the wallet server.<sup>138</sup> This is intended to keep the betting intrastate within the meaning of the Wire Act.<sup>139</sup> West Virginia's Lottery Director, John Meyers, expressed his concern over the Wire Act, saying, "there is not a precedent to go by in the law. There's not a precedent to go by in creating platforms and these systems that move the data around. We are kind of learning as we go."<sup>140</sup> Likewise, Pennsylvania also suspended its launch date for online gambling due to the Pennsylvania Gaming Control Board's (PCPG) concern over the Wire Act.<sup>141</sup> Pennsylvania, like West Virginia, was originally going to share servers with New Jersey, but the PCPG required operators and game providers to maintain separate servers in Pennsylvania.<sup>142</sup> Additionally, Pennsylvania's online casinos offer less games than was originally intended because of the PCPG's new compliance regulations as a result of the new Wire Act interpretation.<sup>143</sup> Not only did these new regulations force online casinos to postpone their launch dates, but they are also now experiencing less growth than states had hoped.<sup>144</sup>

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<sup>136</sup> Steven Stradbrooke, *Wire Act Fears Delay DraftKings' West Virginia Mobile Betting App*, CALVIN AYER (June 6, 2019), <https://calvinayre.com/2019/06/06/business/draftkings-west-virginia-mobile-betting-wire-act-delay/>.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Jake Flatley, *Server Locations Delaying Launch of Sports Betting App in Charles Town*, METRO NEWS (June 5, 2019, 5:51 PM), <http://wvmetronews.com/2019/06/05/server-locations-delaying-launch-of-sports-betting-app-in-charles-town/>.

<sup>141</sup> Vanessa Lutz, *Wire Act Opinion Still Holding Back Fledgling PA Online Gambling Industry A Year Later*, PA ONLINE CASINO (Jan. 21, 2020), <https://www.paonlinecasino.com/7614/wire-act-limiting-online-gambling/>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

Similarly, Nevada is concerned about the conflicting guidance on how phones and mobile devices are used to place wagers and whether these routing transmissions that technically cross state lines are a violation of the Act.<sup>145</sup> Jennifer Roberts, associate director of the International Center for Gaming Regulation in Las Vegas said “[t]here’s so many questions that have been raised. Will they shut down every mobile wagering operation?”<sup>146</sup>

Once the DOJ published its most recent opinion, the New Hampshire Lottery filed suit in February 2019 in the United States District Court for the District of New Hampshire seeking a declaratory judgment and injunctive relief against the DOJ.<sup>147</sup> While New Hampshire acknowledged that the Wire Act prohibits sports gambling through interstate commerce, it argued that the proper understanding of *Murphy* is that intrastate online sports gambling is only illegal if it is illegal under that state’s law.<sup>148</sup> But as this Comment makes clear, the Wire Act does not say this. New Hampshire argued that the DOJ’s new construction of the Wire Act is “not faithful to the text, structure, purpose, or legislative history of the Wire Act.”<sup>149</sup> New Hampshire went on to say that the DOJ’s interpretation is “arbitrary, capricious, an abuse of discretion, and not in accordance with the law.”<sup>150</sup>

The District Court rejected the DOJ’s 2018 reinterpretation and held that the Wire Act only applies to sports gambling.<sup>151</sup> The court reasoned that when a statute’s language is ambiguous, “a

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<sup>145</sup> Nick Rummell, *Worries of Online Gambling Crackdown Spur States to Action*, COURTHOUSE NEWS SERVICE (May 20, 2019), <https://www.courthousenews.com/worries-of-online-gambling-crackdown-spur-states-to-action/>.

<sup>146</sup> *Id.*

<sup>147</sup> Complaint at 1, *New Hampshire Lottery Comm'n v. Barr*, No. 19-cv-163-PB, 2019 U.S. Dist. LEXIS 92220, at \*59 (D.N.H. June 3, 2019) (No. 19 Civ. 163), <https://www.governor.nh.gov/news-media/press-2019/documents/20190215-wire-act-barr-complaint.pdf>.

<sup>148</sup> *Id.* at 3.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 20.

<sup>151</sup> *New Hampshire Lottery Comm'n v. Barr*, No. 19-cv-163-PB, 2019 U.S. Dist. LEXIS 92220, at \*59 (D.N.H. June 3, 2019).

court must look to more than grammar to determine its meaning.”<sup>152</sup> The DOJ on the other hand only looked at grammar to determine its new interpretation of the Wire Act.<sup>153</sup> The District Court was guided by the rule of construction that “[s]tatutes should be interpreted ‘as a symmetrical and coherent regulatory scheme.’”<sup>154</sup> The court also reasoned that limiting the Wire Act to only sports gambling is consistent with this rule because it prevents any coherence problems when reading the statute as it conforms to another gambling law that Congress enacted the same day as the Wire Act.<sup>155</sup> The Paraphernalia Act, enacted the same day as the Wire Act, prohibits carrying sports paraphernalia through interstate commerce that can be used for sports gambling.<sup>156</sup> Neither the Wire Act nor the Paraphernalia Act mentioned prohibiting non-sport-lottery games.<sup>157</sup> As the district court explained, “[t]he Paraphernalia Act demonstrates that when Congress intended to target non-sports gambling it used clear and specific language to accomplish its goal.”<sup>158</sup> But, the New Hampshire District Court’s decision is limited to only the parties involved, meaning the rest of the states are not protected.<sup>159</sup> On August 16, 2019, the DOJ filed an appeal of the District Court’s ruling to the First Circuit.<sup>160</sup> Judge Barbado, the District Court Judge in the case said during oral arguments that, “I have a strong feeling that however I resolve the case, or however

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<sup>152</sup> *Id.* at 41.

<sup>153</sup> Engel, *supra* note 19, at 22.

<sup>154</sup> *Id.* (quoting *Mellouli v. Lynch*, 153 S. Ct. 1980, 1989 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))).

<sup>155</sup> *Id.*

<sup>156</sup> 18 U.S.C. § 1953(a); 18 U.S.C. § 1084(a).

<sup>157</sup> 18 U.S.C. § 1953(a).

<sup>158</sup> *New Hampshire Lottery Comm'n v. Barr*, No. 19-cv-163-PB, 2019 U.S. Dist. LEXIS 92220, at \*44 (D.N.H. June 3, 2019).

<sup>159</sup> James Gatto, *Federal Court “Disregards” DOJ Interpretation of Wire Act*, LAW OF THE LEVEL (June 4, 2019), <https://www.lawofthelevel.com/2019/06/articles/gambling/federal-court-wire-act-lottery-commission/>.

<sup>160</sup> Jennifer Newell, *US Department of Justice Appeals District Court Wire Act Decision*, LEGAL U.S. POKER SITES (Aug. 17, 2019), <https://www.legaluspokersites.com/news/us-department-of-justice-appeals-district-court-wire-act-decision/18995/>.

the First Circuit resolves the case, it is likely going to be resolved by the US Supreme Court either way.”<sup>161</sup>

While New Jersey does not have a case of its own at the moment, the state did file an amicus brief in the New Hampshire case.<sup>162</sup> New Jersey specifically addressed its concerns about how the DOJ is going to enforce the Wire Act based on its new interpretation in the context of all forms of online gambling.<sup>163</sup> New Jersey’s amicus brief argued that “[i]t is simply the nature of the Internet that even purely intrastate transactions may travel through channels that cross state lines.”<sup>164</sup> New Jersey gave the example that if a person in New Jersey is playing an Internet casino game hosted by an Atlantic City casino, the information transmitted to play the game or to process the person’s payment may travel through servers in states other than New Jersey. . . . “There is every reason to believe that the DOJ will attempt to prosecute those involved in such transactions in light of the 2018 Reinterpretation and the DOJ Memo.”<sup>165</sup> New Jersey explained that “that threat alone, regardless of the merit of such a prosecution, will devastate New Jersey’s iGaming industry, as most, if not all, operators and vendors could and would not risk criminal prosecution.”<sup>166</sup> The lack of clarity the DOJ provided in the 2018 Wire Act reinterpretation memo and the Act itself warrants an answer to these questions, either from the DOJ or preferably from Congress itself.

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<sup>161</sup> Dustin Gouker (@DustinGouker), Twitter (Apr. 11, 2019, 8:45 AM), <https://twitter.com/DustinGouker/status/1116361558437744640> (quoting Judge Barbado).

<sup>162</sup> Brief for New Jersey as amicus curiae Supporting Plaintiffs, *New Hampshire Lottery Comm'n v. Barr*, 2019 U.S. Dist. LEXIS 92220 (D.N.H. June 3, 2019) (No. 19-0163), <https://www.courthousenews.com/wp-content/uploads/2019/05/nj-amicus.pdf>.

<sup>163</sup> *Id.* at 7.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 8.

<sup>166</sup> *Id.*

## VI. How the Wire Act Should Be Interpreted

As addressed above, there are two main ambiguities surrounding the Wire Act. First, it is unclear whether the current Wire Act prohibits intrastate online gambling that crosses state lines. Based on Congressional history and federal courts analyses of the Wire Act, the more reasonable interpretation is that the current Wire Act prohibits intrastate online sports betting that crosses state lines. The second ambiguity is whether the Wire Act prohibits only interstate sports gambling or whether it prohibits all forms of interstate gambling, regardless of its nature. A more logical reading, drawn from legislative history and a federal district court's interpretation of the Wire Act in 2018, is that the Wire Act prohibits interstate sports gambling but no other forms of interstate gambling.

### A. The Current Wire Act Should Prohibit Intrastate Online Sports Betting That Crosses State Lines

The Wire Act was enacted to stop the placing of bets telephonically between states; at the time, it was known that telephone wires cross state lines. This can lead to the inference that Congress did intend for the Wire Act to still be violated even when an intrastate bet crosses state lines through a wire. Further proof of this is found in the case *United States v. Yaquinta*, a sports betting case in West Virginia that involved people using the telephone to transmit their sports bets.<sup>167</sup> The court held that even though the people and telephones placing the bets were in a state with legalized sports betting (West Virginia), the telephone wired into Ohio, in which sports betting was unlawful, and therefore was a violation of the Wire Act.<sup>168</sup> While this interpretation of the Wire Act came from a Federal District Court Judge in West Virginia, this decision came out only one year after the Wire Act was enacted, which helps to understand Congress's intent.

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<sup>167</sup> *United States v. Yaquinta*, 204 F. Supp. 276, 277 (N.D. W. Va. 1962).

<sup>168</sup> *Id.*

Therefore, the Wire Act as it is currently written, should prohibit interstate online sports gambling if the Internet transmissions cross state lines before ending in the original state. Therefore, the Wire Act as it is currently written, should prohibit online sports gambling, even if it begins and terminates within a single state, if the Internet transmissions cross state lines before ending in the original state.

Unlike the Unlawful Internet Gambling Enforcement Act (“UIGEA”), which contains a safe harbor provision for online bets that are placed intrastate but that cross state lines in the process of being transmitted, the Wire Act does not have such a provision.<sup>169</sup> The UIGEA “[p]rohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.”<sup>170</sup> The Act’s safe harbor provision states that wagers and bets are allowed to be routed interstate as long as the wager or bet is initiated in the same state.<sup>171</sup> The fact that the Wire Act does not contain such a safe harbor provision lends support to the construction that intrastate online sports betting that crosses state lines in the transmission of placing a bet does violate the Act.

A plausible counterargument exists, however, because the way the Wire Act is written leaves the question unanswered. Many people think that intrastate online sports betting where communications cross state lines does not violate the Wire Act. C.J. Fisher, an associate at Fox Rothschild does not think that online payment companies whose intrastate Internet transmissions might incidentally cross state lines should fear the Wire Act.<sup>172</sup> Fisher said that it is

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<sup>169</sup> *Unlawful Internet Gambling Enforcement Act of 2006 Overview* at 4, <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf> (last visited Jan. 6, 2020).

<sup>170</sup> *Id.* at 1.

<sup>171</sup> 31 U.S.C. § 5362.

<sup>172</sup> Douglas Clarke-Williams, *U.S. Processors Face Wire Act Dilemma After Online Gambling U-Turn*, PAYMENT COMPLIANCE 2 (Jan. 17, 2019), <https://www.foxrothschild.com/content/uploads/2019/01/U.S.-Processors-Face-Wire-Act-Dilemma-After-Online-Gambling-U-Turn.pdf>.

unclear whether the Department of Justice would interpret the Wire Act to apply to transmissions related to Internet gaming that happened to cross state lines, even if the user and the online casino are based in the same state. I think that would be an overly broad interpretation of the Wire Act, but the reversal and the new opinion could increase that risk.<sup>173</sup>

Further, the Congressional Report of 1961, in expressing Attorney General Kennedy's proposal on the Wire Act, provides an insight that Congress did not intend these wires to violate the Wire Act. Under the "Purpose of the Bill" section, it explains that the purpose of the Wire Act "is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses."<sup>174</sup> This suggests that Congress may not have intended to prohibit intrastate online sports gambling that incidentally crosses state lines so long as the gambling is legal within the state in which the bet is placed. Dicta from *Murphy* further supports this argument; the Supreme Court explained that the Wire Act will "apply only if the underlying gambling is illegal under state law."<sup>175</sup> But this is most likely only dicta and it is unclear whether the court was referring to the Wire Act in general or its safe harbor provision which allows for information regarding sports betting to travel through interstate commerce but not bets themselves.

### **B. The Current Wire Act Should Only Prohibit Interstate Sports Gambling but Not All Forms of Interstate Gambling**

The DOJ's 2011 interpretation of the Wire Act is more aligned with Congress's intention of what the Wire Act is meant to prohibit than the 2018 reinterpretation of the Act. Most fundamentally, the Wire Act should be found ambiguous on the issue of whether its scope is limited to sports gambling, as the 2011 interpretation concluded, and as the only two court of

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<sup>173</sup> *Id.*

<sup>174</sup> H.R. REP. 87-967, H.R. Rep. No. 967, 87TH Cong., 1ST Sess. 1961, 1961 U.S.C.C.A.N. 2631, 1961 WL 4794 (Leg.Hist.).

<sup>175</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1483 (2018).

appeals decisions have concluded. In 2011, the DOJ recognized the ambiguity in the language of the Act and stated that in order to understand Congress's intent, the DOJ must look to more than just grammar and look to the legislative history of the Act. The Wire Act's legislative history supports the DOJ's 2011 interpretation.<sup>176</sup> The DOJ in 2011 looked to the House Judiciary Committee Report, which specifically addressed the issues of wire communications and betting on horse races, stating that bookmakers are dependent on telephone services to place bets.<sup>177</sup> This demonstrates that in 1961, Congress's concern and reason for enacting the Wire Act was to stop sports bookmakers. There was no mention in 1961 of wanting to ban other forms of interstate gambling as well.

Additional support for Congress's intent to only ban interstate sports gambling can be found by analyzing the context of the Act when it was enacted in 1961. The two main purposes of the Wire Act were to stop organized crime from becoming too powerful as many mobsters were involved in sports gambling,<sup>178</sup> and to protect the integrity of amateur and professional sports.<sup>179</sup> At the time the Wire Act was enacted, it was intended "to address 'the wire,' that is, the telegraph wire services used by illegal bookies to obtain horserace results before their betters."<sup>180</sup> The statute helped reduce illegal sportsbooks because illegal betting was at that time mostly conducted over the telephone.<sup>181</sup>

This interpretation is supported by the conclusion in the only judicial decision to address the issue since the 2018 interpretation. In 2019, when New Hampshire sued the DOJ over 2018 reinterpretation of the Wire Act, Judge Barbado, the District Court Judge in the case, explained

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<sup>176</sup> Seitz, *supra* note 19, at 8.

<sup>177</sup> Seitz, *supra* note 19, at 9.

<sup>178</sup> ONLINE GAMBLING SITES, *supra* note 76.

<sup>179</sup> *Id.*

<sup>180</sup> Rose & Bolin, *supra* note 80.

<sup>181</sup> *Id.*

that when a statute’s language is ambiguous, “a court must look to more than grammar to determine its meaning.”<sup>182</sup> The court also reasoned that limiting the Wire Act to only sports gambling is consistent with this rule because it prevents any coherence problems when reading the statute and it conforms to another gambling statute that Congress enacted the same day as the Wire Act.<sup>183</sup> The Paraphernalia Act was enacted the same day as the Wire Act and prohibits carrying sports paraphernalia through interstate commerce that can be used for sports gambling.<sup>184</sup> Neither the Wire Act nor the Paraphernalia Act mentioned prohibiting non-sport-lottery games.<sup>185</sup>

The DOJ’s 2018 interpretation ignores the legislative intent behind the Wire Act and chooses to analyze the statute in a way that seems motivated by the desired result.<sup>186</sup> The DOJ choosing to ignore all of the signs that Congress intended only to prohibit interstate sports gambling but instead interpreting the Act to read that all forms of interstate gambling are illegal was a mistake.

## **VII. Recommendations on How to Deal with the Ambiguity of the Wire Act**

As discussed above, many states are struggling with how to enact online gambling legislation, or for states that already have online gambling, how to comply with the DOJ’s 2018 interpretation of the Wire Act. This section seeks to aid states in confronting the Wire Act’s ambiguities and suggests that states who have yet to implement online gambling should wait until the Act’s ambiguities are resolved. Most importantly, this section provides recommendations to Congress on how to resolve these ambiguities. There are two ways Congress can revise the Wire Act, and this section discusses each option.

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<sup>182</sup> *New Hampshire Lottery Comm'n v. Barr*, No. 19-cv-163-PB, 2019 U.S. Dist. LEXIS 92220, at \*41 (D.N.H. June 3, 2019).

<sup>183</sup> *Engel*, *supra* note 19, at 22 (quoting *Mellouli v. Lynch*, 153 S. Ct. 1980, 1989 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))).

<sup>184</sup> 18 U.S.C. § 1953(a); 18 U.S.C.S. § 1084(a).

<sup>185</sup> 18 U.S.C. § 1953(a).

<sup>186</sup> *Engel*, *supra* note 19, at 22.

## A. Recommendations to States

States that have yet to enact online gambling legislation should hold off until the issues surrounding the Wire Act and online gambling are resolved given the reasonable likelihood that the federal government will prosecute intrastate sports gambling that happens to cross state lines. While several states are taking the risk and reasoning that they want to take something that is currently being done illegally and reap tax benefits from it,<sup>187</sup> the tax benefits do not seem to be as rewarding as many states thought. Three states with legal sportsbooks are on pace to bring in much less in taxes than they expected in their first year.<sup>188</sup> For example, Mississippi is only bringing in half of its target goal in taxes.<sup>189</sup> Additionally, Rhode Island and West Virginia are only projected to bring in twenty-percent to thirty-percent of what they expected.<sup>190</sup>

The driving force behind legalizing sports gambling in the United States was New Jersey and since sports gambling has been legalized in the state, New Jersey has brought in a significant amount of revenue from it. Specifically, in 2019, sports betting in New Jersey generated more than \$4.58 billion.<sup>191</sup> In May of 2019 more sports bets were placed in New Jersey than in any other state, surpassing Nevada by \$1.5 million.<sup>192</sup> Former New Jersey Senator Raymond explained that the fight to legalize sports betting “was driven by the fact that the Atlantic City casino industry was dying and the horse racing industry was on life support. It needed an injection of new money

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<sup>187</sup> Associated Press, *Why Sports Betting Won't Make States a Lot of Money*, MARKET WATCH (Jan. 2, 2019, 11:47 PM), <https://www.marketwatch.com/story/why-sports-betting-wont-make-states-a-lot-of-money-2019-01-02>.

<sup>188</sup> Geoff Mulvihill, *Why Sports Betting Hasn't Gone Nationwide Yet After Supreme Court Ruling*, USA TODAY (June 23, 2019, 3:32 PM), <https://www.usatoday.com/story/money/2019/06/23/sports-betting-gambling-states-legal-supreme-court-ruling/1542110001/>.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Adam Candee, *Mobile NJ Sports Betting Hits Largest Share as 2019 Handle Goes Past \$4.5 Billion*, LEGAL SPORTS REPORT (Jan. 15, 2020, 6:16 PM), <https://www.legalsportsreport.com/36842/mobile-nj-sports-betting-hits-largest-share-as-2019-handle-goes-past-4-5-billion/>.

<sup>192</sup> Nick Corasaniti, *Move Over, Nevada: New Jersey is the Sports Betting Capital of the Country*, THE NEW YORK TIMES (June 23, 2019), <https://www.nytimes.com/2019/06/29/nyregion/nj-sports-betting.html>.

and new people that would come, fill up rooms, eat in restaurants, spend money.”<sup>193</sup> The owners of Monmouth and Meadowlands Racetracks said that sports betting saved their racetracks from going out of business.<sup>194</sup> But states that do not rely on places like Atlantic City and want to enact sports gambling legislation for the purposes of allowing online sports gambling and generating a tax revenue, probably should not be driven by that goal, given the relatively small revenue that has been generated in other states.

Another reason for states to temporarily suspend efforts to enact any form of online gambling legislation is that complying with the Wire Act could be extremely costly. The commonwealth of Pennsylvania expressed to the First Circuit in an amicus brief in the *New Hampshire Lottery* case “that the Department of Justice’s disputed new take on federal interstate gambling prohibitions could end up costing the state’s lottery system more than \$1 billion in annual revenue.”<sup>195</sup> Pennsylvania argued that the new broadened interpretation of the Wire Act could destroy the state’s lottery proceeds that are earmarked to benefit elderly residents.<sup>196</sup> The state went on to say that the new opinion could lead to the suspension of most, if not all, of the state’s online lotteries, jeopardizing the livelihood of many of its citizens.<sup>197</sup> As discussed above, Pennsylvania is not the only state fighting with New Hampshire against the DOJ, and the legal battle does not seem to be ending any time soon. It does not seem practical for states that do not already have online gambling to enact legislation now and risk the costs of violating federal law.

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<sup>193</sup> ASSOCIATED PRESS, *supra* note 187.

<sup>194</sup> Corasaniti, *supra* note 192.

<sup>195</sup> Matt Fair, *Pa. Says New DOJ Wire Act Opinion Could Cost Lottery \$1 Billion*, LAW 360 (March 24, 2020, 7:16 PM), [https://www.law360.com/appellate/articles/1256329/pa-says-new-doj-wire-act-opinion-could-cost-lottery-1b?nl\\_pk=177e9315-0184-4d6d-941866061f844067&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=appellate](https://www.law360.com/appellate/articles/1256329/pa-says-new-doj-wire-act-opinion-could-cost-lottery-1b?nl_pk=177e9315-0184-4d6d-941866061f844067&utm_source=newsletter&utm_medium=email&utm_campaign=appellate).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

## B. Recommendations to Congress

There is no doubt that Congress has the power to regulate online sports betting that uses interstate wires through its commerce power. But, what Congress must decide is whether this is something the government should be prohibiting today or whether intrastate sports betting, originating and ending within a state that legalizes sports betting, but that crosses state lines because of the nature of technology, should be a violation of federal law. The current state of the Wire Act and the DOJ's 2018 interpretation makes answering this question unclear. Whatever policy decision Congress makes, it should act so as to clarify the law so that States can plan. In order to resolve this ambiguity Congress should pass a new law or amend the Wire Act. There are two ways Congress can do so: (1) relax the restrictions in the current Wire Act, or (2) follow the DOJ's 2018 interpretation and broaden the activities the Wire Act prohibits.

The first type of law Congress can enact would be a law that relaxes the restrictions on the current Wire Act. The Sports Wagering Market Integrity Act, introduced by Senator Chuck Schumer and retired Senator Orrin Hatch in December 2018, sought to relax the restrictions on the Wire Act to expressly allow intrastate online gambling that incidentally crosses state lines.<sup>198</sup> Section 2 of the proposed bill addresses the illegal sports gambling market, estimating that over fifteen billion dollars are illegally bet annually in the United States on sporting events.<sup>199</sup> The bill then discusses the history of sports gambling in the United States and that while all forms of gaming historically have been regulated at the state level, sports betting, which “often involves individuals across numerous States placing sports wagers on a sporting event that takes place in yet another State, affects interstate commerce more than other forms of gaming that are generally

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<sup>198</sup> Jennifer Roberts and Greg Gemignani, *Who Wore it Better? Federal v. State Government Regulation of Sports Betting*, 9 UNIVERSITY OF NEVADA, LAS VEGAS GAMBLING L.J. 77, 96 (2019).

<sup>199</sup> Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. § 2 (6) (2018).

contained within the walls of a gaming establishment.”<sup>200</sup> For this reason Congress plays an important role in setting standards and providing law enforcement with the necessary laws for targeting the illegal sports betting market.<sup>201</sup>

Section 301 of the proposed Sports Wagering Market Integrity Act directly addresses the legality of interstate sports gambling under the Wire Act.<sup>202</sup> This section would amend the Wire Act to allow for bets and wagers to be made across state lines between states “with approved sports wagering and interstate compacts.”<sup>203</sup> This would eliminate the issue of intermediate routing that was at issue in *Yaquinta* (discussed above). This would also allow states to enact online sports gambling legislation without fear of violating the Wire Act. Since Senator Hatch has since retired, there is no Republican backing for the bill. But, there are rumors that Utah Senator Mitt Romney might be taking Hatch’s place as Schumer’s Republican counter-part for the bill.<sup>204</sup>

The other type of law Congress could enact would be one that broadens the scope of the Wire Act to not only prohibit interstate sports betting, but also to expressly prohibit all forms of interstate betting. This law would be consistent with the DOJ’s 2018 interpretation of the Wire Act. The Restoration of America’s Wire Act, which was proposed in 2014 but has yet to pass, would extend the Wire Act to ban most forms of online gambling regardless of whether such activity is legal in the states involved, while leaving an exception for certain forms of gambling like fantasy sports.<sup>205</sup> The RAWA would delete the Act’s references to sports gambling and insert

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<sup>200</sup> *Id.* § 2 (9).

<sup>201</sup> *Id.* § 2 (10).

<sup>202</sup> *Id.* § 301

<sup>203</sup> Jennifer Roberts and Greg Gemignani, *Who Wore it Better? Federal v. State Government Regulation of Sports Betting*, 9 UNLV GAMBLING L.J. 77, 96 (2019).

<sup>204</sup> Brett Smiley, *Report: Romney To Carry Federal Sports Betting Bill Torch With New York’s Schumer*, SPORTS HANDLE (Sept. 6, 2019), <https://sportshandle.com/romney-schumer-sports-betting-federal-bill-report/>.

<sup>205</sup> Chris Grove, *The Restoration of America’s Wire Act – Inside the Proposed Ban On Regulated Online Gambling*, ONLINE POKER REPORT (Jul. 12, 2019, 3:08 PM), <https://www.onlinepokerreport.com/11725/graham-chaffetz-introduce-anti-online-gambling-bill/>.

the word “Internet” to ban all forms of interstate online gambling, even if a state’s law legalizes the activity.<sup>206</sup> It is apparent that Sheldon Adelson is behind this bill, as early drafts of the bill identified one of Adelson’s lobbyists as the author.<sup>207</sup> It seems that Sheldon Adelson has the money and potentially the lobbying power to attempt to push this bill right now since many believe he was the mastermind behind the DOJ’s new Wire Act interpretation.<sup>208</sup>

If Congress cannot get the backing to pass a new bill into law, then at the very least Congress needs to clarify what the Wire Act prohibits. Congress needs to answer two important questions: (1) whether the Wire Act is limited to only prohibiting interstate sports gambling or does the Act prohibit all forms of interstate gambling, and (2) whether intrastate sports gambling that crosses state lines in the process of bets being placed is a violation of the Wire Act.

### **VIII. Conclusion**

Gambling, and sports gambling specifically, have a complicated and unique history in the United States. While the federal government can no longer commandeer the states to direct them to spend their own resources as a mechanism to prohibit them from enacting sports gambling legislation, the Wire Act remains an ambiguous obstacle for states that currently have online sports gambling, or that wish to do so. Further, the Wire Act is not only an obstacle for online sports gambling, but it has recently become an issue for non-sports online gambling as well. The better interpretation of the Wire Act as it now stands, and of the policy goals underlying the Act, is that only interstate online sports betting is prohibited, but no other forms of interstate online gambling. Based on legislative history and federal courts interpretations of the current Wire Act, the most logical reading of the statute is that it does prohibit intrastate sports gambling that passes through

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<sup>206</sup> Minton, *supra* note 99, at 2.

<sup>207</sup> Grove, *supra* note 205.

<sup>208</sup> *Id.*

other states. These readings are, however, subject to significant question, and whatever policy Congress adopts, it should implement that policy through a statute that states can understand and with which states can comply. Congress should resolve the ambiguities surrounding the Wire Act either through enacting a new law or through amending the Wire Act to clarify what it actually prohibits. Until then, states that have yet to enact online sports gambling and online gambling legislation in general should hold off until this issue is resolved.