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## How the Wrangling Over the Wire Act is Shaping Policy in Sports Betting

BY SENATOR KEITH PICKARD, ESQ.

As states across the country legalize sports wagering, the focus is now on conflicts between state and federal sports betting statutes. Fortunes large and small depend upon predictability and liquidity in the gaming industry, and industry groups spend significant time discussing how the current confusion regarding the legality of sports wagering from the federal perspective might affect them.<sup>1</sup> Most of the discussion focuses on the differing interpretations of the federal Wire Act of 1961, and those conflicting views distort the ways the gaming industry, bettors and illegal operations interact.

## A Simple One-Sentence Act

It helps to understand the trajectory of the discussion when viewed in the light of history. In 1961, then-Attorney General Robert Kennedy embarked on a crusade against organized crime. But federal law was impotent, and Congress was slow to act. So, Kennedy pushed a simple statute as a cornerstone of what would become a complex bundle of laws that gave law enforcement the ability to pursue illegal operators.

The Wire Act, found at 18 U.S.C. § 1084(a), is straightforward:

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>2</sup>

The federal government thought if it could trace the telephone wires used to place bets by illegal bookies across state lines, they could invoke the Wire Act to obtain a conviction.<sup>3</sup> In the days where telephone calls required continuous “twisted pairs” to carry the call from the bookies to the oddsmakers as they took wagers from gamblers, law enforcement now had a hook by which they could snag the illegal operators. By making these calls illegal, the law (1) helped states enforce their own anti-gambling laws, and (2) helped states curtail illegal organized gambling activities.<sup>4</sup>

Of course, simple laws are problematic in the courts given their inherent ambiguity. So the federal government added more effective schemes, including the Organized

Crime Control Act of 1970, which included the Racketeer Influenced and Corrupt Organizations Act (RICO), the Professional and Amateur Sports Protection Act of 1992 (PASPA, now overturned), and more recently, the Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006.<sup>5</sup>

## Gambling in the Era of the Internet

The internet proved to be a game-changer in every respect. Not only did it change how we communicate, both practically and technically, but it changed how we watch and interact with sports. No longer tied to actual wires, information flows freely through air and space, and in real time. No longer were there easy ways to “trace” the wires, since there were none.

But the real wrangling came when trying to fit this new technology into the chassis of the old scheme. At the time of the original Wire Act, AG Kennedy acknowledged “wireless communication was not included in this bill because it is our belief that the Federal Communications Commission has ample authority to control the misuse of this means of communication.” He also said, “[The bill] is not interested in the casual dissemination of information with respect to football, baseball, or other sporting events between acquaintances.”<sup>6</sup>

Of course, betting on sports had been big news for decades. From the 1919 World Series game-fixing scandal, to the lifetime ban for Pete Rose from baseball in 1989, gambling was considered anathema to honest sporting events. Outside of Nevada, where sports wagering was first legalized in 1949, betting on sports was considered the gateway to utter destruction of America’s favorite pastime.<sup>7</sup>

So in 1992, Congress passed PASPA, often called the Bradley Act after NBA-star-turned-U.S. Senator Bill Bradley, the primary sponsor of the bill.<sup>8</sup> PASPA sought to set the boundary for legal sports wagering throughout the U.S. Nevada, Oregon, Delaware and Montana

were grandfathered-out to the extent they offered sports betting. But those activities were all considered intrastate, for which the law created a safe harbor. A decade of court cases and congressional debate ensued, and it was anyone’s guess how the final result would look.

As illegal internet operations flourished and states sought new ways of generating revenue, pressure mounted to find a way to cash in on the growing online platform. In 2006, UIGEA established several safe harbors for the transfer of financial data for legal operations while attacking the illegal operators.<sup>9</sup> But UIGEA was never actually intended to address sports betting, per se. It was intended to obstruct offshore operators’ access to U.S. financial institutions. The safe harbors excluded placing, receiving or otherwise transmitting a bet or wager where they begin or end where betting is legal, provided sufficient geolocation and security measures are taken, from the definition of “unlawful Internet gambling.”<sup>10</sup>

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In 2009, New York and Illinois requested an opinion from the Department of Justice (DOJ) seeking an opinion of the legality of online lottery sales. With confirmation from the Office of Legal Counsel (OLC), the DOJ provided an opinion that made three important concessions:

- 1) UIGEA prohibited payment processors from processing transactions related to illegal online operations, but it specifically excluded *intrastate* online gambling from its proscriptions;
- 2) UIGEA does not consider the “intermediate routing” of electronic data, which might temporarily cross state lines, when determining the location of transactions or whether they are interstate or intrastate; and

CONTINUED ON PAGE 11

# How the Wrangling Over the Wire Act is Shaping Policy in Sports Betting

3) because the online lotteries proposed by Illinois and New York did not involve sports, they fell outside the scope of the Wire Act.<sup>11</sup>

Subsequent case law tightened the reins on online activities and applied the Wire Act to non-sports gambling. Finally, in 2011, the DOJ officially interpreted the Wire Act and held to its original position: that the law only applied to interstate, online sports wagering.

The next “game changer” came in May 2018, when the U.S. Supreme Court decided that PASPA was unconstitutional. In *Murphy v. NCAA*, the court held that the federal law making it unlawful to wager on sports violates the anticommandeering principle foundational to states’ rights.<sup>12</sup> Though it did not declare sports wagering legal, it did say it was up to the states to decide.

States took this opinion and ran with it. As of March 2020, 17 states currently allow sports betting, with four more establishing their regulatory schemes.<sup>13</sup> Most took the tack of legalizing online sports betting as a means of suppressing the illegal offshore operators. Others created their own forms of lottery or mixed “racino” or online sports books offerings where residents could participate from home after a stop at the local casino to register.

But in 2018, the DOJ reversed its 2011 interpretation, declaring that the Wire Act’s proscriptions apply to all forms of gambling that cross state lines.<sup>14</sup> It only limited the prohibition of transmitting information assisting in the placing of bets as to sports. This reinterpretation, though currently being litigated,<sup>15</sup> could set states and the gaming industry on their ears.

## Why This Matters

States, including Nevada, have spent enormous sums of time, energy and money in establishing legal means

and methods of generating revenue from sports wagering. From fantasy football leagues,<sup>16</sup> to lotteries, to formal casino sports books, understanding the rules for legal operations is critical to financial success or failure for states and commercial operations alike. And none of this touches the offshore operations that take people’s money without recourse. The potential intersections between the interpretation of the Wire Act and UIGEA, if left unresolved, place a significant risk on operators seeking to engage in activity anywhere near the fence line.

That risk shapes decisions of state legislators and regulators as they seek to capture revenues from legal activities.

The true resolution, then, lies in one bold, but necessary, move: the repeal of the federal Wire Act. The law is outdated for what has become an ever-increasingly complex market and is ineffective given today’s technology, particularly since geo-fencing allows for careful limitation to intrastate activities. The repeal of this antiquated statute will relieve the states of any capricious and uninformed tendencies of partisan administrations while placing the issue of regulated gaming activities back in the states where it belongs.

1. The National Council of Legislators from Gaming States held numerous panel discussions on sports betting and the Wire Act at its summer and winter meetings in 2019 and anticipate doing the same in 2020 (see <https://www.nclgs.org/index.php/events>). Similarly, presentations and panel discussions regarding the intersection of sports betting and the Wire Act occurred at the Global Gaming Expo (G2E) in 2018 and 2019, and SBC Gaming held a conference dedicated to the subject in April of this year.
2. 18 U.S.C. § 1084. The remaining sections of the act created a safe harbor for the transmission of information relating to wagers between states where it was legal.
3. *E.g. Martin v. United States*, 389 F.2d 895, 896 (5th Cir. 1968).

4. Ryan Todenberg, *The Wire Act of 1961: That Time RFK Sent JFK a Letter About Sports Betting*, Sportshandle.com, March 5, 2018, available at <https://sportshandle.com/the-wire-act-of-1961-rfk-jfk-sports-betting/>.
5. 31 U.S.C. §§ 5361–5367.
6. Todenberg, *supra* at note 3.
7. Becky Harris, *Regulated Sports Betting: A Nevada Perspective*, 10 UNLV Gaming Law J. 75 (2020).
8. 28 USC 178 § 3701 et. seq.
9. *See e.g.* 31 U.S.C. § 5362(10).
10. 31 U.S.C. § 5362(10)(B).
11. 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, 2014, at 2. Available at [https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1035&context=occ\\_papers](https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1035&context=occ_papers).
12. 138 S.Ct. 1461 (2018).
13. *See* <https://www.americangaming.org/research/state-gaming-map/>
14. *Reconsidering Whether the Wire Act Applies to Non-sports Gambling*, U.S. Dept. of Justice, November 2, 2018, available at <https://www.justice.gov/olc/opinion/reconsidering-whether-wire-act-applies-non-sports-gambling>.
15. *See New Hampshire Lottery Comm. v. William Barr*, Civ. Action 19-CV-001163-PB (D.N.H. 2019). This case is currently on appeal in the U.S. Court of Appeals for the First Circuit.
16. Fantasy football leagues present an interesting conundrum for states that differ on their regulatory approach. The challenge for these leagues is that some jurisdictions consider them gaming, others deem them non-gaming, and still others make no determination but regulate them under their consumer protection schemes.

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