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## Creating More Problems Than Solutions: Why it's Time for the Wire Act to Retire

Sarah Elizabeth Robertson

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# Creating More Problems than Solutions: Why It's Time for the Wire Act to Retire

Sarah E. Robertson\*

## I. Introduction

The housewife, the factory worker, and the businessman will tell you that they are against such things as narcotics, bootlegging, prostitution, gang murders, the corruption of public officials and police, and the bribery of college athletes. And yet this is where their money goes.<sup>1</sup>

The gambling industry has been a thorn in the United States' side since its inception, and despite numerous attempts by the federal government to determine whether gambling and sports betting should be legal and who should control it, the government has yet to make up its mind on the subject. In 1961, the Kennedy administration thought it had found a way to finally put an end to mobs and organized crime, when Congress passed the Wire Act of 1961, which sought to cut off those criminal enterprises' access to revenue by making sports betting via "wire communication" illegal.<sup>2</sup>

However, in 2022, one cannot watch a sporting event without a constant influx of sports betting commercials.<sup>3</sup> Companies such as FanDuel and BetMGM dominate the now legal sports betting space and have made it into a multi-billion-dollar industry. In New Jersey alone, close to \$1.35 billion was placed in bets in February 2022.<sup>4</sup> Yet, the archaic Wire Act still makes it a federal crime for persons to be engaged in the business of betting or wagering.<sup>5</sup> It is clear that the Wire

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\*J.D. Candidate, 2022, Seton Hall University School of Law; B.A., 2019, Hamilton College.

<sup>1</sup> Robert F. Kennedy, 1961.

<sup>2</sup> 18 U.S.C.A. § 1084.; Brett Smiley, *The Wire Act of 1961: The Time that RFK sent JFK a Letter about Sports Betting*, SPORTS HANDLE (Mar. 5, 2018), <https://sportshandle.com/the-wire-act-of-1961-rfk-jfk-sports-betting/>.

<sup>3</sup> Avi Salzman, *New Data Show Enormous Growth Rate in Gambling Ads*, BARRON'S (Feb. 10, 2022, 12:25 PM) <https://www.barrons.com/articles/new-data-show-enormous-growth-rate-in-gambling-ads-51644513956>. It is estimated that sports betting companies spent \$725 million on advertising alone in 2021. Compared to 2020, where companies only spent \$292 million. Now, sports betting sites spend three times as much on ads as cereal companies do. This is not to consider the impact on people who watch those sporting events, or how such content affects children or teenagers about to become of legal betting age. While this paper cannot properly dive into such an interesting subject, it begs the question of whether Robert Kennedy might have been correct about some of his ideas.

<sup>4</sup> *New Jersey Gambling Revenue: America's #1 Sports Betting Market*, SPORTS BETTING DIMES (Mar. 1, 2022) <https://www.sportsbettingdime.com/new-jersey/sports-betting-revenue/> (last visited May 16, 2022).

<sup>5</sup> 18 U.S.C.A. § 1084.

Act was passed at a specific time for a specific reason – to halt the spread and funding of organized crime. Robert F. Kennedy and Congress chose to regulate sports betting to achieve this goal. Although the success of these efforts is debatable, what is clear is that the 60-year-old Wire Act has outlived its usefulness.

This paper argues for the modernization of the federal sports betting regulatory scheme, which can only be achieved through the repeal of the Wire Act, and the transfer of power to regulate sports betting and gaming to state governments. The federal government is ill-equipped to control the expansion of sports betting across the country and the Wire Act cannot adapt to the growth of mobile sports betting. Additionally, the federal government’s past efforts have been inconsistent and incomplete. A 2011 Department of Justice (“DOJ”) Opinion stated that the Wire Act only applied to “sports-related gambling activities” because legislative history lacked any intention to provide the government with the ability to prosecute non-sports gaming activities.<sup>6</sup> However, a 2018 DOJ Opinion reversed its previous opinion and concluded that, in fact, the Wire Act implicated all forms of Internet gaming, and not just sports betting.<sup>7</sup> These conflicting opinions have shown the federal government’s lack of a uniform policy about sports betting. With the way the current Wire Act stands, state governments, sports betting companies, and even patrons themselves are open to liability should the DOJ choose to prosecute violations of the Wire Act.<sup>8</sup> States and gaming companies should take a more aggressive approach to persuade Congress to repeal the Wire Act, and pass power to states if it wants to avoid such exposure.

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<sup>6</sup> *Whether the Wire Act Applies to Non-Sports Gambling*, 35 Op. O.L.C. 134 (Sep. 20, 2011) (“*Whether the Wire Act Applies*”), available at <https://www.justice.gov/olc/file/2011-09-20-wire-act-non-sports-gambling/download>; *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 1 (Nov. 2, 2018) (“*Reconsidering Whether the Wire Act Applies*”), available at <https://www.justice.gov/olc/file/1121531/download>.

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

<sup>8</sup> Brandon P. Rainey, Note, *The Unlawful Internet Gambling Enforcement Act of 2006: Legislative Problems and Solutions*, 35 J. Legis. 147, 157 (2009) (“Under the Wire Act, gambling businesses which make gambling over wires their day-to-day occupation may be prosecuted, but individual gamblers cannot be.”).

Part II of this paper will begin with the history of the Wire Act of 1961, the various prosecutions of the 1990s, the 2011 and 2018 Opinion's from the Office of Legislative Affairs ("OLA") and DOJ, the most recent case filed, *New Hampshire Lottery Commission v. Rosen*.<sup>9</sup> Part III of this paper will focus on the failures of the Wire Act and the federal governments' ambivalence towards the idea of properly regulating sports betting, and will argue that it is essential the Wire Act is replaced and regulatory power is returned to the states. Such change is necessary because (1) the Act's outdated language does not address changing technology used by sports betting companies; and (2) the current federal regulatory scheme, which includes the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), cannot appropriately regulate the gaming industry.

## **II. The Wire Act of 1961 and Proceeding Federal Attempts to Control Sports Betting**

The Wire Act was enacted in 1961 as a part of the campaign by then Attorney General Robert F. Kennedy to crack down on illegal sports gambling operations and racketeering which were funding mob organizations.<sup>10</sup> Kennedy believed that organized crime was more of a threat to the United States than Communist aggression, an opinion he developed while serving on the U.S. Senate's McClennan Committee in 1957.<sup>11</sup> The McClennan Committee, named after Senator John L. McClennan of Arkansas, was formed to investigate union corruption, and was colloquially named the "Rackets Committee" as it probed labor and management corruption.<sup>12</sup> The Committee exposed over 49 mobsters that were associated with the Teamsters; 141 Teamsters officers tied to improper or criminal activities (71 of whom invoked their Fifth Amendment rights to avoid

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<sup>9</sup> *New Hampshire Lottery Comm'n v. Barr* 386 F. Supp. 3d 132 (D.N.H. 2019).

<sup>10</sup> *Hearings Before the Senate Judiciary Committee on the Attorney General's Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess., 4 (1961) (statement of Robert F. Kennedy, Att'y Gen. of the United States) ("Organized crime is nourished by a number of activities, but the primary source of its growth is illicit gambling.")

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

<sup>12</sup> *Id.*

answering questions).<sup>13</sup> It is estimated that by the mid-twentieth century, the mafia had close to 5,000 members across the United States.<sup>14</sup>

In fact, in 1960, Kennedy wrote a book on the subject entitled, *The Enemy Within*, documenting his crusade against Jimmy Hoffa and his involvement with corrupt labor unions.<sup>15</sup> After his appointment to the Attorney General's office, Robert Kennedy decided to use the powers of the DOJ to defeat Jimmy Hoffa and mob families across the country.<sup>16</sup> Kennedy proposed several laws to Congress, including Senate Bill 1656, also known as the Wire Act.<sup>17</sup> This was the first time a federal statute targeted an entire organized crime unit instead of just prosecuting individuals.<sup>18</sup> The purpose of this law was to control the mob problem in the United States by attacking a source of funding for mob organizations, part of which was coming from underground betting organizations operated through telegraphs and partially telephones.<sup>19</sup>

Congress passed the bill and John F. Kennedy signed it into law on September 13, 1961.<sup>20</sup>

The Wire Act provides, in relevant part:

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>21</sup>

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<sup>13</sup> Jeff Burbank, *Robert F. Kennedy's Crusade Against the Mob*, THE MOB MUSEUM: ROBERT F. KENNEDY'S CRUSADE AGAINST THE MOB: PART 1 (June 6, 2018), <https://themobmuseum.org/blog/robert-f-kennedys-crusade-mob/>.

<sup>14</sup> Becky Little, *How Bobby Kennedy Started the War on Gangs*, HISTORY: HISTORY STORIES (Feb. 1, 2018), <https://www.history.com/news/robert-kennedy-started-the-war-on-mafia-gangs>.

<sup>15</sup> Robert F. Kennedy, *The Enemy Within* (1960).

<sup>16</sup> Little, *supra* note 13.

<sup>17</sup> David G. Schwartz, *Not Undertaking the Almost-Impossible Task: The 1961's Wire Act's Development, Initial Applications, and Ultimate Purpose*, 14(7) GAMING L. REV. AND ECON. 533, 553 (2010).

<sup>18</sup> Burbank, *supra* note 12.

<sup>19</sup> Baxter Geddies, Note, *A Law of Confusion: Conflicting Interpretations of the Wire Act Prove the Need for Reform*, 24 Gaming L. Rev. 392, 393 (2020).

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

<sup>21</sup> 18 U.S.C.A. § 1084.

A crime under the Wire Act consists of three elements: First, persons engaged in the business of betting or wagering; second, use of a wire communication facility; and third, the transmission of wagering on sports events or horse racing.<sup>22</sup> While these elements appear straightforward, law enforcement agencies struggled to enforce the Wire Act.<sup>23</sup> Specifically, as technology changed from telephones and telegraphs to modern satellite technology, prosecutors were unclear as to whether the Wire Act applied to those new forms of communication.<sup>24</sup>

Some of these issues were brought to light in the late 1990s when the DOJ attempted to prosecute online betting sites that had been deliberately based overseas to avoid prosecution under the Wire Act.<sup>25</sup> The DOJ indicted operators of six online betting sites: Island Casino and Real Casino of Curacao, SDB Global and Real Casino of Costa Rica, and Winner's Way and World Sports Exchange of Antigua.<sup>26</sup> Three Defendants surrendered themselves because they were in the United States at the time of indictment, however, the others remained outside of the United States to avoid being arrested.<sup>27</sup> Because their wagering sites were technically legal in foreign countries, these Defendants had no imminent reason to return to the United States. Of the 10 individuals charged at these betting sites, three pled guilty and seven remained outside of the U.S., successfully avoiding prosecution.<sup>28</sup> However, one of the Defendants, the president of World Sports Exchange

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<sup>22</sup> Robin Harrison-Millan, *Murky Motivations*, IGAMING BUSINESS NORTH AMERICA (Dec. 6, 2019), <https://www.igbnorthamerica.com/murky-motivations/> (last visited May 16, 2022) (comparing the original motivations for the Wire Act and the DOJ's motivation to reinterpret the Act. Concluding that the DOJ's motivations cannot be traced to social responsibility concerns or commercial interests like in 1960. Thus, due to the DOJ's futile efforts, it is inevitable that the DOJ's opinions will end up in front of the Supreme Court).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001).

<sup>26</sup> Schwartz, *supra* note 16, at 538.

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

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

Jay Cohen decided it was time to clear his name and return to the United States, believing that he could successfully prove he was not guilty of violating the Wire Act.<sup>29</sup>

Upon Cohen's return, he was indicted, and his prosecution became a test case to determine if the Wire Act could be used against the operation of online sportsbooks.<sup>30</sup> During the trial, the prosecution argued that although these sites were based and licensed to run books in Antigua, they also used a phone system to accept bets from Americans.<sup>31</sup> Acceptance of bets was a direct violation of the Wire Act because it used an illegal "wire communication facility" to transmit sports bets, and, thus, it did not matter where the company was technically located and licensed.<sup>32</sup> Cohen's counsel, despite conceding that World Sports Exchange had previously accepted bets from undercover agents in the United States, attempted to argue that Cohen himself had not accepted any of these bets and thus had not violated the Wire Act.<sup>33</sup> The jury was unpersuaded by Cohen's argument and found him guilty; Cohen was then sentenced to eighteen months in federal prison.<sup>34</sup>

Although *Cohen* settled the dispute about the Wire Act's application to Internet sports betting, the court did not consider whether the Wire Act applied to other types of Internet gaming, such as slots, blackjack, and roulette. The Fifth Circuit addressed the subject head on when the court consolidated 33 cases into *In re MasterCard Intern. Inc.*<sup>35</sup> In these cases, a patron entered their credit card number into an online gaming site, lost, and then sought to have their money returned.<sup>36</sup> Plaintiffs' counsel argued that credit card companies, through the acceptance of a

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<sup>29</sup> *Id.* at 539.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Cohen*, 260 F.3d at 76. See *Net Gaming Operator Cohen Freed from Prison*, LAS VEGAS SUN (Mar. 23, 2004), <https://m.lasvegassun.com/news/2004/mar/23/net-gaming-operator-cohen-freed-from-prison/>.

<sup>35</sup> *In re MasterCard Intern. Inc.*, 313 F.3d 257, 260–61 (5th Cir. 2002).

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

payment to a gaming site, were involved in racketeering activities with the online casino operators and had collected unlawful debt.<sup>37</sup> “But for” the online site’s acceptance of the credit card payment, the patron would have never gambled in the first place.<sup>38</sup> The Fifth Circuit held that the business relationship between the online sites and the credit card companies was not a corrupt sportsbook operation, but instead a contractual business relationship.<sup>39</sup> Additionally, the court held that the Wire Act applied only to sports betting and that the games of chance wagered on by Plaintiff’s were not clearly sports betting, meaning the Wire Act was inapplicable.<sup>40</sup>

Following *Cohen* and *In re MasterCard Intern. Inc.*, courts were still split on how to apply the Wire Act to sports betting and whether the DOJ could use the Wire Act to prosecute individuals and online gaming sites.<sup>41</sup> That dispute continued by the virtue of conflicting DOJ opinions in 2011 and 2018.

#### **A. The 2011 DOJ Opinion**

In 2009, a handful of states had preliminary plans to sell lottery tickets within its state borders through an Internet platform that used out-of-state transaction processors.<sup>42</sup> This reflected the shift across the country to move casino games and lotteries online as a way to extend its reach to customers.<sup>43</sup> At the time, New York was finalizing its lottery program to use a new computer system to control the sale of lottery tickets.<sup>44</sup> While all transaction data would be routed through

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

<sup>38</sup> *In re MasterCard Int’l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468 (E.D. La. 2001), aff’d sub nom. In re MasterCard Int’l Inc., 313 F.3d 257 (5th Cir. 2002).

<sup>39</sup> *In re MasterCard Int’l Inc.*, 132 F. Supp. 2d at 487.

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

<sup>41</sup> *See also United States v. Lombardo*, 639 F. Supp. 2d 1271, 1275 (D. Utah 2007) (holding the Defendants violated the Wire Act when a company served as a middleman between bettors and financial institution’s when it “misclassified the charge” to hide their gambling nature, thus duping banks into distributing funds).

<sup>42</sup> Anthony Cabot, *Federal Wire Act Should Adjust to State-Regulated Sports Wagering, Not the Other Way Around: A Proposal for Change*, 25 Gaming L. Rev. 109, 113 (2021).

<sup>43</sup> *Id.*

<sup>44</sup> *See 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*, 35 Op. O.L.C. (Sep. 20, 2011) (“*Whether Proposals by Illinois and New York Violate the Wire Act*”), available at



the customer's location in New York, the lottery's data center would be located in New York and Texas, with networks controlled in Maryland and Nevada.<sup>45</sup> Illinois, while still creating a pilot program, had plans to sell lottery tickets solely over the Internet to customers located within the State of Illinois.<sup>46</sup> However, at times, packets of data could be intermediately routed across state lines over the Internet.<sup>47</sup> In advance of launching these programs, New York and Illinois wrote to the DOJ asking for guidance as to whether it could implement online lottery sales without the fear of government prosecution under the Wire Act.<sup>48</sup> Both states believed that its respective programs were entirely intra-state, and thus would not implicate the Wire Act because neither program involved a wire communication about sports wagering that crossed state lines.<sup>49</sup> The DOJ did not respond to its inquiries.<sup>50</sup>

Almost two years later, Senator Harry Reid from the State of Nevada and Senator Jon Kyl from the State of Arizona wrote to the Attorney General Eric Holder and again requested that the DOJ clarify its stance on the scope of the Wire Act as it applied to online gaming.<sup>51</sup> The letter specifically blamed the lack of action by the DOJ for the growing belief that online gaming did not violate federal law.<sup>52</sup> The letter incorporated the prior memorandums from New York and Illinois regarding state lotteries, and argued that the DOJ had given these states "effective consent"

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<https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf> (citing Letter for Portia Roberson, Director, Office of Intergovernmental Affairs, from William J. Murray, Deputy Director and General Counsel, New York Lottery (Dec. 4, 2009)).

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

<sup>46</sup> See *Whether Proposals by Illinois and New York Violate the Wire Act* at 1 (citing Letter for Eric H. Holder, Jr., Attorney General of the United States, from Pat Quinn, Governor, State of Illinois (Dec. 11, 2009)).

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Cabot, *supra* note 41, at 114.

<sup>51</sup> See Letter for Eric Holder, Attorney General of the United States, from Harry Reid, Senator, State of Nevada, and Jon Kyl, Senator, State of Arizona (July 14, 2011), <https://media.lasvegassun.com/media/pdfs/blogs/documents/2011/07/16/reid-kyl-letter-to-holder.pdf>.

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

to implement Internet gaming because the DOJ had neither approved nor rejected those proposals.<sup>53</sup>

In response, the DOJ issued its opinion on the topic on September 20, 2011, concluding that the Wire Act applied only to “sports-related gambling activities.”<sup>54</sup> The DOJ’s Opinion was based on the drafting of the statute and legislative history. The draft language for 1084(a) would have imposed criminal liability on any person using a wire communication “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 ...”<sup>55</sup> However, the commas did not make it into the final version of the Act, which according to the DOJ, completely changed the meaning of the Wire Act, and thus its provisions applied only to sports gaming.<sup>56</sup> In addition to the drafting change, there was no legislative history that led the DOJ to believe Congress wanted the Wire Act apply to anything other than sports gambling.<sup>57</sup> Even the House Judiciary Committee chairman in 1960 specifically stated during debate on the bill that the Wire Act involves “transmission of wagers or bets and layoffs on horse racing and other *sporting events*.”<sup>58</sup> Relying on this guidance, many states began using out of state servers to store data in a similar fashion to New York and Illinois, and online gambling exploded across the United States.<sup>59</sup>

Although the applicability of the Wire Act to non-sports betting activities now seemed settled, the landscape of sports betting itself was about to change. In 1992, Congress passed The

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

<sup>54</sup> *Whether the Wire Act Applies to Non-Sports Gambling* at 135.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

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

<sup>58</sup> *In re MasterCard Int’l Inc.*, 132 F. Supp. 2d at 480 (quoting 107 Cong. Rec. 16533 (Aug. 21, 1961)) (emphasis added).

<sup>59</sup> Mark Hichar & Erica Okerberg, *New Hampshire Lottery Strikes Back: The U.S. District Court Holds That the Wire Act Applies Only to Sports Betting*, 23(8) GAMING L. REV. 594 (2019). By 2017, six states had made online lottery games available: Illinois, Georgia, Michigan, Kentucky, New Hampshire, and Pennsylvania. See LINEUPS, <https://www.lineups.com/betting/online-lottery/> (last visited May 16, 2022).

Professional and Amateur Sports Protection Act, which made it unlawful for states to operate a sports betting regulatory scheme. PASPA stated, in relevant part:

It shall be unlawful for [either] . . . a governmental entity . . . or 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>60</sup>

When passed, the law included provisions that awarded special protections to certain states. Specifically, a grandfather provision was included for Nevada sportsbooks, the limited Oregon sports lottery, the limited Delaware sports lottery, and the limited sports pool betting in Montana to continue its sports betting practices.<sup>61</sup> Additionally, PASPA allowed for a one-year window for New Jersey to legalize sports betting, or else the state was also subject to PASPA prohibitions.<sup>62</sup>

In 2012 however, PASPA was challenged on constitutional grounds.<sup>63</sup> In 2018, the Supreme Court held in *Murphy v. NCAA* that PASPA violated the anti-commandeering principle of the Tenth Amendment, and, thus, was unconstitutional.<sup>64</sup> Simply put, the anti-commandeering doctrine is the “decision to withhold from Congress the power to issue orders” directly to the States.<sup>65</sup> When Congress forced states to prohibit sports gambling, regardless of its desire to allow sports betting, it was an overreach and in direct conflict with states’ sovereignty to enact or modify its own laws.<sup>66</sup> *Murphy* immediately opened the door to the expansion of sports betting and raised serious questions about the scope of federal and state regulation of the gaming industry.

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<sup>60</sup> 28 U.S.C. § 3702 (2006).

<sup>61</sup> *Id.*

<sup>62</sup> However, New Jersey did not take advantage of the one-year provision; despite efforts by the state legislature. See Eric Meer, Note, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2(2) UNLV GAMING L.J. 281, 287 (2011).

<sup>63</sup> *NCAA v. Christie*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013).

<sup>64</sup> *Murphy v. NCAA*, 138 U.S. 1461, 1473 (2018).

<sup>65</sup> *Id.* at 1475.

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

## B. The 2018 DOJ Opinion

Following *Murphy*, some states began to draft regulatory schemes to expand sports betting within its boundaries. At the same time, the federal government revisited the 2011 DOJ Opinion's interpretation of the Wire Act.<sup>67</sup> During *Murphy*, the Trump administration supported sports leagues via amicus briefs.<sup>68</sup> These briefs evidenced the support of the sports leagues that argued for PASPA's constitutionality. Although the inner-workings of the decision to revisit the 2011 DOJ Opinion have not been made public, the logical conclusion is that the DOJ intended to counter-act *Murphy* and halt states from implementing sports betting.

Indeed, in November 2018, the DOJ reversed its interpretation of the Wire Act and as set out in its 2011 Opinion. This new memorandum stated that first, the phrase "on any sporting event or contest" in the Wire Act modified only the prohibition on transmitting "information assisting in the placing of bets or wagers."<sup>69</sup> Second, the DOJ found the Wire Act was unambiguous on its face, so looking through legislative history was completely unnecessary.<sup>70</sup> The DOJ concluded that the Wire Act implicated all forms of Internet gambling, and is not limited to sports betting.<sup>71</sup>

On January 15, 2019, the U.D. Deputy Attorney General Rod Rosenstein issued a memorandum directing the DOJ's attorneys and FBI agents to delay applying the 2018 DOJ Opinion for 90 days.<sup>72</sup> This period was later extended another 60 days, to June 14, 2019.<sup>73</sup> This period was again extended for a third time on December 31, 2019, for 60 days or after the final decision of a then-pending matter in the Federal District Court, *New Hampshire v. Rosen*,

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<sup>67</sup> *Reconsidering Whether the Wire Act Applies* at 13.

<sup>68</sup> Brief for Respondents, *Christie v. NCAA*, 138 U.S. 1461 (2017) (Nos. 16-476, 16-477) 2017 WL 4805228.

<sup>69</sup> *Reconsidering Whether the Wire Act Applies* at 12.

<sup>70</sup> *Id.* at 13-14.

<sup>71</sup> *Id.* at 17-18.

<sup>72</sup> *Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling*, Rod. J. Rosenstein (Jan 15, 2019).

<sup>73</sup> *Additional Directive Regarding the Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling*, Rod. J. Rosenstein (Feb. 28, 2019).

whichever is later.<sup>74</sup> The 2018 Opinion and the subsequent stay from the DOJ placed states, who had relied on the 2011 Opinion to launch lotteries, in limbo when determining how to regulate sports betting and lotteries.

In 2019, the New Hampshire Lottery Commission (“NHLC”) and its iLottery vendor, NewPollard Interactive (“NewPollard”), sued the DOJ seeking a declaration that the Wire Act was limited to sports betting.<sup>75</sup> Plaintiffs feared that after the 2018 DOJ opinion, the government would prosecute the state for its online lottery services, which provided the state with most of its yearly revenue.<sup>76</sup> The District Court for the District of New Hampshire granted summary judgement in favor of the NHLC.<sup>77</sup> First, the court found that the NHLC faced imminent threat of prosecution under the 2018 DOJ Opinion because the 2018 DOJ Opinion did not expressly conclude that states would be exempt from prosecution if it continued to operate online lottery platforms.<sup>78</sup> Next, when examining whether the Wire Act applied to lotteries, the court found the statutory language ambiguous and therefore, turned to the legislative history of the Wire Act, finding no reason why Congress would have wanted to prohibit the transmission of all bets and wagers, but bar information for the sole purpose of placing bets or wagers on sporting events.<sup>79</sup> Regarding the second clause of the Wire Act, the court described DOJ’s 2018 Opinion’s view on the subject as

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<sup>74</sup> *Updated Directive Regarding the Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling*, Jeff Rosen (June 12, 2019); *New Hampshire Lottery Comm’n v. Rosen*, 986 F.3d 38, 62 (1st Cir. Jan. 20, 2021).

<sup>75</sup> *New Hampshire Lottery Comm’n*, at 132.

<sup>76</sup> *Id.* at 139. NHLC was joined in amici by New Jersey, Pennsylvania, and the Michigan Bureau of State Lottery. Michigan was also supported by the “Kentucky Lottery Corporation, the Tennessee Education Lottery Corporation, the Virginia Lottery, the Rhode Island Lottery, the Colorado State Lottery Division, the North Carolina Education Lottery, the State of Delaware, the State of Idaho, the State of Vermont, the State of Mississippi, the State of Alaska, and the District of Columbia. *Id.*

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

<sup>78</sup> *Id.* at 141-42.

<sup>79</sup> *New Hampshire Lottery Comm’n v. Barr*, 386 F. Supp. 3d 132, 150-52 (D.N.H. 2019). The court here looked to the different proposed schools of thought on statutory interpretation. The government proposed a “last-antecedent” rule, while the NHLC proposed the “series-qualifier” rule. While avoiding the intricacies of both rules, the court ultimately decided that both proposed rules were inapplicable, because the statute lacked the proper punctuation to allow either rule to carry the day.

“bizarre” because its interpretation of the first clause would authorize the transmission of information that facilitates non-sports-related gambling, while the second clause would criminalize transmissions that would enable a person to receive payment for those transactions.<sup>80</sup> Additionally within the legislative history, the court found that the Senate Judiciary Committee did not mention an intention to expand the Wire Act beyond sports betting.<sup>81</sup>

On January 20, 2021, the First Circuit affirmed the District Court’s decision.<sup>82</sup> The First Circuit focused on the 2018 DOJ’s “odd and unharmonious” attempted interpretation of the Wire Act, which would have created conflicting views of Internet gaming, versus sports betting across the country.<sup>83</sup> Because NewPollard operates in other jurisdictions, the decision by the First Circuit impacted states across the country, and once again the Wire Act was minimized to a small subset of online gambling. Since *New Hampshire Lottery Commission*, the Biden administration allowed the 150-day period to appeal the case to expire, outwardly declining to appeal the case to the Supreme Court.<sup>84</sup> With this denial, the DOJ has effectively returned to its 2011 Opinion.<sup>85</sup>

This lack of action by the federal government has set the tone of current policy towards the betting industry, a lassie-faire approach that does a disservice to all parties involved. Although the DOJ currently has no plans to seek judicial interpretations of the Wire Act or to prosecute individuals under the Act, this could change. Additionally, the lack of action leaves the decision up to the DOJ and whether it chooses to use the Wire Act to bring charges against states and

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<sup>80</sup> *Id.* at 152.

<sup>81</sup> *Id.* at 156.

<sup>82</sup> *New Hampshire Lottery Comm’n v. Rosen*, 986 F.3d 38, 62 (1st Cir. Jan. 20, 2021).

<sup>83</sup> *Id.* at 61.

<sup>84</sup> Charlie Passut, *Online Poker on Precipice of Transformational Change Should DOJ Take Actions*, POKER INDUSTRY PROS (Jun. 23, 2021), <https://pokerindustrypro.com/news/article/215755-after-doj-declines-appeal-states-ask-biden-doj-clarify-wire>.

<sup>85</sup> Gregory A. Brower, *DOJ Throws in the Towel on Wire Act Interpretation, but Congressional Action May Loom*, WASHINGTON LEGAL FOUNDATION (Jul. 12, 2021), <https://www.wlf.org/2021/07/12/wlf-legal-pulse/doj-throws-in-the-towel-on-wire-act-interpretation-but-congressional-action-may-loom/>.

operators, despite the Act's inconsideration of modern betting technology and third-party intermediary payment methods.

On June 18, 2021, twenty-five State Attorneys General wrote a letter to U.S. Attorney General Merrick Garland urging the DOJ to officially abandon the 2018 DOJ Opinion.<sup>86</sup> The states argued that many state governments relied on the 2011 DOJ Opinion and allowed other forms of gaming, such as lotteries, to proceed.<sup>87</sup> Thus, it was vital for states to get clarity on the subject without having to file suit in every single federal jurisdiction and to continue these gaming and lottery programs without the fear of federal prosecution.<sup>88</sup> To this day the letter remains unanswered. The Biden administration has refused to become involved in the matter, and it is unlikely this policy will change. While it is promising that these members of Congress recognize the need to amend the Wire Act to allow interstate gambling, these actions are not enough.<sup>89</sup> The lack of involvement from the Biden administration, specifically the DOJ, is exactly why Congress should work independently to repeal the Wire Act and move the regulation of gaming directly to state control.

### **III. Repeal of the Wire Act**

The original purpose of the Wire Act was to stop mob activity throughout the United States by eliminating funding organized crime units obtained from operating sportsbooks. However, the need to halt organized crime today has little to do with the legalized sports betting industry.<sup>90</sup> Today, the Wire Act is a fossil in the federal regulatory scheme. The Act is not equipped to oversee the regulation of the newly legalized sports betting market because of advancing technology for

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<sup>86</sup> See Letter for Merrick B. Garland and Lisa O. Monaco, Attorney General and Deputy Attorney General of the United States, from Dana Nessel, Attorney General, State of Michigan, et. al. (June 18, 2021), <https://www.nj.gov/oag/newsreleases21/Final%20Letter%206-18-21.pdf>.

<sup>87</sup> *Id.*

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

<sup>89</sup> *Id.*

<sup>90</sup> *Reconsidering Whether the Wire Act Applies* at 13.

operators and regulators. Furthermore, the federal government is also inadequate to regulate such a fast-growing industry due to its own incoherent approach to the Wire Act. The Wire Act today creates more problems than solutions and should be repealed so that states can regulate sports betting autonomously.

This section argues that the Wire Act must be repealed, and regulatory power handed to the states. First, the Wire Act does not address the ever-changing modern technology used by sports betting companies, and the conflicting opinions of the federal government as to what the Wire Act actually means and what parties it controls. Second, the UIGEA, which some have argued is a proper replacement for the Wire Act, is not a strong enough statute to fully deal with the gaming industry. Third, this section will explore how the Wire Act in its current version exposes states and sports betting companies to liability.

*A. Inapplicability to Modern Technology and Inconsistent Federal Government Approach*

It is undisputed that the Wire Act was enacted in 1961 to curb organized crime, however, it is not clear how the Act should be applied to today's modern gambling technology. The failure to consider advancements in technology and failure to create a comprehensive policy are reasons the Wire Act should be repealed.

In 2021, online sports betting more than doubled, with 12% of adults stating they had placed a bet on sports more than once a week, compared to 5% the year before.<sup>91</sup> The total handle placed in 2021 equaled \$52.7 billion.<sup>92</sup> By October of 2021, mobile sports betting made up 84% of all bets made, compared to 14% of bets coming from retail locations.<sup>93</sup> The sports betting

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<sup>91</sup> Alex Silverman, *2021 Was a Banner Year for Sports Betting Participation*, MORNING CONSULT (Jan. 18, 2022), <https://morningconsult.com/2022/01/18/sports-betting-trends/>.

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

<sup>93</sup> Timothy O'Brien, *The Sports Gambling Gold Rush is Absolutely Off the Charts*, BLOOMBERG (Dec. 16, 2021), <https://www.bloomberg.com/graphics/2021-opinion-online-sports-betting-future-of-american-gambling/>.



industry has all but moved to online betting platforms, yet the federal government is stuck in a time of telegraphs and wire communications.

In recent history, there have been some attempts by both Congress and sports leagues to modernize and adopt a different approach to regulate the gaming and sports betting industry. On September 27, 2018, Congress invited members of the gaming industry to a House Judiciary subcommittee hearing entitled “Post-PASPA: An Examination of Sports Betting in America.”<sup>94</sup> The National Football League (“NFL”) argued for uniform standards for states who want to legalize sports betting, and not for an expansion of federal regulation.<sup>95</sup> Following the congressional hearing, Senators Chuck Schumer and Orrin Hatch introduced the Sports Wagering Market Integrity Act of 2018, which would have implemented customer protecting safety measures, preserved the integrity of sports, and ensured the propriety of the sports wagering market.<sup>96</sup> This bill directly addressed the modern technology of the sports betting industry and created measures that states would have to abide by when implementing sports betting. However, due to varying congressional roadblocks and Senator Hatch’s retirement, the bill never made it out of committee.<sup>97</sup> No vote was ever taken, so the bill was never passed. However, this attempt shows at least some desire by Congress and private organizations to have the federal government address gambling policies on the federal level.

With more people placing sports bets than ever before, it is clear this is a drastic evolution from the sports betting that existed in 1961. While the federal government has the power to regulate interstate commerce through federal legislation that provides guidance and structure, repealing the

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<sup>94</sup> Brett Smiley, *Here’s What Happened at the House Judiciary Hearing on Sports Betting*, SPORTSHANDLE (Sep. 27, 2018) <https://sportshandle.com/heres-what-happened-at-the-house-judiciary-hearing-on-sports-betting/>.

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

<sup>96</sup> *Schumer, Hatch Introduce Bipartisan Sports Betting Integrity Legislation*, Senate Democrats (Dec. 19, 2018), <https://www.democrats.senate.gov/newsroom/press-releases/schumer-hatch-introduce-bipartisan-sports-betting-integrity-legislation>.

<sup>97</sup> Brett, *supra* note 91.

Wire Act would not completely abolish all federal gaming laws. Congress is free to create more legislation that properly regulates the gaming industry in the twenty-first century, but at this moment, repealing the Wire Act and transferring power to the states is the next solution. Only when the Wire Act is repealed can state governments properly regulate sports betting and avoid the risk of prosecution under the Wire Act.

In addition to the outdated nature of the Wire Act, the conflicting DOJ opinions show that the federal government does not fully understand how the Wire Act regulates modern sports betting. Sixty-one years after the Wire Act was passed and there is no uniform interpretation of the Act. Instead of a broad, and inconsistently enforced federal gambling law, each state should be able to determine its own betting regulatory structure. States must be able to make decisions such as whether citizens should be able to gamble, what types of games or bets should be allowed, how these bets are placed, and what platforms are given licenses. Sports betting and gambling policy has almost always been a state-run program, dating back to the 1800s.<sup>98</sup> The most prominent example of a formalized regulatory scheme is Nevada's passage of the "Wide Open Gambling Bill" in 1931 when the state legalized commercial gambling.<sup>99</sup> Today, all but two states have some form of legalized gambling.<sup>100</sup> However, the approach to gambling policy varies across the United States. While some states only allow tribal gambling, others have created inter-state compacts with nearby jurisdictions. Gambling within a state is tied to that population's public policy, and whether its citizens believe sports betting and gambling is right for their state. Gambling programs are also

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<sup>98</sup> Robert Dunstan, *Gambling in California* (1997).

<sup>99</sup> George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 UNLV GAMING RESEARCH & REV. J. 65, 66 (1996). See also Ed Koch, *Bill that Transformed a City*, LAS VEGAS SUN (May 15, 2008), <https://lasvegassun.com/news/2008/may/15/bill-transformed-city/> (explaining that The Wide Open Gambling Bill of 1931 was the cornerstone on which the Las Vegas' modern economy was built, as it allowed casinos to be built across the city).

<sup>100</sup> *State of the States 2020: The AGA Survey of the Commercial Casino Industry*, AMERICAN GAMING ASSOCIATION (June 3, 2020), <https://www.americangaming.org/resources/state-of-the-states-2020/>.

tied to state taxes and state land use. In the case of state lotteries, the funds are typically used to fund public programs, like education.<sup>101</sup> The federal government has no role in determining these issues, as many decisions are made on the local level. When states oversee its own gaming regulations, it is ensured that said rules are tailored to each state's individual circumstances. The federal government has proved it is not prepared to regulate Internet gambling and sports betting and should instead respect state sovereignty.

Supporters of the Wire Act have advocated to allow the Act to continue to control the industry, arguing that the Act's quasi-command for states to only accept wagers within its own state lines retains revenue inside of that state. Abolishing the Act would allow patrons to choose which state they wanted to bet in, meaning the revenue could be distributed unevenly from state to state.<sup>102</sup> What these advocates fail to recognize, however, is that the Wire Act creates a cap on the market because patrons are only allowed to use the sports betting platforms that are available and active in its state, and in some cases platform policies may prevent patrons from using the available platforms.<sup>103</sup> In that situation, the state government would receive no revenue whatsoever. Additionally, states, not the federal government should be allowed to manage these concerns by working with surrounding states to make compacts, similar to the compacts made between Indian tribes and state governments, that could modify restrictions on interstate gaming. Additionally, states could facilitate joint policy enforcement, shared liquidity, and tax revenue.<sup>104</sup> Furthermore, states could also allow sports businesses to engage in multi-jurisdictional risk

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<sup>101</sup> See e.g., Kathleen Ferraiolo, *Is State Gambling Policy "Morality Policy?" Framing Debates Over State Lotteries*, 41 POLICY STUDIES J. 217, 235 (2013).

<sup>102</sup> Additionally, one could argue that patrons may want to place their bets on their favorite professional teams in the state in which the teams reside, which could create an even more uneven situation for those states who do not have professional sports teams, but currently benefit from sports betting revenues under the current Wire Act.

<sup>103</sup> Schwartz, *supra* note 16, at 538.

<sup>104</sup> Cabot, *supra* note 41, at 122.

management.<sup>105</sup> The Wire Act must be repealed to provide states the ability to determine its own gambling policy, which adapts to modern technology and ensures tax revenues do not leave its state.

*B. The UIGEA is not a Viable Replacement for the Wire Act*

The DOJ's 2018 Opinion also raised a new consideration in federal regulation of gambling – the intersection between the Wire Act and the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).<sup>106</sup> Although the 2018 Opinion ultimately decided that the UIGEA did not alter the scope of the Wire Act, it is important to understand how the two interact to fully comprehend how the UIGEA is not a sole, viable alternative to the Wire Act.<sup>107</sup>

In 2006, the Security and Accountability for Every Port Act of 2006 (the SAFE Port Act), a bill focused on ensuring U.S. ports against terrorist threats, had a small, relatively unknown statute attached to the bill, known as UIGEA.<sup>108</sup> Section 5363 of UIGEA states that “[n]o person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling,” the proceeds of any form of financial transaction.<sup>109</sup> Although UIGEA does not directly state that Internet gaming is illegal, it targets financial institutions by restricting transfers of money to Internet gambling providers.<sup>110</sup> UIGEA only makes bets illegal if they are technically unlawful under “any applicable Federal or State law in the State ... in which the bet ... is initiated, received, or otherwise made.”<sup>111</sup> So if the

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

<sup>106</sup> *Id.* at 119.

<sup>107</sup> *Id.*

<sup>108</sup> Benjamin Wickert, Note, *All In, But Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States*, 10(1) VANDERBILT J. OF ENTMT’T & TECH.L. 215, 217 (2007).

<sup>109</sup> 31 U.S.C. § 5363 (2012).

<sup>110</sup> Wickert, *supra* note 104, at 218.

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

wager is illegal under the Wire Act, it is also illegal under UIGEA.<sup>112</sup> However, there is a critical difference between the Wire Act and UIGEA.

Under UIGEA, the only location that matters is where the bet was made and received, regardless of whether it was across state lines or not.<sup>113</sup> Congress likely knew that it was impossible to ensure that every single wager and that wager's location did not cross state lines. However, the allowance of routing wagers across states is technically unlawful under the Wire Act.<sup>114</sup> UIGEA is modern day legislation that does not prohibit gaming activity that crosses state lines, which makes complete sense when the activity in question is legal in both states, and thus the only illegal component is the fact that the wager technically "crosses" state lines.

However, UIGEA is not a proper replacement for the Wire Act. Section 5362(2) of the UIGEA prohibits the acceptance of "an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service."<sup>115</sup> In addition to prohibiting the direct acceptance of credit cards for unlawful Internet gaming, UIGEA also prohibits the acceptance of funds through a third-party intermediary. At the time UIGEA was passed, this provision seemed to be the most devastating for the illegal gaming industry.<sup>116</sup> Prior to UIGEA, large credit card companies, such as Visa, were successfully creating computer codes that prohibited a user from using their credit cards for online gaming.<sup>117</sup> As a result, using a credit card to gamble online became impossible. However, the illegal gaming adapted, and illegal betting sites soon encouraged its users to place money in a PayPal account to deposit funds to its site. This was a short lived-lived workaround, and Paypal soon disallowed such

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<sup>112</sup> Benjamin Miller, Note, *The Regulation of Internet Gambling in the United States: It's Time for the Federal Government to Deal the Cards*, 34 PEPPERDINE UNIV. J. NAT'L ASS'N ADMIN. L. JUDICIARY 527, 531 (2014).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 539.

<sup>115</sup> 31 U.S.C.A. § 5363(2).

<sup>116</sup> *Id.*

<sup>117</sup> Wickert, *supra* note 104, at 233.

transactions.<sup>118</sup> Illegal sites were again forced to find a new way for betters to transfer funds, and they did not have to wait for long.<sup>119</sup>

A new third party intermediary system, Neteller, was on the rise beginning in 2007, coincidentally a year after UIGEA was passed.<sup>120</sup> Because Neteller was incorporated in the Isle of Man and not in the United States, it was not covered by UIGEA, yet again illustrating how easily liability under UIGEA could be avoided. The best the DOJ could do is hope that its investigative efforts would scare these companies enough to stop accepting these payments. However, the DOJ did eventually find a way to halt Neteller, but not under UIGEA. On January 15, 2007, Neteller's founders were arrested for creating a company that assisted in the transfer of illegal gambling proceeds from United States citizens. Two days later, on January 17, 2007, Neteller announced it would stop accepting payments related to illegal gambling.<sup>121</sup>

This is only one of the loopholes that undermines UIGEA's effectiveness.<sup>122</sup> As technology has advanced, alternative payments methods such as Venmo or Cash App, have developed, which allow patrons to easily deposit money into an "e-wallet" and then transfer that money to an illegal gaming provider, cutting banks out of the direct participation in the payment process.<sup>123</sup> Additionally, because patrons label the payments, they can hide what the payments are for, by

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

<sup>119</sup> *Id.* at 234.

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

<sup>121</sup> Press Release, Neteller Group, Neteller PLC Trading Update (Jan. 18, 2007), <http://www.neteller-group.com/press/en/123.htm> ("[T]he Group will cease processing online transactions related to gambling for the [U.S.] market with effect from today in light of the passing of the UIGEA and the uncertainties and likely delays relating to the drafting and implementing of regulations.").

<sup>122</sup> Other loopholes include UIGEA's enforcement provisions under Section 5365. Although UIGEA, on its face, allows for the enjoining of Internet service providers ("ISPs") and financial transaction providers who facilitate online gaming. However, this provision is of little worth because ISPs and financial transaction providers are located outside of the U.S., meaning the ability for courts to serve them with papers to begin a suit will be improbable in many circumstances. Additionally, even if such papers are served, many countries are unwilling to enforce them, making the provision of UIGEA unenforceable. *See* I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 537 (2006).

<sup>123</sup> Rainey, *supra* note 7, at 152.

simply stating the payment is for something unrelated to gambling.<sup>124</sup> As a result, these payments are now controlled by private parties, ensuring that states miss out on its potential taxable income and preventing meaningful regulation under UIGEA.<sup>125</sup> UIGEA is therefore not an effective alternative to replace the Wire Act. In fact, UIGEA has driven illegal gaming even more underground, as it is almost impossible to track what payments are being made to illegal sites, as many times patrons are transferring money to an individual as a way to hide the purpose of the payment, so to an outsider it seems as though they are paying a friend or family member. These types of payments are not regulated by UIGEA and are certainly not contemplated by the Wire Act. To create a comprehensive and successful approach to sports betting, two steps should be taken. The Wire Act should, first, be repealed and the power to regulate gaming should be given to the states. Also, because UIGEA is not a viable alternative to the Wire Act, Congress should amend UIGEA to ensure its effectiveness when applied to modern gaming technology.

### *C. States' Role in the Repeal of the Wire Act*

Finally, the Wire Act must be repealed to protect states from improper liability under the statute. At any point, the DOJ could decide to prosecute sportsbook operators, or even force states to change its regulatory decisions to comply with the DOJ's 2018 Opinion.

For example, after the 2018 DOJ Opinion, Pennsylvania had to halt its efforts to allow operators to take advantage of existing equipment and gaming machines in other states.<sup>126</sup> In turn, Pennsylvania issued its own memorandum to all licensees, instructing them to ensure their

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 153.

<sup>126</sup> Christopher Soriano, *The Consequences of Federal Attempts to Regulate State Gaming Policy: PASPA and the Wire Act as Two Sides of the Same Coin*, 45(3) SETON HALL L.J. 633, 647 (citing Eric Ramset, *Regulators to Pennsylvania Online Gambling Operators: 'Comply With Wire Act'*, Online Poker Report (Jan. 18, 2019, 10:45 PM), <https://www.onlinepokerreport.com/34501/pa-online-gambling-wire-act-compliance/>).

operations were "entirely intrastate," which forced many operators to redesign their original plans to begin sports betting.<sup>127</sup>

Even during the September 27, 2018, Congressional subcommittee hearing about sports gaming, Chairman Jim Sensenbrenner's opening statement laid out several possibilities for congressional action, one of which was for "Congress to defer to the states and allow them to legalize and regulate sports gaming business."<sup>128</sup> Later, during his closing statement, he repeated his call for action when he said that "for Congress to do nothing is the worst possible alternative" indicating that Congress should address the issue of sports betting head-on, instead of leaving the Wire Act to regulate the industry.<sup>129</sup> Letters like the one from twenty-five State Attorneys General on June 18, 2021, to U.S. Attorney General Merrick Garland, is a great first step in encouraging the federal government to take action on the topic of gambling. However, writing a letter and waiting years for a response that will probably never come is not an appropriate final solution and states should not stop here.

The reality is that the DOJ could change its opinion about the Wire Act tomorrow, potentially costing states and sports betting companies millions of dollars. By sitting back and waiting for either a new interpretation or a new law that could narrow the scope of permissible betting, states and companies are only doing themselves a disservice. Only when these parties take a more active role in shaping a clear and concise regulatory scheme or advocating for the transfer of power to the states, will states and companies be immune against liability. All parties with a stake in the business must play a more active role to ensure a comprehensive approach to gambling regulation. The fate of the Wire Act should not be left to Congress or the Supreme Court, and

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

<sup>128</sup> David Purdum, *Congress Indicates It May Act on Sports Betting*, ESPN (Sep. 27, 2018), [https://www.espn.com/chalk/story/\\_/id/24814518/congress-indicates-act-sports-betting](https://www.espn.com/chalk/story/_/id/24814518/congress-indicates-act-sports-betting).

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



instead the power to regulate should be given to the states. States are the best decision-makers to define if and how to legalize and regulate sports betting. States also have decades of experience with gambling, which give state legislatures and regulatory agencies an edge with it comes to crafting new policies.<sup>130</sup>

#### **IV. Conclusion**

The Wire Act has created confusion among the federal government, Congress, state governments, sports betting platforms, sports leagues, and even patrons themselves. The Wire Act was originally passed to stop organized crime's involvement in operating sportsbooks. However, gambling has moved away from a system of placing bets via the telegraph and is now a highly-specialized modern system that allows millions of United States citizens to place a wager from an app on their smartphone. As a result, the Wire Act is ill-equipped to effectively regulate sports betting and should be repealed. The movement to almost solely online gambling shows just how out of touch the Wire Act is with modern-day sports betting technology, and inconsistent federal interpretations of the Wire Act have only exacerbated the statute's weakness. Current federal policy, UIGEA specifically, is not an appropriate replacement for the Wire Act because it still contains loopholes for third-party money transferring organizations. States should be given sole power to regulate sports betting within its own boundaries because it is more reactive and nimbler as to best regulate its own public policy concerns. Due to the above failures, states should take a more active role in the repeal of the Wire Act, because states and companies alike are currently open to extreme amounts of liability if the DOJ decides to change its opinion about the Wire Act once again. Overall, due to exploding nature of the sports betting industry

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<sup>130</sup> Patrick Moran, *Anybody's Game: Sports-Betting Regulations After Murphy v. NCAA*, CATO INSTITUTE (Mar. 11, 2019), <https://www.cato.org/legal-policy-bulletin/anyones-game-sports-betting-regulations-after-murphy-v-ncaa>.

and complete lack of comprehensive federal policy, it is time for the Wire Act to retire, and for states to exert control over the regulation of the gaming industry.