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Once Upon a Crime in America: Time for the Wire Act to Do the Disappearing Act

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I. INTRODUCTION

The Wire Act, enacted in 1961, occupies a unique place within the framework of federal gambling regulation. Amongst several other major federal criminal laws related to gambling, the Wire Act represents the only one that is not derivative of state law and may criminalize gambling activities that may be legal under the law of the relevant states where such activities occur. The major provision of the Wire Act is as follows:

> *Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.*[1]

In summary, the Wire Act criminalizes the transmission of gambling-related information and instructions across state lines via electronic communication wires regulated by the federal government.[2] Enacted in 1961 at the behest of attorney general Robert F. Kennedy as a tool to end organized crime,[3] the Wire Act has been construed and applied both inconsistently and uncertainly, owing to clumsy drafting and its anomalous deviation from reference to state law within the broader paradigm of federal gambling policy.[4] As attitudes and priorities have evolved across the nation with respect to gambling since 1961, and as many states have been moving to legalize gambling under their own state law frameworks, the confusion and uncertainty generated by the Wire Act have become ever more apparent and problematic in a nation that prides itself on economic freedoms and reels from the economic fallout of an unprecedented global pandemic. In

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[1] 18 U.S.C.A § 1084(a)(West).
[2] Elsa Larsen, *Bet on It: Amending the Wire Act Moves the Line Forward on Interstate Sports*, Betting, 47 VT. L. REV. 604, 617 (2023).
[3] *See* David G. Schwartz, *Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose*, 14 GAMING L. REV. AND ECONOMICS 533 (2010).

view of the enduring problems and uncertainty created by the Wire Act, this note argues for repeal of the Wire Act, contending that the Wire Act is dispensable because federal prosecutors have the Travel Act at their disposal, which can be employed in prosecution alternatively and at least as effectively as the Wire Act. This paper first provides the historical context through which the Wire Act came about in order to elucidate the Act's nature and envisioned purposes, and then explores the problems in interpretation and application of the Act that have endured in the years since its passage. Finally, this paper makes the case that repeal is necessary by examining the Travel Act's workability as an effective and comprehensive prosecutorial alternative to the Wire Act that does not implicate the same negative ramifications.

II. THE WIRE ACT: DEVELOPMENT THROUGH HISTORY

Scholars have described the Wire Act as the "crowning achievement" of Robert F. Kennedy's at the time of its passage,[5] but for purposes of understanding the Wire Act it is important to emphasize that the Act is the product of a specific point and confluence of developments in America's public and political consciousness. The Wire Act may be understood as a political response to concerns and preoccupations about organized crime that had gripped America's political discourse in various iterations in the early to mid-20th century.

A. Between Black Sox and Kefauver

In the years that followed the end of World War II, large segments of American society began to brace for a crime wave, which President Harry S. Truman concluded was all but a certainty.[6] In reaching his conclusion, Truman relied on analogies to historical upswings in crime that had followed the Revolutionary War, the Civil War, and World War I, positing that such history

[5] John T. Holden, *Through the Wire Act*, 95 WASH. L. REV. 677, 679 (2020).
[6] DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 46 (Reno: Univ. of Nev. Press, 2005).

demonstrated the inevitability of an upswing in crime following every American armed conflict.[7] Fortunately for Truman, there was no post-WWII wave of crime across America.[8] There was, however, an upswing in wagering across America, attributed to factors including a rise in wartime wages and consumer spending, as well as a prevailing sense of nihilism that some postulate took hold in the wake of humanity's introduction to the atomic bomb.[9]

Looming large in America's societal consciousness was also the infamous 1919 "Black Sox Scandal," in which it was alleged that players for the Chicago White Sox had deliberately thrown the 1919 World Series at the behest of, or in coordination with, organized criminal gambling figures including reputed mob handicapper Arnold Rothstein.[10] In the decades following the Black Sox Scandal, paranoia about organized crime and its relationship to gambling increased, fueled in part by local crime commissions.[11] Crime commissions were local quasi-public organizations, largely staffed by former law enforcement officials,[12] which flourished and became vocal public proponents of the idea that (1) organized crime syndicates represented an existential threat in America society, (2) a syndicate of organized crime was behind the gambling business throughout America, and (3) organized crime derived its menace (and revenues) in great part from its role as the force behind gambling across America.[13] Virgil Peterson, head of the influential Chicago crime commission, became a particularly loud voice for this theory, claiming that gambling in and around Chicago was controlled by The Syndicate, the Chicago mob outfit

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7 *Id*.
8 *Id.* at 46.
9 *Id.* at 46-7.
10 *See* Kevin W. Morrissey, Jr., *Untangling the Confusing Web of Sports Gambling Regulation in the Wake of Murphy v. NCAA*, 39 REV. BANKING & FIN. L. 1171, 1175 (2020); Evan Andrews, *What was the 1919 'Black Sox' Baseball Scandal*?, HISTORY, https://www.history.com/news/black-sox-baseball-scandal-1919-world-series-chicago (last updated Aug. 24, 2023).
11 *See* SCHWARTZ, *supra* note 6, at 48-51.
12 *Id*. at 48.
13 *Id.*

famously known to the American public as having been founded by notorious crime boss Al Capone.[14] In advancing the theory that a syndicate of organized crime was either in control or trying to control the American gambling business, Peterson was joined by an increasing chorus of crime commission leaders from other jurisdictions, journalists, mayors, and law enforcement personnel.[15] As politicians and journalists became aware that organized crime represented an explosive issue ripe for potential exploitation, the chorus of Peterson and others swelled in membership and intensity, coalescing into a formidable "anti-crime lobby" and "grassroots campaign for federal intervention into 'the crime problem.'"[16] Steadily amplified, this chorus eventually crescendoed in a conference, held on February 15, 1950 in the Great Hall of the Department of Justice, where delegates from around the country, the media, and interested citizens met—at the invitation of U.S. Attorney General Howard McGrath—to discuss the interstate transportation of slot machines, "the effect of gambling with reference to organized crime," and "more effective means of cooperation" for federal, state, and local enforcement.[17] Among those who attended this conference, which Attorney General McGrath dubbed "the Attorney General's Conference on Organized Crime," was President Truman, who felt compelled enough to underscore his administration's support for the conference's the anti-organized crime platform that he delivered the opening address.[18] Against this backdrop, the stage was set for the Kefauver Committee—a congressional undertaking that provided Kennedy with predecessor legislation for his Wire Act and supplied much of the foundation, ideas, substance, and inspiration eventually embodied therein.[19]

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[14] *Id*. at 48-50.
[15] *Id*. at 48-53.
[16] *Id.* at 51-2, 54-6 (internal quotation marks author's own).
[17] *See id*. at 50-6 (*citing* *M'grath To War On Ballot Frauds*, Special to N.Y. Times, N.Y. TIMES, Feb. 14, 1950, 11).
[18] *See* SCHWARTZ, *supra* note 6, at 56.
[19] *See id.* at 56, 60, 80, 84-5, 87, 96-7, 105; Holden, *supra* note 5, at 693; *see also generally* U.S. SENATE HISTORICAL OFFICE, *A History of Notable Senate Investigations: Special Committee on Organized Crime in*

B. The Kefauver Committee

In response to the mounting public concern, lobbying, and political discourse about organized crime, the Kefauver Committee, chaired by Senator Este Kefauver of Tennessee, was established in 1950, for the stated purposes that follow:

> *[M]ak[ing[a full and complete study and investigation of whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law . . . and, if so, the manner and extent to which, and the identity of the persons, firms or corporations by which such utilization is being made, what facilities are being used, and whether or not organized crime utilizes such interstate facilities or otherwise operates in interstate commerce for the development of corrupting influences in violation of law . . .* [20]

The Committee took up its directive to investigate organized crime in interstate commerce by interviewing hundreds of witnesses in fourteen cities over a course of fifteen months,[21] and, in the process, became a national political spectacle unprecedented for its time.[22] The Committee's investigative hearings, some of which were broadcasted live on television, captured the fascination of Americans nationwide, who bore witness to Kefauver and fellow committee members as they travelled the nation subpoenaing and interviewing witnesses that included reputed organized crime figures, corrupt officials and law enforcement personnel, gamblers, and a host of others believed to represent or be associated with underworld interstate gambling interests.[23] The televised Kefauver Committee hearings provided most of America its first real glimpse into the nature,

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Interstate Commerce, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/investigations/Kefauver.htm (last visited Oct. 11, 2023).

[20] S. RES. NO. 202, 81ST CONG., 2D SESS. (1950); *see also* 1951 Detail, *Kefauver Report into Organized Crime, U.S. Timeline 1950-1959*, America's Best History, https://americasbesthistory.com/abhtimeline1951m.html (last visited Oct. 11, 2023); U.S. SENATE HISTORICAL OFFICE, *supra* note 19.

[21] PBS, *Las Vegas: An Unconventional History: Estes Kefauver (1903-1963*), https://www.pbs.org/wgbh/americanexperience/features/lasvegas-kefauver/ (last visited Oct. 14, 2023)(hereinafter *Unconventional History*).

[22] *See* U.S. SENATE HISTORICAL OFFICE, *supra* note 19.

[23] *See id.*; Meilan Solly, *A Brief History of Televised Congressional Hearings*, SMITHSONIAN MAG. (June 10, 2022), https://www.smithsonianmag.com/smart-news/a-brief-history-of-televised-congressional-hearings-180980240/.

membership, and operational details of organized crime enterprises, even introducing the term "mafia" to many of the American viewing public.[24] By the time the Committee's investigation concluded, an estimated thirty million Americans had watched the live hearings and seventy-two percent of Americans had become familiar with the Committee's work.[25]

The Kefauver Committee ultimately failed to produce any anti-crime legislation.[26] Still, the Committee produced important non-legislative results.[27] As an initial matter, the Committee's investigation uncovered evidence of gambling, official corruption related to gambling, and organized crime's role in such gambling and official corruption.[28] For instance, in Florida, the Committee traced an illegal bookmaking syndicate's political directly to then Florida Governor Fuller Warren.[29] In another example, in Chicago, the Committee took testimony from reputed gangsters who testified to utilizing legitimate business interests to curry favor with local law enforcement, and further revealed widespread bribery and illegal gambling among large portions of Chicago's police force.[30] In addition to its investigative findings, the Committee included in its final report a recommendation for legislation that would eventually become the Wire Act.[31] The Committee's proposal made it "a federal crime for any person to *transmit* in *interstate* commerce *gambling information* obtained surreptitiously or through stealth and without the permission of the proprietor of the event, when such information is intended to be used for illegal gambling

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[24] *See The Kefauver Hearings: A Window into the Evolution of Money Laundering and Financial Sleuthing*, ACAMS Today (2015), https://www.acamstoday.org/evolution-of-money-laundering-and-financial-sleuthing/.
[25] *See* U.S. SENATE HISTORICAL OFFICE, *supra* note 19; Solly, *supra* note 23.
[26] *See Digital History*, https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3421 (last visited Oct. 14, 2023).
[27] *See* U.S. SENATE HISTORICAL OFFICE, *A History of Notable Senate Investigations: Special Committee on Organized Crime in Interstate Commerce*.
[28] *See* Solly, *supra* note 23, at 2 (describing Committee as having uncovered evidence of gambling and official corruption).
[29] *Id*.
[30] *Id*.
[31] *See* John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 334 n. 30 (2019)(*quoting* S. REP. NO. 82-725, at 89 (1951)).

purposes."[32] The Wire Act, introduced by Kennedy a decade after the Kefauver Committee's work had concluded in 1951, picked up where the Kefauver Committee left off and embodied the Committee's goal of enacting federal legislation aimed at addressing the organized crime and interstate gambling issues that the Committee had uncovered.[33]

C. Robert Kennedy The Attorney General

Kennedy introduced the Wire Act in 1961 as part of his adoption of what scholars have described as "the Kefauver orthodoxy of organized crime's structure: It was a national conspiracy whose chief source of revenue, gaming, enabled it to advance into other fields."[34] Kennedy's introduction of the Wire Act came only months after he had entered office as the newly minted U.S. Attorney General appointed by his brother, President John F. Kennedy.[35] Attorney General Kennedy had used his very first press conference in office as a platform for unveiling an anti-organized crime legislative agenda.[36] Within weeks of the press conference, Kennedy had outlined a comprehensive legislative program to attack organized crime.[37]

Kennedy's preoccupation with attacking organized crime as the immediate first order of business at the outset of his tenure as Attorney General was in keeping with the professional platform he had been building in the preceding years. In the course of his work from 1957-1959 as chief counsel to the McClellan Committee, Kennedy built an anti-organized crime platform.[38] Kennedy's work in the McClellan Committee consisted of investigating the labor racket, during which Kennedy investigated and developed an ongoing personal feud and rivalry with Jimmy

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[32] S. REP. NO. 82-725, *supra* note 31, at 89 (internal quotation marks omitted)(emphasis added).
[33] SCHWARTZ, *supra* note 6, at 85.
[34] *Id*.
[35] Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, U. NEV., LAS VEGAS CTR. GAMING RSCH: OCCASIONAL PAPER SERIES, no. 29, Sept. 2014, at 2.
[36] SCHWARTZ, *supra* note 6, at 79-81.
[37] *Id. at* 80-81, 93 (describing Kennedy as having entered office as U.S, Attorney General and "almost immediately" tasking his aides with drafting new pieces of legislation about fighting organized crime).
[38] *Id. at* 74, 83 (noting that Kennedy himself had personally urged the McLellan Committee to be convened).

Hoffa, a rivalry that resulted in moments like Kennedy publicly arguing with Hoffa over who could do more push-ups but did not result in Hoffa being convicted of crimes.[39] Kennedy's inability to take Hoffa down, as well as their personal rivalry, increased Kennedy's certainty that organized crime was the top law enforcement problem in America.[40] After resigning from the McLellan Committee in 1959, Kennedy wrote a book titled "The Enemy Within," which detailed his investigations in the wake of the McLellan Committee.[41] When Kennedy became U.S. Attorney General his professional platform,[42] beliefs,[43] personal rivalries,[44] and the broader political currents aligned, giving Kennedy the opportunity to draft and push through Congress a package of anti-crime laws. Kennedy's initiative to quickly draft and push through a package of anti-crime bills[45] was successful. He formally proposed his package of anti-crime bills including the Wire Act on April 6, 1961,[46] and by September 13, 1961 his brother had signed into law the Wire Act, the Travel Act, the Wagering Paraphernalia Act, [47] along with two other bills unrelated to gambling that he had proposed in his 1961 anti-crime legislative package.[48]

Kennedy's basic theory in proposing the Wire Act was that criminalizing the use of federally regulated interstate wires for transmitting "bets or wagers or information assisting in the

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[39] *Id*. at 83-84.
[40] *See id.* at 84.
[41] *Id*. at 79.
[42] *See id*. at 83 (discussing Kennedy's professional platform).
[43] *See id*. at 79 (discussing Kennedy's beliefs at the time that gambling sustained organized crime).
[44] *See id.* at 84 (discussing Kennedy's rivalry with Hoffa and its role in Kennedy's law enforcement).
[45] Kennedy made it a top priority to draft and try pushing through a package of anti-crime laws for reasons that included personal animosity with J. Edgar Hoover, and a belief that Hoover's FBI would not do enough to combat organized crime unless required to so under law. *Id*. at 84-85.
[46] *Robert Kennedy Urges New Laws to Fight Rackets*, N.Y. TIMES, Apr. 7, 1961, at 1.
[47] Anthony Cabot & Greg Cloward, *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).
[48] The two other bills from Kennedy's 1961 anti-crime legislative package proposal unrelated to gambling, which were also passed and signed into law, included a law broadening firearms restrictions for felons and a law enlarging the Fugitive Felon Act. *See* Schwartz, *supra* note 3, at 537 (describing passage and signing into law of the five measures from Kennedy's 1961 anti-crime package including the Wire Act, Wagering Paraphernalia Act, Travel Act, law "tightening firearms restrictions for felons," and "the enlargement of the Fugitive Felon Act.").

placing of bets or wagers on any sporting event or contest" would cut the lifeblood and primary source of growth of organized crime in America: interstate sports gambling, *i.e*., sports gambling conducted through telegraphs and telephone wires.[49] To that end, the Wire Act underscored a theme seen throughout Kennedy's 1961 anti-crime legislative program, which was Kennedy's belief that federal legislation was needed to address organized crime because the states were insufficiently equipped to taken on these complex entities.[50] The idea Kennedy repeatedly emphasized when advocating before Congress was that racketeering represented an existential and expanding danger, that racketeering prospered through its use of interstate commerce, and only a federal response could address these criminal endeavors.[51] To that end, Kennedy testified that it was not the aim of the Wire Act for the Department of Justice to usurp state or local police powers, but rather that the Act was necessary due to federal government's unique capability to address the intricate operations of the target organized crime groups, given the multistate nature and complex structure of these groups.[52] Further, Kennedy made clear that the aim of the Wire Act was not for the federal government to target casual sports bettors or to criminalize the dissemination of information concerning sports events between acquaintances,[53] stating that the parties who would be most

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[49] *See 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)("Organized crime is nourished by a number of activities, but the primary source of its growth is illicit gambling."); Benjamin Miller, *The Regulation of Internet Gambling in the United States: It's Time for the Federal Government to Deal the Cards*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 527, 533 (2014)(describing Wire Act as "originally enacted to combat the then-rampant organized crime activity of sports betting . . . ").

[50] *See* Schwartz, *supra* note 3, at 533-35 (describing Kennedy's conception of 1961 legislative proposal as a strategy for fighting "the enemy within"—*i.e*., American organized crime syndicates—by federalizing criminal laws previously enforced at the state level, a measure Kennedy saw as necessary to the extent that he believed that only federal law enforcement could provide local law enforcement the aid necessary for combatting such "highly organized syndicates whose influence extends over State and National borders.")

[51] *See id*. at 534.

[52] *See* Holden, *supra* note 5, at 709.

[53] *See* Holden, supra note 31, at 334-35; Holden, *supra* note 5, at 709 (Kennedy testified to Congress that the Wire Act was "not interested in the casual dissemination of information with respect to football, baseball or other sporting events between acquaintances.")(citing *The Attorney General's Program to Curb Organized Crime and Racketeering Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the Committee on the Judiciary*, 87th Cong. (1961) at 12-13).

affected by the Act were bookmakers and layoff bettors who relied on incoming and outgoing communications via wire facilities.[54] At the same time, Kennedy testified that the law extended no formal exemption for social or casual bettors because, he explained, such formal exemption would enable an offender to avoid prosecution by simply claiming that they just like to engage in betting socially.[55] Nonetheless, however, the statutory text of the Wire Act does speak to liability only for persons "*being engaged in the business of betting or wagering*." While, in theory, this all may have seemed like a set of straightforward and sensical propositions to Kennedy and his supporters in Congress and beyond in 1961, the interpretation and application of the Act since its passage has been anything but clear—a problem that has come to a head in the contemporary age of technological advancement and evolving perspectives on gambling.

D. Wire Act: Initial Implementation & Renewed Purpose

In the decades following the passage of the Wire Act, legalized gambling proliferated in jurisdictions throughout the nation as technology rapidly advanced and perspectives on gambling across the nation evolved. Today, all but two states have legalized at least some form of gambling.[56] Indeed, by way of comparison, in the time since the Wire Act was passed, America has gone from having just one state with legal sports betting to currently having over thirty-five states with legal sports betting.[57]

Moreover, within a matter of less than a decade following the Wire Act's passage, it became clear that the Wire Act—and Kennedy's anti-crime program in general—had failed to deliver the mortal blow to organized crime that Kennedy had envisioned and advocated for before Congress.[58]

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[54] *See* SCHWARTZ, *supra* note 6, at 101 (Kennedy testified that "bookmakers" and "layoff men" who used "ingoing and outgoing wire communications to operate.").
[55] *Id*. at 101.
[56] *See* Larsen, *supra* note 2, at 619.
[57] *See id*.
[58] *See* Schwartz, *supra* note 3, at 533, 537.

As such, over the few decades that followed the Wire Act's passage in 1961, the Act had been superseded in the federal war on organized crime by better legislative tools aimed at more effectively and comprehensively tackling organized crime, including the Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970.[59] RICO connoted a shift in the fundamental paradigm of federal anti-organized crime efforts, pursuant to which law enforcement would begin prosecuting organized crime figures based on their involvement in racketeering organizations rather than based on their commission of discrete, specific criminal offenses.[60] To that end, RICO represented a repudiation of the failure of Kennedy's anti-organized crime program, which had centered around the theory that organized crime organizations would be incapacitated and eventually collapse if Congress criminalized specific, discrete aspects of organized crime's operations, such as sending gambling information over interstate wires.[6162] Kennedy turned out to be wrong, and by the 1970s law enforcement and members of Congress alike had understood that, when members of criminal organizations are imprisoned, others inevitably step in and assume their authority.[63] Furthermore, Kennedy's anti-crime program suffered from being inflexible and outdated in the years that followed the Wire Act's passage, with law enforcement finding that newer generations of organized criminals were making their money in narcotics to an extent that dwarfed gambling.[64] The Wire Act was used on a more limited and narrower basis in the years

[59] SCHWARTZ, *supra* note 6, at 117, 132 ("Within less than a decade, when it became clear that they had failed to make possible the kind of hoodlum head-hunting that Kennedy had originally envisioned, they gave way to RICO, which was far more effective at decapitating, at least temporarily, criminal organizations.").
[60] *Id*.
[61] *Id.* at 131.
[62] Kennedy's idea was that criminalizing these discrete aspects of the organized crime business would eventually land leaders of racketeering organizations in prison, and that this incapacitation of leaders would cause the organizations to eventually buckle without control or capital. *See id*.
[63] *Id*.
[64] *Id.* at 129.

following RICO's passage, with the Act falling into relative obscurity until it reemerged in the 1990s.[65]

By the 1990s, technological and cultural changes gave the Wire Act new life.[66] First, the rise of the internet gave way to online gambling, which necessitated the need to transfer gaming funds by way of wires.[67] Second, state governments embraced a shift to treating gambling as a valuable source of revenue that needed to be regulated rather than as a crime to be prosecuted and eliminated—a transformation influenced by the experiences of numerous states with legal lotteries and casinos within their borders.[68] As a result of factors that included the explosion of the internet and the growth of offshore bookmaking services in countries like Antigua[69] and beyond, gambling across America increased throughout the 1990s, with estimates done in the late 1990s placing the amount wagered in the United States every year at in excess of $500 billion.[7071] With this context

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[65] *See id*. at 133-34 (describing how, under changed paradigm of organized crime prosecution ushered in by RICO, Wire Act was superseded and rendered an anachronism for prosecuting organized crime enterprises, resulting in the Act being used in the years following RICO's passage not as a weapon for battling organized crime but instead as a more limitedly and narrowly used tool for prosecution "specifically to stifle illegal bookmaking.").

[66] *See generally id.* at 139-41 (explaining that "the Wire Act would be pushed into a new, digital realm in unintended ways" as a result of technological advances, dawn of internet gambling, and the "dramatically shifted" role and treatment of gambling in American society).

[67] *Id.* at 178 (noting that first gaming websites appeared in 1995 and initially allowed visitors to play poker for imaginary money only, but soon sites began taking bets for actual funds "using credit cards and wire transfers to move money.").

[68] *Id.* at 146, 150 (describing development of state lotteries throughout nation from 1963 onward, with a boom in lotteries occurring in the 1980s; discussing "rapidly accelerating" expansion of legitimate, commercial casinos to states throughout the nation during early the 1990s).

[69] Antigua became a particularly popular host nation for offshore betting services during this period in the 1990s due to three factors: (1) Antigua had created a free trade zone within its territorial borders, in which gambling services that took cross-border wagers would be permitted to take bets without paying corporate taxes to the Antiguan government but would have to pay government business licensing fees; (2) in Antigua, confidential offshore banking accounts were available that could be used by sports betting operators and clients alike; and (3) Antigua maintained an undersea fiber optic link connected to the United States, making Antigua's telephone lines better equipped than lines elsewhere to handle high call volume in and out of the United States. *See id*. at 178; Mark D. Lynch, *The Smart Money Is on Prosecutions: Using the Federal Interstate Wire Act to Prosecute Offshore Telephone Gambling Services*, 10 INDIANA INT'L AND COMPARATIVE L. R. 177, 181 (1999)(describing Antiguan free trade zone and its advantages for gambling services; discussing attractiveness to offshore sports gambling operations of Antiguan confidential banking accounts and fiber optic link to the United States).

[70] *See* Lynch, *supra* note 69, at 178-180.

[71] It was estimated that nearly $100 billion of this yearly figure was wagered illegally on sporting betting events, and further estimated that between one to five percent of that $100 billion had been captured by offshore betting services. *Id*. at 180.

as the backdrop, the Wire Act made its return to the spotlight in the late 1990s as federal prosecutors began attempting to use it as a tool to prosecute online gambling.[72]

In the course of efforts by prosecutors during the late 1990s to begin using the Wire Act for prosecuting online gambling activities, courts in multiple jurisdictions across the nation were called upon to interpret the scope of the Act and began to do so. The judicial interpretations of the Act's scope that emerged from internet-based prosecutions were varied, inconsistent, incompatible, and sometimes pointedly disagreed with another court's interpretation—thereby failing to provide a clear, certain, or reliable answer to the question of whether internet-based gaming activities could be engaged in without violating the Wire Act.

For instance, in 1999, in *People ex rel. Vacco v. World Interactive Gaming Coro*., 714 N.Y.S.2d 844 (N.Y.Sup.1999), a New York State court applying the Wire Act found that an online casino based in Antigua was liable under the Wire Act for having exchanged wagering information with users who were based in New York.[73] The online casino games in question, which were the subject of the wagering information transmitted by the defendant, consisted of "virtual slots, blackjack, or roulette."[74] In contrast, in 2001, a district court in Louisiana found that the Wire Act only applies to gambling on sports and does not apply with respect to online casino games,[75] a finding that the Fifth Circuit affirmed in 2002.[76] There, in *In re MasterCard*, the two plaintiffs filed class action complaints on behalf of themselves and others against a number of credit card companies, alleging in their complaint that the defendants had violated federal laws, including the Wire Act, by allowing charges from online casinos to be processed on the plaintiffs' credit cards

[72] *See* Minton, *supra* note 35, at 201.
[73] *People ex rel. Vacco*, 714 N.Y.S.2d at 852.
[74] *Id*. at 847.
[75] *In re MasterCard Intern. Inc., Internet Gambling Litig*., 132 F. Supp. 2d 468, 480 (E.D. La. 2001).
[76] *See generally In re MasterCard Intern. Inc*., 313 F.3d 257 (5th Cir. 2002).

after the plaintiffs had placed bets with these online casinos using the credit cards in question.[77] The district court dismissed plaintiffs' Wire Act claims because they did not involve sports betting, finding that the Wire Act require act requires a sports event or contest to be the object the gambling in question.[78] In so doing, the court examined the Act's legislative history and considered legislative attempts to amend it, finding that both reinforced the proposition that sports gambling was required under the Wire Act.[79] On appeal, the Fifth Circuit affirmed, agreeing with the district court's "statutory interpretation," "its summary of the relevant legislative history, and its conclusion."[80] In contrast, in 2007, a district court in Utah held that the Wire Act does not require that a sports event or contest be the object of the gambling in question.[81] There, in *U.S. v. Lombardo*, the federal government indicted a number of payment processing companies for violating statutes including the Wire Act, alleging that defendants had rendered payment processing services in connection with online gambling.[82] The defendants moved to dismiss the indictment as insufficient with respect to the charges under the Wire Act, arguing that the government failed to set forth specific facts in the indictment that defendants actually placed sports bets or made communications entitling a recipient to payment in connection with sports bets.[83] The court held that the Wire Act does not always require sports to have been the object of the gambling at issue, finding that the text of the Act includes three separate proscribed categories of transmissions and that "sports contests or events" was only a modifier for one of those categories.[84] Specifically, the court explained as follows:

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[77] *In re MasterCard Intern. Inc.,* 132 F. Supp. 2d at 473-475, 478.
[78] *Id*. at 479-81.
[79] *Id*. at 480-81.
[80] *In re MasterCard Intern. Inc*., 313 F.3d at 262.
[81] *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007).
[82] *Lombardo*, 639 F. Supp. 2d at 1276.
[83] *Id*. at 1278.
[84] *Id.* at 1281.

> Having carefully examined the language of the statute . . . the Court concludes that § 1084(a) is not confined entirely to wire communications related to sports betting or wagering. The statute proscribes using a wire communication facility (1) "for the transmission . . . of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest;" or (2) "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers;" or (3) "for information assisting in the placing of bets or wagers." The phrase "sporting event or contest" modifies only the first of these three uses of a wire communication facility. Giving effect to the presumably intentional exclusion of the "sporting event or contest" qualifier from the second and third prohibited uses indicates that at least part of § 1084(a) applies to forms of gambling that are unrelated to sporting events.[85]

Accordingly, under the interpretation of the Wire Act set forth above by the district court in *Lombardo*, there are two categories of transmissions prohibited under the Wire Act that are not required to be related to wagers on sports: (1) "transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers;" and (2) transmissions of a wire communication "for information assisting in the placing of bets or wagers."[86] In reaching this interpretation of the Act, the *Lombardo* court specifically pointed out the opposing interpretation in *In re MasterCard* that sports betting was required under the Wire Act.[87]

If the variance, inconsistency, incompatibility, and disagreement seen amongst courts' interpretations had made little clear about the Wire Act's scope with respect to internet gaming, the interpretations underscored the Act interpretive malleability—particularly highlighting the ability to arrive at disparate interpretations of the Act depending on whether and to what extent one reviews and considers legislative history or instead focuses on examining pieces of syntactic or linguistic structure.[88] This interpretive malleability would prove to be an ongoing issue, only

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[85] *Id*. (*quoting* 18 U.S.C. § 1084(a)).

[86] *See id*. at 1281-82 (identifying the three categories, concluding that "the second and third prohibited uses of a wire communication facility under § 1084(a) do not require that the bets or wagers to which those uses relate be limited to bets or wagers placed on sporting events or contests alone.").

[87] *See id*. at 1279–81.

[88] *Compare In re MasterCard.,* 132 F. Supp. at 480-81 (examining Act's legislative history and considering record of legislative attempts to amend Act to include a provision that would reach forms of gambling unrelated to sports; finding that both clearly reinforce proposition that sports gambling was required under the Act), *with Lombardo*, 639

becoming more exigent as the 2000s drew to a close and the question of whether internet-based gaming is a federal crime under the Wire Act remained without a conclusive, consistent, or reliable answer. Indeed, as highlighted in the subsections that follow, which discuss the Act's more recent history from 2009 onward, the malleability of the Act has become a central theme of its recent existence.

E. 2011 DOJ Opinion

In 2009, a number of states including New York and Illinois were planning to implement a system of selling online lottery tickets within their territorial borders using out-of-state transaction processors.[89] New York was preparing to introduce a new computerized system that would enable delivery of the virtual lottery tickets to customers via the internet on their computers or mobile phones.[90] Transaction data would flow originating from the customer's device in located New York to the lottery's data centers located in either New York or Texas, passing through networks controlled in Maryland and Nevada on the way.[91] Illinois was also prepared to sell tickets via the internet, using geofencing to confirm that the purchaser of the ticket was physically present within the State of Illinois.[92] However, even so, with Illinois's system, data packets had the potential to be intermediately routed across state via the internet.[93] In December, 2009, ahead of launching these internet based lottery systems, officials from New York and Illinois wrote the DOJ seeking

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F. Supp. 2d at 1281–83 (finding that sports betting is not required under Wire Act; foregoing consideration or review of legislative history to interpret Act; arriving at interpretation by (i) disagreeing with defendant that Act contains uncertainties in language or structure, (ii) holding that "plain language" of statute is "unambiguous," (iii) declining to apply interpretive "rule of lenity" in favor of defendants arguing that Act requires sports, (iv) examining the comparative position of individual "qualifiers" located in separate parts of statute, finding this to be "weighty" evidence probative of meaning; (vi) finding that interpretation urged by defendant is "simply unpalatable to the Court.").

[89] Cabot, *supra* note 47, at 113.

[90] *Id*.

[91] *Id*.

[92] *Id*.

[93] 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*, 35 Op. O.L.C. 134, 135-36 (Sept. 20, 2011).

its views on whether these proposed systems could be implemented without running afoul of the Wire Act.[94] Both states contended that the Wire Act should not be applicable to their proposed online lottery systems because the Wire Act's scope does not cover transmissions of communications related to wagering other than on sports.[95] The DOJ did not respond to this initial overture for more than a year and a half, at which point Senators Harry Reid of Nevada and Jon Kyl of Arizona wrote a joint letter to Attorney General Eric Holder requesting that the DOJ state its position on the legal status of internet gambling under the Wire Act.[96] An impetus for Reid and Kyl's joint letter to the DOJ was their concern over recent indictments of online poker outfits in New York and Baltimore.[97] The joint letter placed blame on the DOJ for a years-long lack of law enforcement that they contended had created a growing view that either online gambling was not violative of federal of law or that the DOJ did not feel the legal status was certain enough to pursue prosecution.[98] The joint letter further contended that several state lottery officials were under the belief that the DOJ had effectively consented to implementing online gambling because the DOJ had failed to object to their proposals despite months or years passing.[99]

On December 23, 2011, the DOJ's Office of Legal Counsel ("OLC") released a memo responsive to the original inquiries by Illinois and New York concerning the lawfulness of selling online lottery tickets to in-state adults but using out-of-state transaction processors (the "2011 OLC Opinion").[100] The OLC noted at the outset of the opinion that the DOJ's Criminal Division had taken the position that legal, intrastate lottery transactions may come within the scope of the Wire

[94] *Id*.
[95] *Id*.
[96] Cabot, *supra* note 47, at 114.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] Miller, *supra* note 49, at 541-42.

Act, based on the Criminal Division's view that the Wire Act applied to all gambling.[101] The Criminal Division further took the position that even wagering transactions initiated an received within the same state could run afoul of the Wire Act if the transaction crossed a state lines at any point during the process.[102] Still, the 2011 OLC Opinion concluded that interstate transmissions of communications unrelated to sports fall outside the scope of the Wire Act.[103] As such, the 2011 OLC Opinion concluded that the lottery proposals at issue did not run afoul of the Wire Act because they do not involve wagering on sporting events or contests.[104] To that end, the 2011 OLC Opinion noted that reading the Wire Act as applying solely to sports wagering gave the statute cohesion and applied the prohibitions thereunder evenly to the same conduct.[105] In reaching its conclusion, the 2011 OLC Opinion sidestepped resolving the question that New York and Illinois had originally been asking , which was two-fold: (1) whether the Wire Act would prohibit States from conducting online in-state lottery transactions if the transmissions over the internet during an online transactions happened to cross state lines as a result of intermediate data routing; and (2) whether the Wire Act would regulate States' abilities to transmit lottery data across state lines to out-of-state transaction processors.[106]

F. 2018 DOJ Opinion

In 2018, the DOJ surprised many by issuing a new OLC opinion reversing its 2011 OLC Opinion, after almost a decade of growth in the online gambling industry had occurred in the interim (the "2018 OLC Opinion").[107] In a reversal, the 2018 OLC Opinion concluded that the

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[101] Seitz, *supra* note 93, at 136.
[102] *Id*.
[103] Miller, *supra* note 49, at 542.
[104] Seitz, *supra* note 93, at 136.
[105] *Id*. at 141.
[106] *Id*.
[107] Baxter Geddie, Note, *A Law of Confusion: Conflicting Interpretations of the Wire Act Prove the Need for Reform*, 24 Gaming L. Rev. 392, 397 (2020).

Wire Act's prohibitions are not uniformly limited across the board to sports betting, instead concluding that only the clause in the statute that directly mentions sporting events is limited to sports.[108] In other words, under the 2018 OLC Opinion, the Wire Act's phrase "on any sports event or contest" only modifies the prohibition on transmission of "information assisting in the placing of bets or wagers."[109] In the 2018 OLC Opinion, the OLC reached its conclusion by finding that the plain text of the Wire Act was unambiguous on the point of whether or not the statute applied only to sports gambling, and on that basis dismissed any need to examine the Act's legislative history, electing to settle the ultimate issue based on a long grammatical analysis.[110]

G. Lotto Versus Barr

In response to the 2018 OLC Opinion, the New Hampshire Lottery Commission ("NHLC") and its lottery vendor sued the DOJ in 2019, seeking declaratory relief that the Wire Act was limited in scope to wagering on sports and an order setting aside the 2018 OLC Opinion.[111] NHLC feared that the 2018 OLC Opinion would criminalize lottery games the state relied on for revenue under the Wire Act.[112] Both parties in the case moved for summary judgment, and the court granted summary judgment in favor of NHLC.[113] The court disagreed with the 2018 OLC Opinion's basic premise that plain text of the statute was unambiguous, and therefore turned to contextual evidence on the issue to aid its determination.[114] Turning to the structure of the statute, the court found the 2018 OLC Opinion's construction bizarre to the extent that it would mean Congress prohibited transmissions of payments for sports and non-sports betting but would only prohibit transmission

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[108] *Id*.
[109] Steven A. Engel, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 1, 12 (2018).
[110] Cabot, *supra* note 47, at 115.
[111] *N.H. Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132, 136 (D.N.H. 2019).
[112] Cabot, *supra* note 47, at 115.
[113] *Id*. at 116.
[114] *Id*.

of information related to sports gambling.[115] The court found it implausible that legislators would have authorized the activity of transmitting information related to a non-sports wager but would have prohibited getting paid for doing so.[116] The court also looked to a previous draft of the Wire Act which spoke to liability for parties who maintained wire communication facilities intending that they be used to transmit bets, or information that assists placing a bet, on sporting events or contests.[117] The structure of this previous draft left the court no doubt that the proscribed transmissions in the Wire Act had a scope limited to sports gambling, a notion which the court also found supported by statements in the legislative record.[118] The court accordingly declared the 2018 OLC Opinion invalid, but limits its ruling to the parties before it.[119] The First Circuit affirmed on appeal, emphasizing the bizarre and incoherent nature of the 2018 OLC Opinion's proposed construction of the statute.[120]

H. Post-Barr Through Present

After the declaratory judgment striking down the 2018 OLC Opinion was granted with respect to NHLC, on June 18, 2021 a coalition of twenty-five state attorney generals penned a letter to U.S. Attorney General Merrick Garland urging the DOJ to abandon the 2018 OLC Opinion across the board.[121] As part of their appeal to the DOJ, these state officials noted that numerous state jurisdictions had relied on the 2011 OLC Opinion to authorize and invest in forms gambling, like lotteries.[122] Accordingly, they contended that states and industry participants needed clarity on

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[115] Geddie, *supra* note 107, at 398.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] Cabot, *supra* note 47, at 117.
[120] *N.H. Lottery Comm'n v. Rosen*, 986 F.3d 38, 61-62 (1st Cir. Jan. 20, 2021).
[121] *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 (unanswered letter from twenty-five State attorneys general to Attorney General, dated June 18, 2021).
[122] *Id*.

the DOJ's position.[123] Further, they noted that finality on the issue is needed in order for the gaming industry to confidently invest and grow.[124] Moreover, they pointed out that the 2018 OLC Opinion remains on the books for the DOJ as their last opinion on their matter.[125] The letter has not been answered and the Biden administration has not gotten involved to date. Accordingly, given the limitation of the declaratory judgment obtained by NHLC to the parties in that case, from an official perspective, the 2018 OLC Opinion is still the current word from federal law enforcement on the Wire Act.

III. THE CASE FOR REPEAL

If not much else is clear about the Wire Act at this point, one thing that appears clear is that it has outlived whatever useful life it had as originally envisioned by Robert F. Kennedy.[126] What is also clear is that the Act is a federal criminal regulation that has proven problematic to consistently administer, apply, or enforce, which represents an issue of concern not only for the most zealous member of the 2011 DOJ Criminal Division,[127] but also for the State government official who is presently trying to implement regulated gaming policy that already exists under the laws of their State but is uncertain whether the policy is subject to federal takedown.[128] Inconsistent interpretations of the Act at the federal level have led to uncertainty in the industry for state governments, and cause concerns that federal gambling policy may be an instrument of undue private influence and interests.[129] Moreover, the reality is that the Wire Act's originally envisioned

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123 *Id*.
124 *Id*.
125 *Id*. at 3.
126 *See* SCHWARTZ, *supra* note 6, at 117, 131 (describing RICO as repudiation of Wire Act and taking front seat as federal model for organized crime fighting in the 1970s).
127 *See* Seitz, *supra* note 93, 136 (describing hardline positions of 2011 DOJ Criminal Division, including that even intrastate, legal gaming may run afoul of the Wire Act).
128 *See generally 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).
129 *See* Holden, *supra* note 5, at 680 ("The new [2018 OLC] opinion followed several years of failed efforts, purportedly backed by casino magnate and Republican Party donor Sheldon Adelson, to legislatively override the

purposes, if they ever were achievable, are no longer achievable now because the problem the Wire Act was made to address largely no longer exists. The organized crime syndicate activity that Kennedy was concerned with in the 1960s is no longer rampant, and regulating interstate transmission of sports betting information under the Wire Act is not needed today as a tool for cutting down the activity of organized gambling rackets.[130]

As a result, repeal of the Wire Act is appropriate. A federal criminal statute is already in place that can be employed as in prosecution and effective and comprehensive alternative to the Wire Act without the commercial, political, and fiscal costs that have implicated by the Wire Act. That criminal statute is the Travel Act, which can be employed in a manner that renders the Wire Act dispensable, and, furthermore, because, the Travel Act is derivative of state law, it does not implicate the same uncertainties and difficulties currently faced by States and those engaged in legitimate commerce due to the Wire Act.

A. Travel Act

The Travel Act, codified under 18 U.S.C. § 1952, makes it illegal under federal law to travel or use interstate or foreign commerce facilities to distribute the proceeds of, promote, manage, establish, or carry on unlawful activities, including unlawful gambling related activities.[131] The Travel Act provides, in relevant part, as follows:

> (a) *Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—*
> (1) *distribute the proceeds of any unlawful activity; or*
> (2) *commit any crime of violence to further any unlawful activity; or*

Justice Department's 2011 opinion and pass a law banning all online gambling."); Cabot, *supra* note 47, at 118 (regarding 2018 OLC reversal, noting that, "[s]ome saw the Trump administration's decision to reverse the 2011 OLC opinion adopted under President Obama as politically motivated as the changed coincided with a vigorous campaign by a major campaign supporter who wanted to end internet gaming in the United States.").

[130] *See* Geddie, *supra* note 107, at 399 ("It is no longer necessary to restrict interstate transmission of sports bets to cut down on mob activity, as was the original purpose of the Wire Act.); *see also* Schwartz, supra note 1, at 129 (organized crime's reliance on gambling was beginning to be dwarfed by its reliance on narcotics by the 1970s).

[131] *See generally* 18 U.S.C.A. § 1952 (West).

> (3) *otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,*
>
> *and thereafter performs or attempts to perform—*
>
> (A) *an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or*
> (B) *an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.*
>
> (b) *As used in this section (i) "unlawful activity" means (1) any business enterprise involving* ***gambling****, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or …*[132]

The Travel Act was proposed to Congress by Robert F. Kennedy along with the Wire Act, both as part of Kennedy's 1961 anti-crime legislative package that he had envisioned as the death knell for American organized crime.[133] Within Kennedy's 1961 legislative package for defeating organized crime, the Travel Act was the centerpiece bill and keystone of the program, with the Wire Act being one of its supporting measures.[134] While the Wire Act was designed and envisioned as a supporting measure in the package, aimed primarily at bookmakers and layoff bettors,[135] the Travel Act was the centerpiece of program because it was the bill designed for taking down "'the bankrollers and kingpins of the rackets,' men who had thus far been able to elude prosecution."[136] To that end, the Travel Act, which focused on criminalizing the *travel* or *use* of interstate facilities in connection with a broad range of conduct related to "unlawful activities," was envisioned by Kennedy as a key means for prosecuting bosses in organized crime groups, who Kennedy believed

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[132] *Id*. (emphasis added).
[133] *See* Schwartz, *supra* note 3, at 533-34.
[134] *See id*.
[135] *See id*. at 535.
[136] *Id*.

frequently lived luxurious and outwardly respectable lifestyles in one state or location, but meanwhile would periodically return to another state or area where they would collect from rackets they run.[137]

The penalties for conviction under the Act are imprisonment for not more than five years and/or fines in a sum the greater of not more than twice the gain or loss associated with the offense or $250,000 ($500,000 if an organization).[138] To secure a conviction under the Travel Act based on gambling related activities, prosecutors must prove three elements: "(1) interstate travel or use of an interstate facility; (2) with the intent to distribute the proceeds of or otherwise promote, manage, establish, carry on, or facilitate an unlawful [gambling] activity; (3) followed by performance or attempted performance of acts in furtherance of the unlawful [gambling] activity."[139] As such, prosecution under the Travel Act is unlike that under the Wire Act to the extent that, "[u]nlike a [Wire Act] prosecution, to obtain a conviction under [the Travel Act], the government must allege and prove as an element of the offense that the defendants carried on an activity in violation of state law."[140] It is important to note that the Travel Act's "proscribed conduct is the *use* of interstate facilities with the requisite intent to promote some unlawful activity, rather than the *commission* of acts which may be in violation of the state law."[141] Accordingly, proof of a defendant's actual "[c]onsummation of the [underlying] state substantive offense is not the indispensable gravamen of a conviction under [the Travel Act]. Reference to the state law is

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[137] *Id*. at 534 (noting that, in Kennedy's testimony before Congress in support of the Travel Act, he made clear that he did not believe kingpins in organized crime groups were going to be personally returning to the gambling racket every day to pick up bag for the day's gambling take, but he testified that the Travel Act was designed so that bosses could be prosecuted in connection with pickups and travel by their bagmen under aiding and abetting.)

[138] 18 U.S.C.A §§ 1084(a), 3571(d) (West).

[139] *See United States. v. Escobar-De Jesus*, 187 F.3d 148, 177 (1st Cir. 1999); *see also United States v. Polizzi*, 500 F.2d 856, 897 (9th Cir.).

[140] *United States v. McLeod*, 493 F.2d 1186, 1190 (7th Cir. 1974); *see also United States v. Ruthstein*, 414 F.2d 1079, 1082-84 (7th Cir. 1969)(noting the Wire Act does not preempt similar state anti-gambling statutes that provide the underlying predicates required for prosecution of the same conduct under the Travel Act).

[141] *McIntosh v. United States*, 385 F.2d 274, 276 (8th Cir. 1967)(emphasis added).

necessary only to identify the type of unlawful activity in which the accused was engaged."[142] Furthermore, as explained by the Supreme Court, the Travel Act is distinguishable from a number of other federal criminal laws that reach gambling to the extent that the Travel Act's provisions do not apply just to gambling but rather to a "broad spectrum of 'unlawful activity,'" reflecting the Travel Act's focus on "the *use* of the facilities of interstate commerce with the intent of furthering an unlawful 'business enterprise.'"[143] The Travel Act is "in short, an effort to deny individuals who act for such a criminal purpose access to the channels of commerce."[144]

Because the Travel Act focuses on use of interstate facilities for purposes of furthering a broad range of unlawful business enterprises, it is capable of potentially reaching an even wider range of gambling related activities than the Wire Act.[145] The Travel Act may frequently be used as an alternative to the Wire Act for prosecuting many of the same gambling related acts in interstate commerce that would also be proscribed under the Wire Act,[146] with the DOJ itself having ranked the Travel Act along with the Wire Act as the two "principal statutes" that are

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[142] *Id*.
[143] *Erlenbaugh v. United States*, 409 U.S. 239, 246 (1972)(*citing* 18 U.S.C. § 1952(b))(comparing the Travel Act to 18 U.S.C. §1053)(emphasis added).
[144] *Id*.
[145] *See* Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, 52 (2004).
[146] *See, e.g., United States v. Smith*, 209 F. Supp. 907, 919 (E.D. Ill. 1962)(affirming defendant's convictions under Travel Act and Wire Act for same underlying gambling related activities); *People ex rel. Vacco v. World Interactive Gaming Corp*., 714 N.Y.S.2d at 852 (same; noting that the Travel Act "proscribes similar interstate gambling activity" to the Wire Act, finding that "[b]y hosting this casino and exchanging betting information with the user, an illegal communication in violation of the Wire Act and the Travel Act has occurred."); *United States v. Kelley*, 395 F.2d 727, 728–29 (2d Cir. 1968)(where defendant provided prospective bettors with phone number and code word for getting in touch with him if they wished to place bets with him, such conduct violated and was convictable under both the Wire Act and Travel Act); *United States v. Kaczowski*, 114 F. Supp. 2d 143, 153–54 (W.D.N.Y. 2000)(indictment sufficiently alleged violations of both the Wire Act and the Travel Act based on same underlying conduct whereby defendants used telephone facilities to transmit gambling line information and to receive bets); *United States v. Votteller*, 544 F.2d 1355, 1358 (6th Cir. 1976)(defendant convicted of conspiracy to violate Wire Act and Travel Act on basis of same underlying conduct); *United States v. McLeod*, 493 F.2d 1186, 1189–90 (7th Cir. 1974)(same; rejecting defendant's argument that Wire Act and Travel Act charges related to a single telephone call placed by defendant were multiplicitous and violative of defendant's fifth amendment right against double jeopardy).

applicable to gambling activities conducted via internet facilities.[147] In addition to both statutes being applicable to use of internet facilities, it is also worth noting that both statutes also largely overlap in applicability with respect to other common channels and facilities in interstate commerce, including to use of telephone.[148] To that extent, using the Travel Act as an alternative to the Wire Act strikes a reasonable balance between, on one hand, the DOJ's potential interest in a tool for prosecuting the use of interstate facilities for gambling activities but, one the other hand, the States' interest in federal gambling policy that relies on State gambling policy unlike the Wire Act.[149]

Moreover, due to the Travel Act's broader range of proscribed activity, it may also be employed more viably than the Wire Act for prosecution of interstate activities related to gambling that may not be covered under the Wire Act. For instance, given the continuing uncertainty about whether the Wire Act is limited to sports wagering,[150] the Travel Act may be a more effective tool to prosecute activities that use interstate facilities to wager on the outcome of events that may have at least questionable status as "sports" within the meaning applied to the Wire Act.[151] An illustrative example of a situation where the Travel Act may be even more effective than the Wire

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[147] *See Letter from U.S. Attorney David M. Nissman to Eileen R. Peterson*, Chair of the U.S. Virgin Islands Casino Control Commission (Jan. 2, 2004)(noting, "[w]hile several federal statutes are applicable in Internet gambling, the principal statutes are sections 1084 and 1952 of Title 18 . . .").

[148] *See*, *e.g., United States v. Nader*, 542 F.3d 713, 720-22 (9th Cir. 2008)(holding that, "telephone calls made with intent to further unlawful activity can violate the Travel Act because the telephone is a facility in interstate commerce," noting that this principle would apply under the Travel Act even if telephone call at issue was intrastate call rather than interstate.); *United States v. Burke*, 495 F.2d 1226, 1232 (5th Cir. 1974)(under Travel Act, evidence was sufficient to sustain convictions of interstate travel for promotion of an illegal gambling enterprise, and use of interstate telephone facilities in an unlawful gambling enterprise); *United States v. Kaczowski*, 114 F. Supp. 2d 143, 153–54 (W.D.N.Y. 2000)(use of telephone in connection with wagering activities was sufficient to satisfy interstate jurisdictional hook for separate charges related to such wagering activities under both Travel and Wire Act).

[149] *Compare* 18 U.S.C.A. § 1952(b)(defining "unlawful activity" under the statute with respect to "gambling" as offenses "in violation of the laws of the State in which they are committed"), *with* § 1084(a)(lacking reference to State law).

[150] *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 (unanswered letter from twenty-five State attorneys general to U.S. Attorney General, dated June 18, 2021.

[151] Gottfried, *supra* note 145, at 52.

Act at reaching possible non-sports betting can be found in the prosecution of former NFL star Mike Vick for Travel Act offenses related to interstate wagering on dog fights.[152] In summary, it was alleged that Vick and three codefendants operated a company named "Bad Newz Kennels" in the State of Virginia, acquired and trained a number of pit bulls for the purpose of fighting the pit bulls for money, and travelled interstate or solicited others to travel interstate for purposes of wagering on the result of dog fights between pitbulls owned by Bad Newz Kennels and pit bulls owned by other, similar dog fighting outfits from other states.[153] There, Vick and codefendants were indicted under the Travel Act for charges related to their participation in interstate gambling activities that revolved around wagering on the outcome of the fights between their pit bulls and those of the other dog fighting outfits, but, notably, were not also indicted for Wire Act charges despite having ostensibly used interstate transmissions to arrange these wagering events.[154] For instance, the indictment against Vick and codefendants, which charged only Travel Act violations, nonetheless appears to allege extensive conduct and interstate wagering activities from which it may be reasonably inferred that the prosecution could have theoretically also chosen to allege and charge Vick with Wire Act violations based on using telephones or other communication facilities to arrange the interstate dog fights. Taking one illustrative example, the indictment against Vick describes a series of planned March, 2003 pit bull fights "involving two pit bulls owned by an individual from North Carolina versus pit bulls owned by 'Bad Newz Kennels.'"[155] As alleged in the indictment, this series of dog fights took place in March, 2003 but had begun being agreed upon, planned, and coordinated months in advance, starting as early as in or about June, 2002 but

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[152] *See* Andrew Wiktor, *You Say Intrastate, I Say Interstate: Why We Should Call the Whole Thing Off*, 87 Fordham L. Rev. 1323, 1359–60 (2018).
[153] *See generally* Indictment, United States v. Vick, Criminal No. 3:07CR (E.D. Va. filed July 17, 2007)[hereinafter "Vick Indictment"].
[154] *Id.*
[155] *See generally* Vick Indictment ¶¶ 47-57.

not later than the late summer of 2002.[156] As alleged, by in or about late summer of 2002, an individual from Vick's "Bad Newz Kennels" had agreed with a Confidential Witness ("C.W.") from North Carolina to a have a fight between two dogs belonging to C.W. in North Carolina and two dogs belonging to Vick's "Bad Newz Kennels" in Virginia, further agreeing that such fights would be scheduled and take place several months later, specifically in or about March, 2003.[157] In making this agreement, the indictment indicates that the C.W. provided the member of "Bad Newz Kennels" with information that the C.W.'s two dogs in question were 35-pounds and 47-pounds respectively.[158] Following this initial agreement in the summer of 2002—*i.e.*, to a have a specific dog fight, involving dogs of specific weights, at a point specifically in or about March, 2003—in or about March, 2003 the C.W. travelled from North Carolina to a location in Virginia with the two dogs of the previously discussed weights for the purpose of having the dog fight that had been scheduled.[159] The two dog fights took place, as previously agreed upon and scheduled months prior, with purses of $13,000 for the first fight and $10,000 for the second.[160] After Vick's dogs lost both fights, Vick retrieved a book bag from a vehicle that contained the total amount of the two purses, $23,000, and gave it to the C.W.[161] The specific and interstate nature of these allegations—which includes a lucrative wagering event planned months in advanced amongst parties ostensibly engaged in wagering on dog fights for money on a regular basis—creates a highly reasonable inference that the prosecution had the ability to allege a use of interstate wire (*e.g.,* phone line) by Vick or codefendants in connection with this wagering event. For instance, presumably the C.W. drove from North Carlina to the site of the scheduled fight in Virginia because

[156] *Id*.
[157] *Id*. ¶¶ 47-49.
[158] *Id*. ¶ 47-48.
[159] *Id*. ¶ 49.
[160] *Id*. ¶ 50, 54.
[161] Id. ¶¶ 49-57.

somebody had caused a wire facility to be used in order for him to have obtained knowledge of where to go for the fight. Furthermore, it appears unlikely that Vick would have had precisely $23,000 for both purses in a back bag ready for the C.W. if the discussion of wagers had not previously occurred over wire before that day and moment. Assuming that a phone line or telecommunication wire was used by Vick or a codefendant in connection with arranging, coordinating, or planning this lucrative interstate dog wagering event, it may have been chargeable under the Wire Act, but not if the prosecutor was concerned about alleging that illegal dog fighting is a "sports" contest. The successful use of the Travel Act in this prosecution context illustrates how the Travel Act may be used more effectively and more viably for prosecution of interstate wagering activities in close situations where the underlying contest may be difficult or uncomfortable to allege as a sporting event.

Furthermore, because the Travel Act reaches a wide range of unlawful activities and business enterprises in areas that are not limited to the scope of gambling, prosecution for gambling related activities in interstate commerce under the Travel Act does not require prosecutors to establish that the defendant was engaged in the business of gambling, unlike prosecution for gambling related activities in interstate commerce under the Wire Act.[162] In that regard, the Travel Act presents an effective but also potentially less burdensome alternative to the Wire Act for successful federal prosecution of interstate gambling based on the same underlying course of conduct, particularly where there may be infirmities in proof that the defendant was engaged in the business of gambling.[163] To illustrate, the Travel Act can be employed to successfully prosecute

[162] *See United States v. Marder*, 474 F.2d 1192, 1194 (5th Cir. 1973)(in prosecution under Wire Act, burden is on government to establish defendant was engaged in business of gambling during underlying conduct).
[163] *See, e.g.*, *United States v. Baborian*, 528 F. Supp. 324, 327–31 (D.R.I. 1981), *rev'd sub nom. United States v. Southard*, 700 F.2d 1 (1st Cir. 1983); *United States v. Alpirn*, 307 F. Supp. 452, 455 (S.D.N.Y. 1969)(acquitting defendant of Wire Act charges where government's evidence fail to prove or permit inference that defendant was engaged in business gambling by either acting as a bookmaker or providing assistance to bookmakers).

individuals who use interstate facilities to act as middlemen introducing sports bettors to bookmakers in interstate commerce, even where the available evidence may not be competent to prove that the individual is a bookmaker, had a stake in acting as middleman, received a payment for acting as a middleman, or acted as middleman on a repeated or continuous basis.[164] Under the Wire Act, a prosecutor must show that the defendant was engaged in the business of gambling, which generally has been construed to mean proving that the defendant is a bookmaker[165] or a person who, through a *continuing course of conduct*, "holds himself out as being willing to make bets or wagers over interstate [wire] facilities, and does in fact accept offers of bets or wagers over [interstate wire] as part of his business."[166] Instead, under the Travel Act, no proof of continuous conduct would be necessary for conviction of gambling offenses because what the Travel Act focuses on prosecuting is the *use* of facilities of interstate commerce.[167]

Based on the wide range of applications for the Travel Act set forth above in comparison to the Wire Act, it is apparent that the Travel Act has the range of coverage sufficient to reach the scope of conduct proscribed under the Wire Act. While the proscribed conduct under the Wire Act is effectively subsumed under the Travel Act as highlighted above, a key difference for purposes of this examination is that the Travel Act is constrained and checked by reference to State law and the Wire Act is not. It is submitted by this author that the Travel Act accordingly presents an

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[164] *See, e.g., United States v. Anderson*, 542 F.2d 428, 434–35 (7th Cir. 1976).

[165] *See, e.g., id.*; *United States v. Marder*, 474 F.2d 1192, 1194 (5th Cir. 1973)(burden was on government to establish that defendant "was in the business of gambling or in common parlance, was a 'bookie.'")(*citing Cohen v. United States*, 378 F.2d 751 (9th Cir. 1967)).

[166] *Sagansky v. United States*, 358 F.2d 195, 200 (1st Cir. 1966); *see also, e.g., United States v. Baborian*, 528 F. Supp. 324, 327-32 (D.R.I. 1981), *rev'd sub nom. United States v. Southard*, 700 F.2d 1 (1st Cir. 1983); Anthony Cabot*, The Absence of A Comprehensive Federal Policy Toward Internet and Sports Wagering and A Proposal for Change*, 17 Vill. Sports & Ent. L.J. 271, 282-83 (2010)(noting that, "[u]nder the Wire Act, no person or entity has ever been successfully prosecuted under the Wire Act unless he/it was: (i) in the business of accepting or laying off bets from customers on a regular basis or (ii) engaged in knowingly providing betting or wagering information to bookmakers or others engaged in illegal gaming activity.").

[167] *See Erlenbaugh*, 409 U.S. at 246 (emphasizing the Travel Act's focus being on "use" of facilities).

effective, comprehensive, and low-cost solution to address the interests of law enforcement, States, legitimate commerce, and political actors alike in a balanced manner that is least likely to be objectionable in practice.