INTERNET GAMBLING IN NEVADA:
Overview of Federal Law Affecting Assembly Bill 466

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On June 14, 2001, Nevada Governor Kenny C. Guinn signed into law Assembly Bill (A.B.) 466 and opened the door to a potential new frontier for gaming on the Internet.[1] This legislation enables the Nevada Gaming Commission to adopt regulations upon the advice and assistance of the Nevada Gaming Control Board. However, before such regulations may be promulgated, the Legislature clearly instructed the Commission to first determine, among other things, whether "interactive gaming"[2] is legal.[3]

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[1] The Internet is an international network of thousands of networks linked by Transmission Control Protocol/Internet Protocol (TCP/IP). The Internet is not one network, but a mass of interconnected networks capable of passing information by way of Internet protocols. More specifically, computers are connected by some form of cable creating local area networks or LANs. In turn, special-purpose routers provide links between various LANs. This link creates a wide area network or WAN. *See* Harley J. Goldstein, *On-Line Gambling: Down to the Wire?*, 8 Marq. Sports L.J. 1, 2, (Fall 1997). The Internet was developed and more accurately, the TCP/IP was created by the Defense Advance Research Projects Agency, the brainchild of the United States Department of Defense, in the late 1970s to ensure continual communication between "network's individual components in the event of the destruction of any of the constituent networks . . .", including nuclear attack. *Id*., at 2 n. 20; *see also American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 830-838 (E.D. Pa. 1996) (for a thorough analysis of the Internet and Worldwide Web); Ari Lanin, *Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*, 73 S. Cal. L. Rev. 1423, 1424-1430 (history of the Internet).

[2] The term "interactive gaming" means:

> [T]he conduct of gambling games through the use of communications technology that allows a person, utilizing money, checks, electronic checks, electronic transfers of money, credit cards, debit cards or any other instrumentality, to transmit to a computer information to assist in the placing of a bet or wager and the corresponding information related to the display of the game, game outcomes or other similar information. The term does not include the operation of a race book or sports pool that uses communications technology approved by the board pursuant to regulations adopted by the commission to accept wagers originating within this state for races or sporting events.

Act of June 14, 2001, ch. 593, § 2, 2001 Nev. Stat. 3075. "Communications technology" has been defined to mean "any method used and the components employed by an establishment to facilitate the transmission of information, including, without limitation, transmission and reception by systems based on wire, cable, radio, microwave, light, optics or computer data networks, including without limitation, the Internet and intranets." *Id*.

[3] *See id*., § 3.

This article attempts to provide an overview of the various federal statutes that may affect the legality of on-line gaming. It is important to note that the following analysis does not consider the constitutional ramifications of casino advertisements on the Internet in light of the federal district court and United States Supreme Court decisions in *Valley Broadcasting Co. v. United States*[4] and *Greater New Orleans Broadcasting Ass'n v. United States*,[5] respectively.

I.

CONGRESSIONAL HISTORY ON GAMBLING

Gambling has historically been a creature of state regulation governed by the powers reserved to the states under the Tenth Amendment of the United States Constitution.[6] Generally, "[g]ambling is illegal unless regulated by an individual state,"[7] such as Nevada. This "states' rights" stance on the issue of gambling appears be a federal policy aimed at capturing the will of the people.[8] From the colonial-era to post-Civil War America, Congress has consistently taken a hands-off approach towards gambling.[9] In the late 1890's, Congress briefly entered the field of gaming regulation with respect to lotteries.[10]

In 1961, Congress entered the gaming arena again by enacting a series of statutes that were aimed at fighting organized crime.[11] In 1970, Congress strengthened these statutes by passing the Racketeer Influenced and Corrupt Organizations Act.[12] In each instance, Congress exercised its powers to regulate interstate commerce by passing legislation that would assist the various states in enforcing their respective gambling laws.[13] A states' rights position was still evident in the late 1970's with the passage of the Interstate Horseracing Act of

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[4] *See Valley Broadcasting Co. v. United States*, 820 F. Supp. 519 (D. Nev. 1993), *aff'd*, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) (the wholesale ban of promotional advertising of legalized casino gambling is a violation of commercial free speech under the First Amendment).

[5] *See Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999) (application of 18 U.S.C. § 1304 as a prohibition to radio and television broadcasts of advertisements for legal casino gaming is a violation of protected commercial speech under the First Amendment).

[6] *See* U.S. Const. Amend. X; *see also* Beau Thompson, *Internet Gambling*, 2 N.C. J.L. & Tech. 81, 90 (Spring 2001).

[7] *See* Michael P. Kailus, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U. Ill. L. Rev. 1045, 1047.

[8] *See* David Goodman, *Proposals for a Federal Prohibition of Internet Gambling: Are There Any Other Viable Solutions to the Perplexing Problem?*, 70 Miss. L.J. 375, 379 (Fall 2000); *see also* Michael J. Thompson, *Give Me $25 on Red and Derek Jeter for $26: Do Fantasy Sports Leagues Constitute Gambling*, 8 Sports Law J. 21, 33 (Spring 2001).

[9] *See United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988).

[10] *See infra*, IV(7).

[11] *See infra*, IV(1), (2), (3).

[12] *See infra*, IV(5).

[13] *See infra, e.g.,* IV.

1978,[14] which regulates pari-mutuel wagering on horse racing. Congress specifically found that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders."[15]

Now with the advent of the Internet, many believe that Congress can no longer continue to follow the same states' rights doctrine as gambling merges onto the information superhighway. The Internet is inherently an instrument of interstate commerce.[16] As one author states "[b]ecause of the national and international scope of the Internet, state regulation may not be constitutional under the Dormant Commerce Clause."[17] In fact, Congress may be shifting its focus in this direction. On June 28, 2001, the "Jurisdictional Certainty Over Digital Commerce Act" was introduced before the House of Representatives Committee on Energy and Commerce.[18] If the proposed legislation becomes law, Congress would completely preempt state regulation of e-commerce, including gaming.[19]

II.

LOCATION OF INTERNET GAMBLING: JURISDICTION OF THE WAGER

A critical decision, in the analysis of whether Internet gambling is legal, is a determination of where it takes place. Does the physical act of placing a wager take place where the gambler is located or where the Internet site is operated?[20] The answer will be pivotal in analyzing federal statutes that require a predicate state law violation or the relevant exemptions to those laws.

In *Playboy Ent., Inc. v. Chuckleberry Pub., Inc.*,[21] the plaintiff had successfully brought an action against the defendant for trademark infringement.[22] Approximately ten years later, the plaintiff brought a motion for contempt against the defendant claiming it had violated the permanent injunction that had been entered by distributing pictorial images in the United States through the creation of an Internet site.[23] The defendant argued that merely posting the pictures on a computer server in Italy did not constitute distribution

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[14] *See* 15 U.S.C. § 3001, *et seq*.

[15] *See* Interstate Horse Racing Act, Pub. L. No. 95-515, § 2(a)(1), 92 Stat. 1811 (1978).

[16] *See* Ari Lanin, *Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*, *supra*, n. 1, at 1424.

[17] *See* Scott Olson, *Betting No End to Internet Gambling*, 4 J. Tech. L. & Pol'y 2 (Spring 1999); *see also infra*, n. 219.

[18] *See infra*, VI.

[19] *See id*.

[20] *See* Michael P. Kailus, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, *supra*, n. 7, at 1047.

[21] *See Playboy Ent., Inc. v. Chuckleberry Pub., Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996).

[22] *See id.* 939 F.Supp. at 1034.

[23] *See id.* at 1035.

within the United States in violation of the permanent injunction since such an act was tantamount to flying to Italy to buy a magazine.[24] The federal district court disagreed and held that the defendant actively solicited United States customers to its website and, as such, it distributed its product in the United States.[25]

In rejecting the defense argument that gambling takes place in the jurisdiction of the Internet operator, the state court in *Vacco v. World Interactive Gaming Corp.* held that "[t]he act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within the State of New York."[26] As one federal prosecutor succinctly stated, "the notion that a person 'travels' to these foreign nations by communicating with computers there is as persuasive as the notion that a person who picks up a telephone and dials a friend in London should first put on a raincoat."[27]

In *Missouri v. Coeur d'Alene Tribe*,[28] a federally registered tribe in Idaho, began operating an Internet lottery site (www.uslottery.com) on June 19, 1997, pursuant to a state compact under the Indian Gaming Regulatory Act (IGRA)[29] of 1988.[30] Patrons in thirty-six states may register from their personal computers by establishing a gambling account funded with their credit cards.[31] The Attorney General of Missouri brought action in Missouri state court seeking to enjoin the Tribe and the operators from offering the Internet lottery to Missouri residents in contravention of state law.[32] The Tribe and the operators removed the case to federal district court claiming that IGRA completely preempts[33] state regulation of tribal gaming.[34] The federal district court agreed with the Tribe and found that IGRA entirely preempts the area of Indian gaming, even if the gaming does not occur on Indian lands.[35] The Eighth Circuit disagreed and held that the language of IGRA and the related legislative history only refer to "gaming on Indian lands."[36] The court stated that:

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[24] *See id*. at 1039.

[25] *See id*.; *see also* Terrence Berg, *www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law*, 2000 B.Y.U. L. Rev. 1305, 1360 (mere access to the website will not be sufficient to exercise personal jurisdiction).

[26] *Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 850 (1999).

[27] Joseph V. DeMarco, Assistant United States Attorney, Southern District of New York, *Gambling Against Enforcement – Internet Sports Books and the Wire Act*, United State Attorneys' Bulletin, Vol. 49, No. 2, at 36 (March 2001).

[28] *Missouri v. Coeur d'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999), *cert. denied*, 527 U.S. 1039 (1999).

[29] *See* 25 U.S.C. §§ 2701-2721.

[30] *See Coeur d'Alene Tribe*, *164* F.3d at 1104.

[31] *See id.*

[32] *See id.*

[33] *See infra*, n. 274.

[34] *See Coeur d'Alene Tribe*, 164 F.3d at 1105.

[35] *See id.*

[36] *Id.* at 1108.

> [O]nce a tribe leaves its own lands and conducts gambling activities on state lands, nothing in the IGRA suggests that Congress intended to preempt the State's historic right to regulate this controversial class of economic activities. For example, if the State of Missouri sought an injunction against the Tribe conducting an internet lottery from a Kansas City hotel room, or a floating crap game in the streets of St. Louis, the IGRA should not completely preempt such a law enforcement action simply because the injunction might "interfere with tribal governance of gaming."[37]

The court concluded that if the Internet lottery were conducted on tribal lands, IGRA would preempt the state's ability to regulate or prohibit the activity.[38] If, on the other hand, the lottery were being run in Missouri, then IGRA would not operate as shield to preempt state action.[39] This question of where the lottery is located was left to the federal district court to resolve on remand.[40]

It is worth noting that the issue on remand appears to have been decided in a prior suit involving the same Tribe in *AT&T Corp. v. Couer d'Arlene Tribe*.[41] Specifically, AT&T sought declaratory relief that it was not required to provide the Tribe with toll-free interstate service to any state in which the operation of a lottery was in violation of that state's laws.[42] The court held that "since the proposal for the 800 number contemplated orders [for chances in the lottery] being placed from states other than Idaho, the proposed gaming activities were not on Indian lands."[43] Since the lottery is not being conducted on Indian lands when a telephone wager is placed from beyond the borders of Idaho, the federal district court in Missouri, as some believe, should reach the same conclusion as to the Internet aspect of this same lottery.[44]

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[37] *Id.*
[38] *See id.* at 1109.
[39] *See id.*
[40] *See id.*
[41] *See AT&T Corp. v. Couer d'Arlene Tribe*, 45 F. Supp. 2d 995 (D. Idaho 1998).
[42] *See id.* 45 F. Supp. 2d at 1005.
[43] *Id.*
[44] *See* Jeffrey A. Dempsey, *Surfing for Wampum: Federal Regulation of Internet Gambling and Native American Sovereignty*, 25 Am. Indian L. Rev. 133, 148 (2000/2001); *see also* Jenna F. Karadbil, *Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 Ariz. J. Int'l & Comp. Law 413, 419-421 (Spring 2000).

III.

OVERVIEW OF FEDERAL LAW

Is Internet gambling legal? Numerous federal statutes touch on aspects of this question and are separately considered in this analysis. In 1961, the Wire Act (18 U.S.C. § 1084), the Travel Act (18 U.S.C. § 1952) and the Interstate Transportation of Wagering Paraphernalia Act (18 U.S.C. § 1953) were enacted as part of the same legislation to combat organized crime.

The Wire Act clearly prohibits the use of the Internet for transmission of sports bets or wagers or information assisting in the placement of such bets or wagers, unless the transmission constitutes either a bona fide news report of a sporting event or contest, or information relating to sports betting that is legal in both the state from which it was sent and the state in which it was received.[45] The language of the Wire Act, the related legislative history (including the companion provisions of sections 1953 and 1955), and the case law seem to strongly suggest that the Wire Act should be narrowly construed to sporting events and similar contests, rather than a broader view that would encompass traditional casino games or games of chance.

The Travel Act prohibits the interstate travel or use of an interstate facility in furtherance of an unlawful business enterprise.[46] The Interstate Transportation of Wagering Paraphernalia Act criminalizes the interstate transportation, except by common carrier, of any record, writing, paraphernalia or device used, adapted or devised for use in bookmaking, sports wagering pools, policy, bolita or similar games.[47] By contrast, the Travel Act is not limited to illegal gambling, but addresses a larger spectrum of unlawful activity. Furthermore, the Travel Act does not concentrate on any particular type of materials, but instead focuses upon the use of interstate facilities with the intent of continuing an unlawful business enterprise.

In 1970, as part of the Organized Crime Control Act, Congress enacted the Illegal Gambling Business Act and the Racketeer Influenced and Corrupt Organizations Act, commonly known as RICO. A conviction under the Illegal Gambling Business Act requires a showing that there is a gambling operation which (1) is in violation of state or local law, (2) involves five or more persons that either conduct, finance, manage, supervise, direct or own all or part of the business and (3) remains in substantially continuous operation for thirty days or has a gross revenue of $2,000 in any given day.[48]

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[45] *See* 18 U.S.C. § 1084(a), (b).
[46] *See* 18 U.S.C. § 1952.
[47] *See* 18 U.S.C. § 1953.
[48] *See* 18 U.S.C. § 1955.

RICO, which compliments the Illegal Gambling Business Act, imposes both criminal penalties and civil remedies.[49] Although RICO is, in large part, a response to organized crime's infiltration of legitimate businesses, it makes no mention of "organized crime." Instead, RICO targets "racketeering activity," which includes, among other things, illegal gambling that is a felony under state law or a violation of specific provisions of Title 18, including the Wire Act, the Travel Act, the Interstate Transportation of Wagering Paraphernalia Act and the Illegal Gambling Business Act.[50] Whether the action is civil or criminal in nature, a violation of RICO requires proof of (1) the existence of an enterprise, (2) either a pattern of racketeering activity or the collection of an unlawful debt and (3) the enterprise engaging in or affecting interstate commerce.[51]

The Professional and Amateur Sports Protection Act, which was passed in 1992 over the objections of the Justice Department, prohibits state sponsored or sanctioned wagering on professional and amateur sports.[52] Although this legislation was born out of a fear concerning the implications of sports wagering on all Americans, Congress, nevertheless, exempted Nevada's licensed sports pools from the reach of the statute's prohibition.[53] Unlike the Wire Act, this legislation does not require the use of interstate transmissions.

The Interstate Wagering Amendment of 1994 revised 18 U.S.C. § 1301 and closed an apparent loophole regarding lottery ticket messenger services. Prior to the amendment, the judicial system made two important holdings. First, the carriage of lottery tickets between states constituted interstate commerce.[54] Second, simply selling an "interest" in a legal and authorized lottery of another state did not violate section 1301.[55]

Finally, in December 2000, despite opposition from the Justice Department, the Interstate Horseracing Act of 1978 was amended to specifically expand the definition of "interstate off-track wager" to include pari-mutuel wagers transmitted between states by way of telephone or other electronic media,[56] arguably opening the door to pari-mutuel wagering on horseracing over the Internet between states that permit such wagering.

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[49] *See* 18 U.S.C. §§ 1963, 1964.
[50] *See* 18 U.S.C. §§ 1961, 1962.
[51] *See* 18 U.S.C. § 1962.
[52] *See* 28 U.S.C. § 3702.
[53] *See* 28 U.S.C. § 3704(a)(2).
[54] *See Champion v. Ames*, 188 U.S. 321, 354 (1903).
[55] *See PIC-A-State PA, Inc. v. Commonwealth of Pennsylvania*, 42 F.3d 175, 177 (3rd Cir. 1994).
[56] *See* 15 U.S.C. § 3002(3).

IV.

REVIEW OF FEDERAL STATUTES AND CASE LAW

1. Wire Act of 1961.

In 1961, Congress enacted the Wire Act[57] as a part of series of anti-racketeering laws. The Wire Act compliments other federal bookmaking statutes, such as the Travel Act (interstate travel in aid of racketeering enterprises, including gambling), the Interstate Transportation of Wagering Paraphernalia Act, and the Illegal Gambling Business Act (requires a predicate state law violation). The Wire Act was intended to assist the states, territories and possessions of the United States, as well as the District of Columbia, in enforcing their respective laws on gambling and bookmaking and to suppress organized gambling activities.[58]

Subsection (a) of the Wire Act, a criminal provision, provides:

> 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.[59]

In order to prove a *prima facie* case, the government must establish that:

1. The person was "*engaged in the business of betting or wagering*" (compared with a casual bettor);
2. The person transmitted in interstate or foreign commerce:
   (a) bets or wagers,
   (b) information assisting in the placement of bets or wagers, or
   (c) a communication that entitled the recipient to receive money or credit as a result of a bet or wager;
3. The person used a "*wire communication facility*;" and

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[57] *See* Sporting Events – Transmission of Bets, Wagers, and Related Information Act, Pub. L. No. 87-216, § 2, 75 Stat. 491, 552-553 (1961).

[58] *See United States v. McDonough*, 835 F.2d 1103, 1105 n. 7 (5th Cir. 1988); *see also Martin v. United States*, 389 F.2d 895, 898 n. 6 (5th Cir. 1968), *cert. denied*, 391 U.S. 919 (1968) (*quoting* 2 U.S. Code & Cong. News, 87th Cong., 1st Sess., 2631, 2633 (letter from Attorney General Robert F. Kennedy to Speaker of the House of Representatives, dated April 6, 1961)).

[59] 18 U.S.C. § 1084(a).

4. The person knowingly used a wire communication facility to engage in one of the three prohibited forms of transmissions.

In analyzing the first element, the legislative history[60] of the Wire Act seems to support the position that casual bettors would fall outside of the prosecutorial reach of the statute. During the House of Representatives debate on the bill, Congressman Emanuel Celler, Chairman of the House Judiciary Committee stated "[t]his bill only gets after the bookmaker, the gambler who makes it his business to take bets or to lay off bets. . . It does not go after the causal gambler who bets $2 on a race. That type of transaction is not within the purvue of the statute."[61] In *Baborian*, the federal district court concluded that Congress did not intend to include social bettors within the umbrella of the statute, even those bettors that bet large sums of money and show a certain degree of sophistication.[62]

Some courts have construed the second element concerning transmission to mean just the "sending" of information and not the receipt thereof.[63] Other courts have interpreted the term "transmission" more broadly to include both parties using a wire communication facility.[64]

The term "wire communication facility" is defined, for purposes of transmitting as set forth in the third element above, as:

> [A]ny and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.[65]

The fourth element is that the person acted "knowingly." This does not mean that he or she knew they were violating the statute, but rather, the

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[60] *See* S. 1656, 87th Cong., 1st Sess. (1961); *see also* H.R. 7039, 87th Cong., 1st Sess. (1961).

[61] *United States v. Baborian*, 528 F. Supp. 324, 328 (D.R.I. 1981) (*quoting* 107 Cong. Rec. 16,534 (1961)).

[62] *See id*.

[63] *See Telephone News Sys., Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621, 638 (N.D. Ill. 1963), *aff'd*, 376 U.S. 782 (1964).

[64] *See Sagansky v. United States*, 358 F.2d 195, 200 (1st Cir. 1966), *cert. denied*, 385 U.S. 816 (1966) (focusing on the phrase "uses a wire communication facility for the transmission" the court held that an individual who holds himself out as being willing to and does, in fact, accept offers of bets or wagers over an interstate telephone line has used a wire communication facility); *see also United States v. Pezzino*, 535 F.2d 483, 484 (9th Cir. 1976); *United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir. 1972).

[65] 18 U.S.C. § 1081.

individual knowingly used an interstate wire communication facility to engage in one of the three forms of prohibited transmissions listed above.[66]

Subsection (b) of the Wire Act sets forth exceptions, also known as a "safe harbor" clause and provides:

> Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information [(1)] for the use in news reporting of sporting events or contests, or [(2)] for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on the sporting event or contest is legal into a State or foreign country in which such betting is legal.[67]

"The first exemption was designed to permit 'bona fide news reporting of sporting events or contests.'"[68] The second exemption "was created for the discrete purpose of permitting the transmission of *information* relating to betting on particular sports where such betting was legal in both the state from which the information was sent and the state in which it was received."[69]

Subsection (c) simply provides that nothing contained in the provisions of the Wire Act shall create immunity from criminal prosecution under any state laws.[70] Finally, subsection (d) dictates when a telephone company or other common carrier, subject to the jurisdiction of the Federal Communications Commission, must terminate service when that service is being used to transmit or receive gambling information in violation of law.[71]

The language of the Wire Act clearly prohibits the use of the Internet for transmission of sports bets or wagers or information assisting in the placement of such bets or wagers,[72] unless transmission falls within one of the two exceptions noted above. The statute, however, does not expressly discuss its possible application to other forms of gambling. As a result, differing interpretations have

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[66] *See United States v. Southard*, 700 F.2d 1, 24-25 (1st Cir. 1983), *cert. denied*, 464 U.S. 823 (1983); *United States v. Cohen*, 260 F.3d 68, 76 (2nd Cir. 2001) ("it mattered only that Cohen knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute").

[67] 18 U.S.C. § 1084(b).

[68] Joseph V. DeMarco, Assistant United States Attorney, Southern District of New York, *Gambling Against Enforcement – Internet Sports Books and the Wire Act*, supra, n. 27, at 35.

[69] *Id.*

[70] *See* 18 U.S.C. § 1084(c).

[71] *See* 18 U.S.C. § 1084(d).

[72] *See e.g., Cohen*, 260 F.3d at 68 (the conviction of Antigua bookmaker who accepted wagers from New York was upheld as a violation of 18 U.S.C. 1804(a)).

arisen over the construction of the phrase "any sporting event or contest," and over whether the 40-year old Wire Act prohibits Internet gambling.

The interpretation of this language turns upon the determination of whether "sporting" is an adjective intended to modify both "event" and "contest."[73] Neither section 1084 nor the definitional section 1081 defines the term "sporting event or contest." A narrow construction would seem to suggest that the phrase is limited to sports-related activities.[74] There is support for this argument in the language of the statute, in the legislative history and in case law.

Statutory language: Section 1081 defines a "gambling establishment" as "any common gaming or gambling establishment operated for the purpose of gaming or gambling, including accepting, recording, or registering bets, or carrying on a policy game or any other lottery, or playing *a game of chance*, for money or other thing of value."[75] However, the term "gambling establishment" does not appear in section 1084.

A narrow construction approach is further bolstered by looking at the Interstate Transportation of Wagering Paraphernalia Act,[76] which was enacted as part of the same anti-organized crime legislation as the Wire Act. Section 1953 separately references bookmaking, wagering pools with respect to a sporting event, numbers, policy, bolita or similar games.[77] By contrast, section 1084 only references bets or wagers on "sporting events or contests." Similarly, the Illegal Gambling Business Act,[78] defines "gambling" to include "but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein."[79]

Legislative history: The legislative history of the Wire Act seems to provide support for a narrow construction. The title of the legislation is "Sporting Events – Transmission of Bets, Wagers, and Related Information."[80] The House of Representatives Report on Senate Bill 1656, dated August 17, 1961, states that the bill is in response "modern bookmaking."[81] In the "Sectional Analysis" of the report, the terms "sporting event or contest" and "sporting event" seemed to be

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[73] *See* Anthony N. Cabot, *Internet Gambling Report IV*, at 247-248 (2001).

[74] *See United States v. Bergland*, 209 F. Supp. 547, 549-550 (E.D. Wis. 1962), *cert. denied*, 375 U.S. 861 (1963) (a criminal statute, such as the Wire Act should be strictly construed).

[75] 18 U.S.C. § 1081 (emphasis added).

[76] *See* Wagering Paraphernalia – Transportation Act, Pub. L. No. 87-218, § 1, 75 Stat. 492, 553-554 (1961).

[77] *See* 18 U.S.C. § 1953(a).

[78] *See* Organized Crime Control Act, Pub. L. No. 91-452, § 803, 84 Stat. 922, 1091-1092 (1970).

[79] 18 U.S.C. § 1955(b)(2).

[80] *See supra,* n. 57.

[81] *See* U.S. Code & Cong. News, 87th Cong. 1st Sess., 2631.

interchangeable.[82] Included in the report is a letter from Attorney General Robert F. Kennedy to the Speaker of the House of Representatives, dated April 6, 1961, which only refers to wagering on sporting events.[83] Moreover, the Congressional debates on this legislation concerned the bill's impact on "horse racing and other sporting events."[84]

Congress' use of these different terms reflect its knowledge of the various forms of gambling, including traditional casino games or games of chance and specifically limited the Wire Act's application to sporting events or related contests.[85] This is evident from the statement of United States Senator Jon Kyl of Arizona as he introduced the Internet Gambling Prohibition Act of 1997.[86] Specifically, Senator Kyl stated that the bill was necessary, because "[i]t dispels any ambiguity by making it clear that all betting, including sports betting, is illegal. Currently, nonsports betting is interpreted as legal"[87] under the Wire Act.[88]

Case law: most notably the recent decision by the United States District Court for the Eastern District of Louisiana, clearly supports this conclusion. In *In re MasterCard Int'l, et al.*, a class action against several banks and credit card companies alleged unlawful interaction with Internet casinos in violation of RICO.[89] The various defendants moved to dismiss the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.[90] The court held that the plain language of the Wire Act was limited to gambling on a sporting event or related contest.[91] The court reasoned that:

> [T]he recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084. Recent legislative attempts have sought to amend the Wire Act to encompass "contest[s] of chance. . ." the "Internet Gambling Prohibition Act of 1999" . . . sought to amend Title 18 to prohibit the use of the internet to

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[82] *See id.* at 2632-2633.

[83] *See id.* at 2633-2634.

[84] *Baborian*, 548 F. Supp. at 328.

[85] "[U]ntil the legislature manifests its intent to include on-line gambling within the purview of present gambling laws, courts should not apply Section 1084 to Internet gambling activities." Harley J. Goldstein, *On-Line Gambling: Down to the Wire?*, *supra*, n. 1, at 8; *see also* Scott Olson, *Betting No End to Internet Gambling*, *supra*, n. 17.

[86] *See* S. 474, 105th Cong., 1st Sess. (1997).

[87] *See* S. 474, 105th Cong., 1st Sess. (1997).

[88] *See e.g.*, Tom Lundin, Jr., *The Internet Gambling Prohibition Act of 1999: Congress Stacks the Deck Against Online Wagering But Deals in Traditional Gaming Industry High Rollers*, 16 Ga. St. U. L. Rev. 845, 863 (Summer 2000).

[89] *See In re MasterCard Int'l, et al.*, 132 F. Supp. 2d 468, 472 (E.D. La. 2001).

[90] *See id.*

[91] *See id.* at 480.

> place a bet or wager upon a "contest of others, a sporting event, or a game of chance. . . ."[92]

The case is currently on appeal to the Fifth Circuit.

If on the other hand the term "contest" is to be viewed more broadly to encompass traditional casino games or games of chance, then on-line gaming, as some have argued,[93] will be prohibited by the Wire Act.

Finally, there is a secondary debate ongoing about whether the definition of "wire communication facility" in section 1081 applies to the Internet.[94] Some have pointed to section 1084(d) and its reference to "common carriers" within the jurisdiction of the Federal Communications Commission to support the argument that "wire communication facility" is limited to telephone companies.[95] "Thus, absent a determination that it violates federal, state, or local law, use of the Internet for gambling would not appear to implicate directly any of the FCC's common carrier rules."[96] Others simply argue that Congress chose to broadly define "wire communication facility" to cover a wide range of wire communication modes that were known and unknown in 1961, like the Internet.[97]

"Despite the divergent views . . ., the official position as expressed by the Justice Department [during the Clinton Administration] and several state attorneys general is to treat the Wire Act as applying broadly and covering all forms of Internet gaming."[98]

2. Travel Act of 1961.

As part of United States Attorney General Robert F. Kennedy's program to combat organized crime and racketeering, Congress enacted the Travel Act in 1961 as part of the same series of legislation as the Wire Act discussed above.[99] The Travel Act, which is aimed at prohibiting interstate travel or use of an

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[92] *Id*.

[93] *See* Seth Gorman and Anthony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 Loy. L.A. Ent. L.J. 667, 671 (1996); *see also* Mark G. Tratos, *Gaming on the Internet*, 3 Stan. J.L. Bus. & Fin. 101, 105 (Winter 1997).

[94] See Cynthia R. Janower, Harvard Law School, *Gambling on the Internet*, 2. J. Computer – Mediated Com. 2, (September 1996) (http://jcmc.huji.ac.il/vol2/issue2/janower.html).

[95] *See id*.

[96] *See* American Gaming Association, *Federal Laws and Regulations Affecting the Use of the Internet for Gambling*, at 1 (September 19, 1995).

[97] *See supra*, n. 94; *see also* Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U. J. Sci. & Tech. L. 7 (1996).

[98] *See* Adrian Goss, *Jay Cohen's Brave New World: The Liability of Offshore Operators of Licensed Internet Casinos for Breach of United States Anti-Gambling Laws*, 7 Rich. J.L. & Tech. 32 (Spring 2001).

[99] *See* Racketeering Enterprises – Travel or Transportation Act, Pub. L. No. 87-228, 75 Stat. 498, 561-562 (1961).

interstate facility in aid of a racketeering or an unlawful business enterprise, provides 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 –
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> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (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 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 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 (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of the titled and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.
>
> (c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.[100]

[100] 18 U.S.C. § 1952.

"Unlawful activity," as defined in subsection (b) refers to a business enterprise involving, among other things, illegal gambling. The Sectional Analysis of the House Report on Senate Bill 1653 specifically states that the term "'business enterprise' requires that the activity be a continuous course of conduct."[101]

A conviction under the Travel Act necessitates a violation of either a state or federal law.[102] However, the government need not prove that the defendant specifically intended to violate state or federal law.[103]

The courts have determined that the use of the mail, telephone or telegraph, newspapers, credit cards and tickertapes is sufficient to establish that a defendant "used a facility of interstate commerce" to further an unlawful activity in violation of the Travel Act.[104] It is important to note that the Travel Act "refers to state law only to identify the defendant's unlawful activity, the federal crime to be proved in § 1952 is use of the interstate facilities in furtherance of the unlawful activity, not the violation of state law; therefore § 1952 does not require that the state crime ever be completed."[105]

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[101] U.S. Code & Cong. News, 87th Cong. 1st Sess., 2666; *see also United States v. Ruiz*, 987 F.2d 243, 250-251 (5th Cir. 1993), *cert. denied*, 510 U.S. 855 (1993) (government is not required to prove that the defendant personally engaged in a continuous course of conduct, but rather the government must prove that there was a continuous business enterprise and that the defendant participated in the enterprise); *United States v. Vaccaro*, 816 F.2d 443, 454 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987) (defendant's involvement in three jackpot cheating incidents over a three-year period was sufficient to show a continuous and illegal conduct for a Travel Act conviction).

[102] *See* 18 U.S.C. § 1952(b)(i).

[103] *See United States v. Polizzi*, 500 F.2d 856, 876-877 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975) (government need only show that the defendants had a specific intent to facilitate an activity they knew to be unlawful under law – i.e., carrying on a hidden ownership interest in the Frontier Hotel in violation of NRS 463.160).

[104] *See United States v. Heacock*, 31 F.3d 249, 255 (5th Cir. 1994) (interstate mailings); *United States .v Villano*, 529 F.2d 1046, 1050-1051 (10th Cir. 1976), *cert. denied*, 426 U.S. 953 (1976) (interstate use of telephones for bookmaking); *United States v. Erlenbaugh*, 452 F.2d 967, 970-973 (7th Cir. 1971), *aff'd* 409 U.S. 239 (1972) (although exempt under 18 U.S.C. § 1953, "scratch sheets" from the Illinois Sporting News newspaper that were transported by train from Chicago to Indiana and used by customers of an illegal bookmaking operation constituted use of an interstate facility under the Travel Act); *United States v. Campione*, 942 F.2d 429, 435-436 (7th Cir. 1991) (use of interstate telephone facilities to secure credit card authorization was use of an interstate facility to promote an unlawful activity, such as prostitution); *United States v. Miller*, 379 F.2d 483, 485 (7th Cir. 1967), *cert. denied*, 389 U.S. 930 (1967) (use of a Western Union tickertape to post baseball scores in furtherance of an unlawful gambling activity under Indiana law constituted use of an interstate facility); s*ee also United States v. Garner*, 663 F.2d 834, 839(9th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (evidence showed that defendant practiced a blackjack cheating scheme in California and Nevada that was later used at Harrah's Lake Tahoe and the court held that the "government is not required to establish an interstate connection with respect to each defendant's activity. . . only. . . that the scheme as a whole had substantial interstate connections").

[105] *Campione*, 942 F.2d at 434; *see also United States v. Peskin*, 527 F.2d 71, 79 n. 3 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976).

3. Interstate Transportation of Wagering Paraphernalia Act of 1961.

In 1961, Congress also enacted the Interstate Transportation of Wagering Paraphernalia Act. According to the House Report, the purpose of the statute was to criminalize the interstate transportation, except by common carrier, "of any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, adapted, devised or designed for use in" bookmaking, wagering pools with respect to sporting events or a numbers, policy, bolita, or similar game.[106]

This statute[107] is designed to accomplish a very specific function. "It erects a substantial barrier to the distribution of certain materials used in the conduct of various forms of illegal gambling" by cutting off gambling supplies.[108] By contrast, the Travel Act is not limited to illegal gambling, but rather addresses a much broader spectrum of "unlawful activity."[109] Unlike section 1953, the Travel Act does not concentrate upon any particular type of materials, but instead focuses on "the use of facilities of interstate commerce with the intent of furthering an unlawful 'business enterprise.'"[110]

Many of the terms utilized in section 1953 are undefined words of general meaning, such as "paraphernalia," "paper," "writing" and "device." Nevertheless, it appears that "Congress employed broad language to 'permit law enforcement to keep pace with the latest developments . . .' because organized crime has shown 'great ingenuity in avoiding the law.'"[111]

Unlike the Travel Act that requires an intent to participate in an illegal business enterprise that is continuous or ongoing, section 1953 does not require specific intent to violate the law.[112] In *Mendelsohn*, the defendants mailed a computer disk from Las Vegas to California for use in a bookmaking operation.[113] The disk was encoded with a program called SOAP, or Sports Office Accounting Program.[114] The program records and analyzes sports wagers.[115] The Ninth Circuit held that the computer disk constituted a "device" within the meaning of the statute.[116] Since section 1953 is not a specific intent statute but rather a general intent criminal provision, the court concluded that it was irrelevant whether the defendants knew that selling such a computer disk encoded with

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106 U.S. Code. & Cong. News, 87th Cong. 1st Sess., 2635.
107 *See* 18 U.S.C. § 1953.
108 *Erlenbaugh v. United States*, 409 U.S. 239, 246 (1972).
109 *See id.*
110 *Id.*
111 *United States v. Mendelsohn*, 896 F.2d 1183, 1187 (9th Cir. 1990).
112 *See Ruiz*, 987 F.2d at 250-251; *see also Marquez*, 424 F.2d at 240.
113 *See Mendelsohn*, 896 F.2d at 1184.
114 *See id.*
115 *See id.*
116 *See id.* at 1187.

SOAP outside of Nevada was illegal.[117] As such, the government merely had to prove that the defendants knowingly (not by accident, mistake or ignorance) sent the disk in interstate commerce to be used in an illegal bookmaking operation.[118] Therefore, if a subscriber to an on-line gaming site resides in a state without legalized gambling, sending of hardware and software through interstate commerce may, as some point out, [119] violate section 1953.

4. <u>Illegal Gambling Business Act of 1970</u>.

In 1970, as part of the Organized Crime Control Act, Congress passed the Illegal Gambling Business Act. The statute was aimed at syndicated gambling.[120] Congress determined that large-scale, illegal gambling operations financed organized crime, which, in turn, has a significant impact on interstate commerce.[121] As such, section 1955 is a direct exercise of Congressional power to regulate interstate commerce[122] and, specifically, the activities that substantially affect interstate commerce.[123]

In order to prove a *prima facie* case under this statute, [124] the government must establish that there is a gambling operation which (1) is in violation of state or local law where it is conducted, (2) involves five or more persons that conduct, finance, manage, supervise, direct or own all or part of the business and (3) remains in substantially continuous operation for more than thirty days or has a gross revenue of $2,000 in any given day.[125]

The first element requires a predicate state or local law violation. The second and third elements have been the subject of much discussion in our judicial system. As for the requirement of "five or more persons," it was Congress' intent to include all individuals who participate in the operation of an illegal gambling business, "regardless of how minor their roles, and whether they be labeled agents, runners, independent contractors or the like."[126] However, Congress did not intend for mere bettors to fall within the prosecutorial arm of the

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[117] *See id.* at 1188.

[118] *See id.*

[119] *See* Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet, supra*, n. 97.

[120] *See United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974).

[121] *See id.* at 998-1001; *see also United States v. Lee*, 173 F.3d 809, 810-811 (11th Cir. 1999) ("if Congress, or a committee thereof, makes legislative findings that a statute regulates activities with a substantial effect on commerce, a court may not override those findings unless they lack a rational basis").

[122] S*ee U.S*. Const. art. I, § 8, cl. 7 (Commerce Clause).

[123] *See United States v. Zizzo*, 120 F.3d 1338, 1350 (7th Cir. 1997), *cert. denied*, 522 U.S. 998 (1997).

[124] *See* 18 U.S.C. § 1955.

[125] *See Sacco*, 491 U.S. at 998.

[126] *United States v. Schullo*, 363 F. Supp. 246, 249-250 (D. C. Minn. 1973), *aff'd*, 508 F.2d 1200 (1975), *cert. denied*, 421 U.S. 947 (1975).

statute.[127] The term "conduct" means "any degree of participation in an illegal gambling business, except participation as a mere bettor."[128] The term "participation" is limited to the performance of acts that assist in the gambling business.[129] Therefore, the government need only show that the defendant was involved in the illegal gambling business to be counted and not that the defendant knew the activity involved five or more persons.[130] "The jurisdictional five persons may include unindicted and unnamed persons."[131] Moreover, the government need not prove that the same five individuals were involved for the statutory 30-day period.[132]

As for the third element, "Congress did not purport to require absolute or total continuity in the gambling operations."[133] The term "substantially continuous" has been interpreted to mean an operation conducted with some degree of regularity.[134]

Given the minimal proof required to demonstrate a violation of the Illegal Gambling Business Act, some have argued that computer operators and maintenance crews, accountants and owners may all be included within the ambit of the statute even though their participation may not relate to Internet gaming.[135]

5. Racketeer Influenced and Corrupt Organizations Act of 1970.

In 1970, as part of the Organized Crime Control Act that included the Illegal Gambling Business Act discussed above, Congress, exercised its broad power once again under the Commerce Clause[136] and enacted RICO.[137] Like the Illegal Gambling Business Act, RICO was intended to eradicate organized crime by attacking the sources of its revenue, such as syndicated gambling or bookmakers.[138] RICO imposes both criminal (imprisonment from 20 years to life,

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[127] *See id.*

[128] *Sanabria v. United States*, 437 U.S. 54, 70-71, n. 26 (1978); *cf. King*, 834 F.2d at 113-114 (one isolated incident of laying off a bet with the illegal gambling business is insufficient in light of the Congressional intent to attack the revenue sources of organized crime and the policy of strict construction of criminal statues).

[129] *See United States v. DiMuro*, 540 F.2d 503, 508 (1st Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

[130] *See United States v. Trupiano*, 11 F.3d 769, 772-773 (8th Cir. 1993).

[131] *Id.*, at 772.

[132] *See United States v. Murray*, 928 F.2d 1242, 1246 (1st Cir. 1991).

[133] *Trupiano*, 11 F.3d at 773.

[134] *See id.* at 773-774.

[135] *See* Seth Gorman and Anthony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, *supra*, n. 93, at 676.

[136] *See United States v. Vignola*, 464 F. Supp. 1091, 1098 (E.D. Pa. 1979), *aff'd*, 605 F.2d 1199 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

[137] *See* Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970).

[138] *See* Ante Z. Udovicic, *Sports and Gambling a Good Mix? I Wouldn't Bet on It*, 8 Marq. Sports L.J. 401, 407 (Spring 1998).

depending on the racketeering activity involved)[139] and civil liability (including treble damages, costs and attorneys fees)[140] for those who engage in certain prohibited acts. Section 1962, sets forth the following prohibited activities:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

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[139] *See* 18 U.S.C. § 1963.
[140] *See* 18 U.S.C. § 1964.

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.[141]

Essentially, RICO is an aggressive initiative that is remedial in its purpose by supplementing old methods for fighting crime and providing "new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[142] RICO was enacted, in large part, as a Congressional response to organized crime's financial infiltration of legitimate business operations that affected interstate commerce.[143] Congress wanted to remove the profit from organized crime and separate the racketeer from his or her revenue source.[144] Yet, RICO makes no mention of "organized crime." Instead, Congress chose to target "racketeering activity." The provisions of RICO demand a liberal reading to effectuate this broad Congressional intent.[145] Some courts have even interpreted RICO as legislation that ensures marketplace integrity.[146]

"Section 1962 establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations."[147] Subsection (a) makes it unlawful to invest funds derived from a pattern of racketeering activity or collected from an unlawful debt.[148] "Subsection (b) forbids acquiring or maintaining an interest in an enterprise which affects commerce through a pattern of racketeering activity or through collection of an unlawful debt; and subsection (c) forbids participation in the affairs of such an enterprise through those means."[149]

Regardless of whether the action is criminal or civil, a violation of RICO "requires proof of (1) the existence of an enterprise, (2) either a pattern of racketeering activity or the collection of an unlawful debt, and (3) that the enterprise be engaged in or affect interstate commerce."[150] Section 1961 defines several key terms, such as "racketeering activity," "enterprise," "pattern of racketeering activity" and "unlawful debt" as follows:

- "Racketeering activity" generally means (1) any act or threat involving, among other things, gambling, which is a felony under

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[141] 18 U.S.C. § 1962; s*ee also Salinas v. United States*, 522 U.S. 52, 63 (1997) (unlike the general conspiracy principals applicable to federal crimes, section 1964(d) does not require the conspirator to commit an overt act – i.e., commit or agree to commit two or more predicate acts).

[142] *See* 31A Am. Jur. 2d *Extortsion, Blackmail, and Threats* §128 (1989).

[143] *See id.; see also United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975)

[144] *See supra,* n. 142.

[145] *See United States v. Forsythe*, 560 F.2d 1127, 1135-1136 (3rd Cir. 1977).

[146] *See supra,* n. 142.

[147] S. 30, 91st Cong., 2nd Sess., 1 U.S. Code & Cong. News 4033.

[148] *See* 18 U.S.C. § 1962(a).

[149] *Cappetto*, 502 F.2d at 1358.

[150] *See supra,* n. 142, § 138.

state law, or (2) an act which is indictable under certain provisions of Title 18, such as the Wire Act, the Travel Act, the Interstate Transportation of Wagering Paraphernalia Act, and the Illegal Gambling Business Act.[151]

- "Enterprise" is defined to include "any individual, partnership, corporation, association, or other legal entity, and union or group of individuals associated in fact although not a legal entity."[152]

- "Pattern of racketeering activity" "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[153]

- "Unlawful debt" generally means a debt that is incurred or contracted in a gambling activity or business in violation of federal, state or local law or is unenforceable, in whole or part, due to usury laws.[154] Congress clearly intended that evidence proving the collection of an unlawful debt would substitute for a showing that two or more predicate offenses were engaged in forming a pattern of racketeering activity.[155]

In 1989, the United States Supreme Court rejected the Eighth Circuit's test that a pattern of racketeering activity required proof of multiple illegal schemes.[156] The term "pattern" requires a two-prong showing of a "relationship" between the predicate offenses and the threat of a "continuing activity."[157] A relationship is established where the conduct amounts to a pattern that embraces offenses having the same or similar purposes, results, participants, victims, or methods of commission, or were interrelated by distinguishing characteristics and not merely isolated events.[158] Continuity will be found where the predicate offenses amount to or pose a threat of continued conduct.[159] For example, since Congress was concerned with long-term activity, continuity may be demonstrated by a series of predicate offenses over a substantial period of time, rather than a few weeks or months with no threat of future conduct.[160] Continuity may also be shown by a

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[151] *See* 18 U.S.C. § 1961(1)(A), (B); *see also United States v. Joseph*, 781 F.2d 549, 555 (6th Cir. 1986) (conspiracy to commit a violation of state gambling laws constitutes racketeering activity).

[152] 18 U.S.C. § 1961(4).

[153] 18 U.S.C. § 1961(5).

[154] *See* 18 U.S.C. § 1961(6).

[155] *See United States v. Bertolino*, 964 F.2d 1492, 1496-1497 (5th Cir. 1992).

[156] *See H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236-237 (1989).

[157] *See id.* at 239.

[158] *See id.* at 240.

[159] *See id.*

[160] *See id.* at 242.

few predicate offenses within a short period of time with the threat of the acts extending indefinitely into the future.[161]

A predicate racketeering activity involving gambling could arise as either violations of a particular state statute or as one of the enumerated provisions in Title 18, such as the Wire Act, the Travel Act, the Interstate Transportation of Wagering Paraphernalia Act or the Illegal Gambling Business Act.[162] In *United States v. Tripp*, the defendant argued that his activities did not constitute "gambling" under either Ohio or Michigan law, but rather larceny by trick since the poker games in question were rigged.[163] The court rejected the defense's argument and found that traditional gambling existed, because the poker games began honestly and subsequent thereto the dealer inserted a marked deck of cards.[164] Even if the element of chance were eliminated, the court found that the conduct still fell within the parameters of the state statutes.[165]

In proving a nexus between the racketeering activity and interstate commerce, it is not necessary that the alleged acts directly involve interstate commerce.[166] Thus, evidence that the supplies used in an illegal Maryland bookmaking operation originated outside the state was sufficient to show a nexus between the enterprise and interstate commerce to trigger RICO.[167] Even minimal evidence is sufficient to demonstrate a nexus.[168] Therefore, merely traveling between states in furtherance of an illegal gambling operation will establish a nexus to interstate commerce.[169]

In dismissing a RICO suit against a credit card company by a disgruntled Internet gaming patron, the federal district court in *Jubelirer v. MaterCard Int'l, Inc.*, held that merely performing financial, accounting or legal services for an alleged RICO enterprise, such as various on-line casinos, does not constitute involvement in that enterprise since the services fell short of participation in the operation or management of the enterprise.[170]

The First Circuit also addressed the requirement of an enterprise in *United States v. London*.[171] The defendant, in *London* operated a bar in Massachusetts and a separate check cashing service in an enclosed area of the bar.[172] The bar

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[161] *See id.*

[162] *See* 18 U.S.C. § 1961(1)(A), (B).

[163] *See United States v. Tripp*, 782 F.2d 38, 42 (6th Cir. 1986), *cert. denied*, 475 U.S. 1128 (1986).

[164] *See id.*

[165] *See id.* at 43.

[166] *See United States v. Allen*, 656 F.2d 964 (4th Cir. 1981).

[167] *See id.*

[168] *See United States v. Mazzio*, 501 F. Supp. 340, 342 (E.D. Pa. 1980), *aff'd*, 681 F.2d 810 (3rd Cir. 1982), *cert. denied*, 457 U.S. 1134 (1982).

[169] *See id.*

[170] *See Jubelirer v. MasterCard Int'l, Inc.*, 68 F. Supp. 2d 1049, 1053 (W.D. Wis. 1999).

[171] *United States v. London*, 66 F.3d 1227 (1st Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996),

[172] *See id.* at 1230.

was organized as a closely held corporation and the check cashing service was a sole proprietorship.[173] Frequently, the check cashing service cashed checks (that banks would not accept) from illegal bookmakers who patronized the bar.[174] The defendant did not inquire about the checks he was cashing nor did he require the checks to be indorsed.[175] Moreover, the defendant did not file cash transaction reports or CTRs notifying the Internal Revenue Service of his many currency transactions in excess of $10,000.[176] These business practices, in turn, were enormously beneficial to the bookmakers who were able to accept more checks and increase their volume of business.[177] The court of appeals found that two or more legal entities, such as a corporation and a sole proprietorship, could form or be a part of an association-in-fact to comprise a RICO enterprise.[178] The court further held that the enterprise in question had a common shared purpose or relationship with those associated with it for which it acted in continuity (i.e., the economic gain of the defendant).[179] Although a RICO defendant and a RICO enterprise cannot be one and the same, the court held that there was sufficient evidence showing separateness, given the fact that the check cashing service employed an additional person and the bar was incorporated and employed several individuals.[180]

The issue of separation was further addressed in *In re MasterCard Int'l*. The district court relying on the Eighth Circuit's test held that the alleged enterprise, consisting of an Internet casino, a credit company and an issuing bank, were separate and distinct from the alleged pattern of racketeering activity, Internet gambling.[181]

If Internet gambling is illegal under a particular state law and/or one of the enumerated provisions of Title 18 of the United State Code that have been discussed herein, then operators of such sites could face civil action or criminal prosecution under RICO.

6. Professional and Amateur Sports Protections Act of 1992.

On June 26, 1991, the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks held public hearings on Senate Bill 474.[182] As a result, Congress found that "[s]ports gambling is a national problem. The harms

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[173] *See id.*
[174] *See id.*
[175] *See id.*
[176] *See id.*
[177] *See id.*
[178] *See id.* at 1243.
[179] *See id.* at 1244.
[180] *See id.*; *see also* 18 U.S.C. 1962(c).
[181] *See In re MasterCard Int'l*, 132 F. Supp. 2d at 484-486; *see also Handeen v. Lemaire*, 112 F.3d 1339, 1352 (8th Cir. 1997) (to determine if an enterprise is separate and distinct from the pattern of racketeering activity, the court examines whether the enterprise would still exist if the predicate acts were removed from the analysis).
[182] *See* U.S. Code & Cong. News, 102nd Cong. 1st Sess., 3554.

it inflicts are felt beyond the borders of those States that sanction it."[183] Moreover, the Senate Judiciary Committee agreed with the testimony of "David Stern, commissioner for the National Basketball Association, that '[t]he interstate ramifications of sports betting are a compelling reason for federal legislation.'"[184] In light of these findings, it appears that Congress exercised its authority under the Commerce Clause[185] to enact the Professional and Amateur Sports Protection Act (PASPA) in 1992,[186] codified at 28 U.S.C. § 3701, *et seq.* Specifically, PASPA makes it unlawful for:

> (1) a government entity[187] to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
> (2) a person to sponsor, operate, advertise, promote, pursuant to the law or compact of a government 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.[188]

As documented in the Section-by-Section Analysis of the Senate Report, the Judiciary Committee made it clear that it had no desire to prohibit the lawful sports gambling schemes that were in operation when Senate Bill 474 was introduced.[189] Congress manifested this intent in section 3704 of PASPA by providing a grandfather provision for states that either had (1) operated a legalized sports wagering scheme prior to August 31, 1990, or (2) legalized sports wagering and such operations were conducted during the period of September 1, 1989, through October 2, 1991.[190] Consequently, the sports lotteries conducted in Oregon and Delaware[191] were exempt, as well as the licensed sports pools in Nevada.[192] In addition, Congress provided a one-year

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[183] *Id.*, at 3556.
[184] *Id.*, at 3556-3557.
[185] *See e.g.,* Senator Bill Bradley (D-NJ), *The Professional and Amateur Sports Protection Act – Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5 (1992).
[186] *See* Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227-4229 (1992).
[187] The term "governmental entity" is defined generally as State and local governments, including organized described in 25 U.S.C. § 2703(5) of the Indian Gaming Regulatory Act of 1988. *See* 28 U.S.C. § 3701(2).
[188] 28 U.S.C. § 3702.
[189] *See* U.S. Code & Cong. News, 102th Cong. 1st Sess., 3559.
[190] *See* 28 U.S.C. § 3704(a)(1)-(2).
[191] *See National Football League v. Governor of Delaware*, 435 F. Supp. 1372, 1376-1377 (D. Del. 1977) (description of Delaware's sports lotteries).
[192] *See* U.S. Code & Cong. News, 102th Cong. 1st Sess., 3561.

window of opportunity from the effective date of PASPA (January 1, 1993) for states, which operated licensed casino gaming for the previous ten-year period to pass laws permitting sports wagering.[193] The latter exception was clearly crafted with New Jersey in mind. However, New Jersey failed to take advantage of this opportunity and carve out an exception for itself.[194] Also excluded from the reach of PASPA are jai alai and pari-mutuel horse and dog racing.[195]

Unlike the Wire Act, PASPA does not require the use of interstate wire transmissions. Reading PASPA together with section 1084(b) of the Wire Act, sports wagering is effectively limited to Nevada. As one author remarked, "in order to accept lawful Internet sports wagers on college or professional football, the casino must be located in Nevada and only accept Internet wagers from Nevada residents."[196]

The United States Department of Justice strongly opposed the passage of PASPA based, in part, upon its belief that the legislation was a substantial intrusion on states' rights.[197] The Justice Department outlined three fundamental concerns in its September 24, 1991, letter to Senator Joseph R. Biden, Jr. (D-DE), Chairman of the Senate Judiciary Committee.[198] First, the Justice Department observed that Congress has historically left the decision on how to raise revenue to the states.[199] Second, it noted that if PASPA were construed as anything more than a mere clarification of existing law, it would put into question issues of federalism.[200] Finally, the Justice Department found section 3703 "particularly troubling" in that it permits not only the United States Attorney General to seek enforcement of PASPA through the use of civil injunctions, but also amateur[201] and professional[202] sports organizations as well.[203]

To date, there are no reported cases interpreting PASPA except for the 1999 decision in *Greater New Orleans Broadcasting Ass'n*. In *Greater New Orleans*, the Supreme Court briefly touched upon the interplay between the

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[193] *See* 28 U.S.C. § 3704(a)(3).

[194] *See In re Petition of Casino Licensees for Approval of a New Game, Rule Making, and Authorization of a Test*, 647 A.2d 454, 456 (N.J. 1993).

[195] *See* 28 U.S.C. § 3704(a)(4).

[196] *See* Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, *supra*, n. 97.

[197] *See* U.S. Code & Cong. News, 102th Cong. 1st Sess., 3563.

[198] *See id.*

[199] *See id.*

[200] *See id.*

[201] "Amateur sports organization" means "(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participates, or (B) a league or associations of persons or governmental entities described in subparagraph (A)." 28 U.S.C. § 3701(1).

[202] "Professional sports organization" means "(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participates, or (B) a league or associations of persons or governmental entities described in subparagraph." 28 U.S.C. § 3701(3).

[203] *See id.*; *see also* 28 U.S.C. 3703.

exemptions set forth in section 3704 and the scope of section 3702's advertising prohibition, in light of its analysis of whether the Communications Act of 1934 violated First Amendment free speech as applied to radio and television advertisements of private casino gambling in Louisiana.[204]

7. Interstate Wagering Amendment of 1994.

Lotteries played a unique role in our country's early history, which included "financing the establishment of the first English colonies."[205] In the colonial-era, America funded public works projects through the use of lotteries.[206] In the eighteenth century, lotteries were used to underwrite the construction of buildings on the campuses of Harvard and Yale.[207] Following the Civil War, the Southern states utilized lotteries as a simple means by which to raise revenue.[208] With the proliferation of state lotteries came an increase in the number of scandals, most notably the Louisiana State Lottery in the late nineteenth century.[209] In response to the public outcry, Congress made "a brief foray into the field of gambling legislation, . . . [then] resumed its hands-off approach to gambling."[210] During this period in 1890, Congress exercised its postal powers[211] and prohibited the use of the postal service for transportation of lottery paraphernalia.[212] In 1895, Congress, acting under the Commerce Clause for the first time, extended the ban to all interstate commerce with the passage of Federal Anti-Lottery Act.[213] The Act was intended to:

> [S]upplement the provisions of prior acts excluding lottery tickets from the mails and prohibiting the importation of lottery matter from abroad, and to prohibit the causing [of] lottery tickets to be carried, and lottery tickets and lottery advertisements to be transferred, from one State to another by any means or method.[214]

In 1909, the Act was revised and codified at 18 U.S.C. § 387.[215] In turn, the Act was replaced by 18 U.S.C. § 1301 in 1948.[216]

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[204] *See id.* 527 U.S. at 180.
[205] National Gambling Impact Study Commission Report, ch. 2, at 2-1 (June 18, 1999).
[206] *See id*.
[207] *See supra*, n. 205.
[208] *See King*, 834 F.2d at 111-112 (a historical perspective of gambling regulation); *see also* Kristen D. Adams, *Interstate Gambling – Can States Stop the Run for the Boarder?*, 44 Emory L.J. 1025, 1033-1034 (Summer 1995).
[209] *See e.g., id*.
[210] *King*, 834 F.2d at 111.
[211] *See* U.S. Const. art. I, § 8, cl. 3 (Postal Clause).
[212] *See* Act of September 19, 1890, ch. 908, § 1, 26 State. 465 (codified at 18 U.S.C. § 1302).
[213] *See* Act of March 2, 1995, ch. 191, § 1, 28 Stat. 963.
[214] *Champion*, 188 U.S. at 354.
[215] *See* Act of March 4, 1909, ch. 321, § 237, 35 Stat. 1136.

For a period of time state lotteries fell out of favor. In 1964, New Hampshire was the first state to reintroduce the state lottery to the American landscape.[217] By 1999, thirty-seven states had followed New Hampshire's lead.[218] In 1994, Congress made significant revisions to section 1301 in light of a federal district court ruling.

In *Pic-A-State PA, Inc. v. Commonwealth of Pennsylvania*, the federal district court held that a Pennsylvania statute that prohibited the selling of interests in another state's lottery was unconstitutional under the Dormant[219] Commerce Clause.[220] Subsequent to the district court's decision, but prior to arguments before the Third Circuit, Congress amended 18 U.S.C. § 1301[221] to close an apparent loophole[222] in the statute and preserve a state's right to sell its own lottery tickets to the exclusion of other states.[223] As a result, the court of appeals reversed the district court and held that the Pennsylvania statute in question was constitutionally consistent with the newly enacted federal law that prohibited the interstate sale of lottery interests.[224]

As amended, section 1301 provides:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign

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[216] *See* Act of June 25, 1948, ch. 645, 62 Stat. 762; *see also* Kristen D. Adams, *Interstate Gambling – Can States Stop the Run for the Boarder?*, *supra*, n. 208, at 1033.

[217] *See* Scott M. Montpas, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 Dayton L. Rev. 163, 165-166 (Fall 1996).

[218] *See id.*; *see also supra,* n. 205.

[219] The Commerce Clause is generally referred to as the "Dormant Commerce Clause," because states are prohibited from regulating in a particular area that discriminates against interstate commerce or unduly burdens interstate commerce, even though Congress has not seen fit to specifically exercise its power to enact a law. *See Maine v. Taylor*, 477 U.S. 131, 151-152 (1986); *see also Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 431 (1946) (holding that the McCarran Act expressly authorizes states to regulate and tax the business of insurance, even though such regulation and taxation might burden interstate commerce); James E. Gaylord, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 53 Vand. L. Rev. 1095, 1106-1109 (May 1999).

[220] *See Pic-A-State PA, Inc. v. Commonwealth of Pennsylvania*, No. CV-93-0814, 1993 U.S. Dist. LEXIS 12790 at *9-10 (M.D. Pa. July 23, 1993).

[221] *See* Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, § 320905, 108 Stat. 2126 (1994).

[222] *See Wenner v. Texas Lottery Comm'n*, 123 F.3d 321, 323 n. 2 (5th Cir. 1997) (for an analysis of the pre-1994 loophole in 18 U.S.C. § 1301).

[223] *See* Kristen D. Adams, *Interstate Gambling – Can States Stop the Run for the Boarder?*, *supra*, n. 208, at 1052.

[224] *See Pic-A-State*, 42 F.3d at 180.

> commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or, being engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined under this title or imprisoned not more than two years, or both.[225]

The 1994 amendment sought to expressly prohibit lottery ticket messenger services in the absence of a compact between the states in question.[226]

Pic-A-State involved a corporation that conducted business through retail stores in Pennsylvania, where customers participated in the legal and authorized lotteries of other states by placing orders for tickets.[227] In turn, the retail stores transmitted the orders to purchasing agents in the other states by way of a computer terminal.[228] The retail store charged one dollar for each ticket purchased and the customer received a computer-generated receipt, rather than a lottery ticket (i.e., no interstate transport of lottery tickets and thus, the pre-1994 loophole).[229]

In a subsequent challenge to the constitutionality of the 1994 amendment, the Third Circuit held that:

> The Interstate Wagering Amendment regulates lotteries – an activity affecting interstate commerce. It rationally relates to Congress' goals of protecting

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[225] 18 U.S.C. § 1301.
[226] *See supra*, n. 208, at 1056.
[227] *See Pic-A-State*, 42 F.3d at 176-177.
[228] *See id.* at 177; *see also Pic-A-State,* 1993 U.S. Dist. LEXIS, at *4-5.
[229] *See id.*; *see also Champion*, 188 U.S. at 354 (carriage of lottery tickets between states by an independent carrier constitutes interstate commerce).

> state lottery revenues, preserving state sovereignty in the regulation of lotteries, and controlling interstate gambling. The Amendment was a constitutional exercise of Congress' power to legislate under the Commerce Clause.[230]

As one final point of interest, unlike PASPA, which permits its enforcement by professional and amateur sports organizations, there is no private right of action under section 1301 or the companion provisions of sections 1302 (mailing of lottery tickets), 1304 (broadcast of lottery information) and 1307 (exceptions for state lottery advertisements).[231]

8. 2000 Amendment to the Interstate Horseracing Act of 1978.

In December 2000, Congress, in spite of the Justice Department's strong opposition, amended the Interstate Horseracing Act of 1978[232] and specifically expanded the definition of "interstate off-track wager" to include pari-mutuel wagers transmitted between states by way of telephone or other electronic media, as follows:

> [T]he term--. . . 'interstate off-track wager' means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools;[233]

The plain language of the revised statute would appear to permit interstate pari-mutuel wagering over the telephone or other modes of electronic communication, including the Internet, so long as such wagering is legal in both states. The legislative history of the amendment seems to support this conclusion.

Specifically, Congressman Frank R. Wolf (R-VA) expressed the following concern:

> Mr. Speaker, . . ., this conference report contains a provision that deeply troubles me. I want Members of

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[230] *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294, 1304 (3rd Cir. 1996), *cert. denied*, 517 U.S., 1246 (1996).

[231] *See National Football League*, 435 F. Supp. at 1388-1389.

[232] *See* DC Appropriations, Pub. L. No. 106-553, § 629, 114 Stat. 2762A-108 (2000).

[233] 15 U.S.C. § 3002(3).

> this body to be aware that section 629 . . . would legalize interstate pari-mutuel gambling over the Internet. Under the current interpretation of the Interstate Horse Racing Act in 1978, this type of gambling is illegal, although the Justice Department has not taken steps to enforce it. This provision would codify legality of placing wagers over the telephone or other electronic media like the Internet.[234]

In his statement that accompanied the signing of H. R. 4942, former President Clinton acknowledged the Justice Department's objection to the amendment as follows:

> [S]ection 629 of the Act amends the Interstate Horseracing Act of 1978 to include within the definition of the term 'interstate off-track wager,' pari-mutuel wagers on horseraces that are placed or transmitted from individuals in one State via the telephone or other electronic media and accepted by an off-track betting system in the same or another State. The Department of Justice, however, does not view this provision as codifying the legality of common pool wagering and interstate account wagering even where such wagering is legal in the various States involved for horseracing, nor does the Department view the provision as repealing or amending existing criminal statutes that may be applicable to such activity, in particular, sections 1084, 1952 and 1955 of Title 18, United States Code.[235]

V.

ADDITIONAL FEDERAL STATUTES OF NOTE

The following statutes do not directly address the question of whether on-line gaming is a legal venture. Nevertheless, these provisions will certainly affect how Internet gaming is conducted.

1. Transportation of Gambling Devices Act of 1951.

In 1951, Congress enacted the Transportation of Gambling Devices Act.[236] The Act, more commonly known as the Johnson Act,[237] which has been

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[234] 146 Cong. Rec. H 11230, 11232, 106th Cong. 2nd Sess. (2000).
[235] 5 U.S. Code & Cong. News., 106th Cong. 2nd Sess., 2457-2458 (2000).
[236] *See* Act of January 2, 1951, ch. 1194, § 1, 64 Stat. 1134.

amended several times during the intervening years, makes it unlawful to knowingly transport a gambling device to a state where such a device is prohibited by law.[238] The manufacturers and distributors of gaming devices for interstate commerce must register each year with the United States Department of Justice, and the devices must be appropriately marked for shipment.[239]

> (a) The term "gambling device" means--
>
> (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> (2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> (3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.[240]

The interstate shipment of hardware or software for use in connection with an Internet or Interactive gaming system may trigger the Johnson Act, as well as the Interstate Transportation of Wagering Paraphernalia Act discussed above.[241]

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[237] *See* 15 U.S.C. §§ 1171-1178.

[238] *See* 15 U.S.C. § 1172.

[239] *See* 15 U.S.C. §§ 1173, 1174.

[240] 15 U.S.C. § 1171(a).

[241] *See* Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, *supra*, n. 97.

2. Bank Records and Foreign Transaction Act of 1970.

In 1970, Congress passed the Bank Records and Foreign Transaction Act,[242] which is better known as the Bank Secrecy Act (BSA).[243] The BSA required "financial institutions" to report all currency transactions greater than $10,000 in effort to fight money laundering. This obligation was first limited to just banks. In 1985, the United States Treasury Department extended the requirement to casinos through the adoption of regulations.[244] Nevada casinos enjoy an exemption from the CTR reporting requirements of the BSA.[245]

Internet or interactive casinos will certainly be subject to some form of currency reporting requirement whether it is the BSA or Nevada Gaming Commission Regulation 6A, or both.

3. Money Laundering Control Act of 1986.

In 1986, Congress enacted the Money Laundering Control Act,[246] codified at 18 U.S.C. §§ 1956, 1957. Section 1956 applies to the knowing and intentional laundering of monetary instruments.[247] Section 1957 pertains to monetary transactions involving property that is "derived from specified unlawful activity," which includes "racketeering activity" under RICO.[248]

4. Electronic Communications Privacy Act of 1986.

In 1986, Congress enacted the Electronic Communications Privacy Act (ECPA),[249] codified at 18 U.S.C. § 2510 *et seq.* The legislation amended Title 18 of the United States Code to extend the prohibition against the unauthorized interception of communications from wire and oral communications to "electronic communications," which are defined as:

> (12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include--
>
> (A) any wire or oral communication;

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[242] *See* Bank Records and Foreign Transportation Act, Pub. L. No. 91-508, § 202, 84 Stat. 1118.

[243] *See* 31 U.S.C. §§ 5311-5326.

[244] *See* 31 C.F.R. § 103.11(n)(7)(i).

[245] *See* 31 U.S.C. § 5318(a)(5); *see also* Nev. Gaming Comm'n Reg. 6A.030.

[246] *See* Money Laundering Control Act, Pub. L. No. 99-570, § 1352(a) (1986).

[247] *See* 18 U.S.C. § 1956(a)(1).

[248] 18 U.S.C. § 1957(a); *see also* 18 U.S.C. § 1956(c)(7)(A).

[249] *See* Electronic Communications Privacy Act, Pub. L. No. 99-508, § 101 (1986).

> (B) any communication made through a tone-only paging device;
>
> (C) any communication from a tracking device (as defined in section 3117 of this title); or
>
> (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.[250]

The term "intercept" means "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."[251]

ECPA provides exceptions for the law enforcement to intercept communications where either (1) law enforcement is a party to the communication, or (2) where one of the parties to the communication has given prior consent to such interception.[252] The Nevada Gaming Control Board and Nevada Gaming Commission could take advantage of this exemption and be excluded from the reach of ECPA either through the promulgation of a regulatory provision (i.e., that licensees will permit the Board and Commission to monitor all electronic communications with patrons) or by imposing conditions on the licenses of operators of Interactive gaming.

5. <u>Illegal Money Transmitting Business Act of 1992</u>.

Congress, concerned that those engaged in money laundering were using money transmitting services rather than traditional financial institutions, passed the Illegal Money Transmitting Business Act of 1992,[253] codified at 18 U.S.C. 1960. The Act provides that it is a crime to conduct, control, manage, supervise, direct, "or own all or part of a business, knowing the business is an illegal money transmitting business."[254] The term "illegal money transmitting business" is defined generally to mean a money transmitting business that affects interstate commerce in any manner and fails to comply with either state law or the registration requirements for such a business under 31 U.S.C. § 5330.[255] Possibly more troubling for the operators of on-line gaming is the definition of "money transmitting," which "includes but is not limited to transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier."[256]

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[250] 18 U.S.C. § 2510(12).
[251] 18 U.S.C. § 2510(4).
[252] *See* 18 U.S.C. § 2511(2)(c).
[253] *See* Illegal Money Transmitting Business Act, Pub. L. No. 102-760, § 1512(a) (1992).
[254] 18 U.S.C. § 1960(a).
[255] *See* 18 U.S.C. § 1960(b)(1).
[256] 18 U.S.C. § 1960(b)(2).

VI.

RECENT CONGRESSIONAL ACTIVITIES

The Internet Gambling Prohibition Act in 1997 and 1999, which sought an outright federal ban on e-gaming may have been, if passed, problematic under the principals of federalism and the United States Supreme Court's 1997 ruling in *Reno v. American Civil Liberties Union*.[257] In *Reno*, the court struck down the Communications Decency Act of 1996,[258] aimed at protecting children from harmful or indecent material on the Internet, on the grounds that the law was contrary to First Amendment free speech.[259] The language of the court's holding suggests "that Congress should not dismiss Internet gambling as merely a vice activity that is undeserving of any First Amendment protection."[260] As a result, Congress may be moving away from the principals of a complete prohibition.

On February 12, 2001, Congressman James A. Leach (R-IA) introduced the "Unlawful Internet Gambling Funding Prohibition Act" before the House Committee on Financial Services and the House Judiciary Committee.[261] Five months later, on July 20, 2001, Congressman John J. LaFalce (D-NY) introduced an identical bill, known as the "Internet Gambling Payments Prohibition Act."[262]

The catalyst behind both H.R. 556 and H.R. 2579 can be found in the proposed "Findings" of the bills, which state:

> (1) Internet gambling is primarily funded through personal use of bank instruments, including credit cards and wire transfers.
>
> (2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent them.[263]
>
> (3) Internet gambling is a major cause of debt collection problems for insured depository institutions and the consumer credit industry.
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> (4) Internet gambling conducted through offshore jurisdictions has been identified by United

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[257] *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

[258] *See* Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 (1996); *see also* 47 U.S.C. § 223.

[259] *See Reno,* 521 U.S. at 847.

[260] *See* Stevie A. Kish, *Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling*, 51 Fed. Comm. L.J. 449, 451 (March 1999).

[261] *See* H.R. 556, 107th Cong., 1st Sess. (2001).

[262] *See* H.R. 2579, 107th Cong., 1st Sess. (2001).

[263] *See e.g.,* Michael Anastasio, *The Enforceability of Internet Gambling Debts: Laws, Policies, and Causes of Action*, 6 Va. J.L. & Tech. 6 (Spring 2001).

States law enforcement officials as a significant money laundering vulnerability.[264]

Each bill seeks to eliminate nearly all forms of traditional funding for Internet gambling. Ultimately, this purpose, if achieved, would make on-line gaming more difficult if not impossible. Each bill targets the operators of Internet gambling and specifically excludes financial institutions.

In a nutshell, the legislation would prohibit a person engaged in a gambling business from knowingly accepting from a participant of unlawful Internet gaming (1) credit, including credit cards, (2) electronic fund transfers, (3) checks, drafts or similar negotiable instruments drawn on or payable at or through a financial institution and (4) proceeds from any other financial transaction involving a financial institution.[265] The bills provide both civil remedies and criminal penalties.[266]

On February 14, 2001, Senator John Ensign (R-NV) introduced the "National Collegiate and Amateur Athletic Protection Act of 2001" before the Senate Judiciary Committee.[267] The same day, Congressman Jim Gibbons (R-NV) introduced similar legislation before the House Judiciary Committee.[268] The bills provide, among other things, for the establishment of a prosecutorial task force assigned to illegal wagering on amateur and collegiate sporting events and an increase in the related criminal penalties.[269]

Congressman Lindsey Graham (R-SC) introduced the "Student Protection Act" on March 20, 2001, before the House Judiciary Committee.[270] The bill seeks to amend PASPA by proposing an outright ban on sports wagering for high school, collegiate and Olympic events.[271]

On April 5, 2001, Senator John McCain (R-AZ) introduced the "Amateur Sports Integrity Act" before the Senate Committee on Commerce, Science and Transportation.[272] The legislation contains two important points of interest for this discussion. The first component of the bill concerns a prohibition on state-sponsored or sanctioned sports wagering on high school, collegiate and Olympic events.[273] If enacted, this provision would eliminate the exemption Nevada currently enjoys for licensed sports pools under PASPA at 18 U.S.C. § 3704(a)(2). With regard to this on-line gambling analysis, the bill's second

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264 H.R. 556, § 2, 107th Cong., 1st Sess. (2001); H.R. 2579, § 2, 107th Cong., 1st Sess. (2001).
265 *See id.* § 3.
266 *See id.*
267 *See* S. 338, 107th Cong., 1st Sess. (2001).
268 *See* H.R. 641, 107th Cong., 1st Sess. (2001).
269 *See* S. 338, §§ 2, 3; *see also* H.R. 641, §§ 2, 3.
270 *See* H.R. 1110, 107th Cong., 1st Sess. (2001).
271 *See id.* § 2.
272 *See* S. 718, 107th Cong., 1st Sess. (2001).
273 *See id.* § 201.

component incorporates the "Unlawful Internet Gambling Funding Prohibition Act" mentioned above.[274]

On June 28, 2001, Congressman Cliff Stearns (R-FL) introduced the "Jurisdictional Certainty Over Digital Commerce Act" before the House Committee on Energy and Commerce and the House Judiciary Committee.[275] The legislation, if passed, would leave the Internet the sole domain of Congress to govern. There is no question that this legislation is being offered as an exercise of Congressional power under the Commerce Clause.[276] More important, the bill clearly expresses Congress' intent to totally preempt[277] state regulation of digital commercial transactions and, specifically, Internet commerce, goods and services.[278] The term "digital service" is defined as "any service conducted or provided by means of the Internet."[279] If this bill becomes law, it would not only render Internet gambling and A.B. 466 moot, but the right of each state to manifestly decide its own destiny on the issue of e-commerce, including on-line gaming, would be surrendered to the federal government.

One month later on July 19, 2001, Congressman LaFalce, introduced the "Gambling ATM and Credit/Debit Card Reform Act" before the House Committee on Financial Services.[280] This bill is worth noting, because it would prohibit the placement of an ATM or similar electronic device in the immediate area of a "gambling establishment."[281] Currently, the term "gambling establishment" is broadly defined as any establishment engaged in gambling activity, including arguably, on-line gaming.[282]

Finally, on November 1, 2001, Congressman Bob Goodlatte (R-VA) introduced the "Combatting Illegal Gambling Reform and Modernization Act" before the House Judiciary Committee.[283] The proposed legislation would amend the Wire Act to include all interstate communications and more importantly, expand the scope of Section 1084 to all bets or wagers, including games of chance.[284]

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[274] *See id.* § 301.
[275] *See* H.R. 2421, 107th Cong., 1st Sess. (2001).
[276] *See id.*
[277] *See* U.S. Const. art. VI., § 2; *see also Pic-A-State*, 42 F.3d at 179 ("[w]here Congress has acted to pre-empt state regulation of a particular area of interstate commerce, state regulation, consistent or inconsistent, is precluded).
[278] *See id.* § 3.
[279] *Id.*
[280] *See* H.R. 2572, 107th Cong., 1st Sess. (2001).
[281] *See id.* § 918.
[282] *See* 18 U.S.C. § 1081.
[283] *See* H.R. 3215, 107th Cong., 1st Sess. (2001).
[284] *See id.* §§ 2, 3.

VII.

CONCLUSION

Although recent Congressional activity appears to suggest a realization that the Internet is uniquely a creature of interstate commerce, Congress has so far been unable to pass any legislation that would define the regulatory boundaries of this medium and the role states will play in its governance. Moreover, the Department of Justice under the Bush Administration has yet to announce its policy on Internet gaming.

Therefore, what conclusions, if any, can be reached regarding future federal action? Can the Nevada Gaming Control Board and the Nevada Gaming Commission sufficiently answer the Legislature's directive? Is interactive gaming or on-line gambling legal under current federal law? Absent Congressional guidance, these questions will remain unanswered and subject to the ongoing debate about the interpretation and application of the federal laws that have been enumerated herein.

In the interim, Nevada cannot remain idle. In addition to the legality of this venture, the Legislature further directed the Nevada Gaming Commission to determine whether the related systems are secure and reliable and provide at least a reasonable level of assurance that players will be of a lawful age and that gambling will be available only in legal jurisdictions.[285] As such, Nevada's regulators will still face a daunting task.

[285] *See* Act of June 14, 2001, ch. 593, § 3, 2001 Nev. Stat. 3076.