



Justice Department Reverses Stand on Gambling Statute

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In January, Deputy Attorney General Rod J. Rosenstein [announced](#) that the Justice Department’s Office of Legal Counsel (OLC) had determined that a federal gambling statute, the so-called Wire Act, applied to both sports gambling and non-sports gambling. The [OLC opinion](#) reversed an earlier pronouncement issued in 2011. The [2011 OLC Memorandum](#) itself had contradicted a long-held understanding within the Justice Department. The Deputy Attorney General [instructed](#) the federal prosecutors and Federal Bureau of Investigation to delay acting on the change of interpretation for 90 days to “give businesses that relied on the 2011 OLC [Memorandum] time to bring their operations into compliance with federal law.” Media accounts [report](#) that the recent interpretation may impact emerging interstate internet gambling ventures including internet poker and state lotteries.

The Issue

The [Wire Act](#), parsed, enumerated, and with emphasis added for purposes of discussion, states in pertinent part:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility

[1] for the transmission in interstate or foreign commerce of [a] *bets or wagers* or [b] information assisting in the placing of *bets or wagers* **on any sporting event or contest**, or

[2] for the transmission of a wire communication [a] which entitles the recipient to receive money or credit as a result of *bets or wagers*, or [b] 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.

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The issue from the beginning has been whether the term “on any sporting event or contest” refers to the bets or wagers in [1][a], [1][b], [2][a], and [2][b] or only to the bets or wagers in [1][b] or possibly only on bets or wagers in [1][a] and [1][b]. The 2011 OLC Memorandum [determined](#) the term applied to all four prohibitions. The recent OLC Opinion [concludes](#) that the term only applies to [1][b], information assisting the placing of bets or wagers, and that the other prohibitions apply to sports and non-sports gambling alike. Both the [2011 OLC Memorandum](#) and the [recent OLC Opinion](#) claim support from the sparse and divided case law under the Act.

Background

Congress [passed](#) the Wire Act in 1961 as part of an anti-racketeering package of statutory prohibitions, and has left it essentially unchanged ever since. Prior to 2011, the Department of Justice (DOJ) relied upon it primarily to prosecute sports-related gambling, with only rare recourse to it for other forms of gambling. DOJ consistently informed Congress, however, that DOJ viewed the Wire Act as applicable to all forms of gambling.

The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) brought the issue to the fore. State officials in Illinois and New York asked DOJ whether UIGEA trumped the Wire Act’s ban on (1) a state lottery’s use of out-of-state processing services or (2) in-state online lottery transactions that crossed state lines during transmission. DOJ responded in the [2011 OLC Memorandum](#) that there was no Wire Act ban on such state lottery activity. The Wire Act, it said, bans only sports-related gambling activities. Because the state lotteries did not involve sports gambling, the Wire Act did not apply to them, the 2011 OLC Memorandum concluded. All of which made unnecessary any speculation on the impact of the UIGEA on the scope of the Wire Act, the memorandum added.

2011 OLC Memorandum

The 2011 OLC Memorandum pointed to portions of the Wire Act’s [legislative history](#) for support of the proposition that sports gambling was the main focus of Congress’s concern when it passed the Wire Act. The memorandum also argued that a logical reading of the statute suggests that Congress referred to “bets or wagers on any sporting event” once and elsewhere used the term “bets or wagers” as shorthand for the term “bets or wagers on any sporting event.” The memorandum claimed support from a separate provision in the Wire Act. Section 1084(b) of the Wire Act permits the transmission of sports gambling information to and from states in which sports gambling is lawful. Had Congress intended the Wire Act to reach non-sports gambling, it would not have limited the exception to sports gambling information, the memorandum reasoned.

Recent OLC Opinion

Asked to reconsider the matter, the OLC Opinion [concluded](#) “that the words of the statute are sufficiently clear that all but one of its prohibitions sweep beyond sports gambling” and “that the 2006 enactment of UIGEA did not alter the scope of the Wire Act.” The OLC Opinion [captures](#) the difference between its analysis and that of the 2011 OLC Memorandum with a quote from the Supreme Court: “[O]nce [Congress] enacts a statute, ‘we do not inquire what the legislature meant; we ask only what the statute means.’” There is no need for recourse to the Wire Act’s legislative history when its language is clear, the OLC Opinion declared. And it called upon [two canons](#) of statutory construction to buttress its interpretation of the Wire Act’s language.

One, the “‘last-antecedent rule’ reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only the item directly before it.” Thus, from the perspective of the OLC Opinion, when the Wire Act bans “transmission ... of bets or wagers or information assisting in the placing of bets or wagers *on any sporting event or contest*,” the rule limits the application of the

modifying phrase “on any sporting event or contest” to the last antecedent, i.e., the phrase “information assisting in the placing of bets or wagers.” The second canon, the “series-qualifier” rule, arises when a modifier appears at the beginning or end of a list of related verbs or nouns, in which case the modifier is thought to apply to each of the verbs or nouns in the list. The rule, however, “applies when a modifier precedes or follows a list, not [as in the Wire Act] when the modifier appears in the middle” of the list, the OLC Opinion contends.

As for the question of UIGEA’s possible limitation on the scope of the Wire Act, the OLC Opinion [determined](#) that “UIGEA ... in no way ‘alter[s], limit[s], or extend[s]’ the existing prohibitions under the Wire Act.”

The OLC Opinion [ends](#) with an affirmation of its general reluctance to repudiate prior OLC pronouncements and an explanation of why it felt compelled to overturn the 2011 OLC Memorandum. The OLC is slow to walk away from its precedents for the same reasons that courts, under the stare decisis doctrine, are reluctant to abandon their precedents: “efficiency, institutional credibility, and the reasonable expectations of those who have relied on” the precedent. As in the case of stare decisis, OLC is willing to revisit a precedent when the laws or facts have changed or when the precedent is clearly in error and is no longer tenable. The OLC Opinion rests on this last point, but finds further assurance in the fact that: (1) the 2011 OLC Memorandum is relatively recent and overturned the DOJ long-standing view that the OLC Opinion reinstates; and (2) a dispositive judicial construction of the Wire Act is more likely because prosecution is more likely in light of the OLC Opinion.

Impact and Congressional Options

Media coverage of the OLC Opinion [suggests](#) that under the OLC’s reading of the Wire Act interstate internet non-sports gambling ventures are unlawful. DOJ [delayed](#) the effective date of the OLC Opinion for 90 days for those involved in the gaming industry to bring their activities into compliance with the Wire Act, as newly construed. Lottery officials in at least one state have reportedly [sued](#) to enjoin enforcement.

The OLC Opinion has no impact on DOJ’s view of the Wire Act’s coverage of sports gambling. The 2011 OLC Memorandum already applied the Wire Act to all sports-related gambling.

The OLC Opinion likely has no impact on the in-state transmission and receipt of information (although not necessarily of bets or wagers) even if the communication passes through another state during the course of transmission. Existing Supreme Court case law suggests that the First Amendment’s Free Speech Clause precludes a ban in such cases. The Court in *Greater New Orleans Broadcasting Ass’n, Inc. v. U.S.* [held](#) that the federal ban of broadcasting gambling information could “not be applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal,” even though the broadcasts could also be heard in Texas and Arkansas where casino gambling was illegal.

Congress has several options. The Wire Act is the work of Congress, and Congress is free to rework it. Congress may elect to endorse the interpretation of either the 2011 OLC Memorandum or the more recent OLC Opinion. Senator Lindsey Graham, now Chairman of the Senate Judiciary Committee, [proposed](#) clarifying amendments in this vein in the wake of the 2011 OLC Memorandum. Senator Graham’s proposal (S. 1668 (114th Cong.)), and [that](#) of then Representative Jason Chaffetz in the House (H.R. 707 (114th Cong.)), would have largely codified the interpretation of the recent OLC Opinion. Alternatively, Congress may prefer to re-examine federal law relating to sports gambling or to gambling generally. Then Senator Orrin Hatch urged this approach in the 115th Congress. There, he [offered](#) the proposed Sports Wagering Market Integrity Act (S. 3793 (115th Cong.)) which would have include modifications in the Wire Act as part of more comprehensive adjustment of federal sports gambling law. On the other

hand, Congress may find it prudent to await a judicial resolution of OLC's conflicting interpretations and other gambling-related developments.