

“THE BUSINESS OF BETTING OR WAGERING”:
A UNIFYING VIEW OF FEDERAL GAMING
LAW

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I. INTRODUCTION

The explosive growth of Internet gaming prompted Congress to adopt the Unlawful Internet Gambling Enforcement Act of 2006 (Internet Act), which principally regulates financial institutions as a means to enforce existing state and federal laws in the context of Internet gambling.¹ The Internet Act is the most recent of a series of federal laws designed to control gambling activities. It shares three fundamental features with its gambling-related predecessor, the Wire Act of 1961 (Wire Act):² both Acts criminalize behavior; both Acts apply to persons “engaged in the business of betting or wagering;” and neither Act defines that key phrase.³

This Article’s purpose is to examine what constitutes “the business of betting or wagering” under the Internet Act and the Wire Act. Additionally, this Article will propose a definition that harmonizes the Acts with various other gambling-related federal laws. Ultimately, this Article will conclude that “the business of betting or wagering” is not a broad, limitless phrase applicable to all businesses whose commercial activities relate to gambling in some way or manner. Rather, the phrase is very precise language directed at businesses that themselves bet or wager with others and thereby risk or stake money in a game or contest that the business may win or lose depending upon an eventuality. This distinction is significant because if the result were otherwise, the Internet and Wire Acts would conflict with other federal laws that relate to gambling and could threaten the existence of the state-licensed and state-regulated pari-mutuel wagering industry that has long utilized interstate telephonic and electronic communication without any known interference or action taken by the federal government.

Part I will review how Congress has used the phrase “the business of betting or wagering” in the regulation of gambling. Part II will examine the applicable principles of statutory construction that should be used to define this statutory language. Part III will apply those tools and discuss how the interpretation they support unifies the various federal gambling laws and avoids the conflicts and chaos of a broader interpretation. Part IV will offer a brief conclusion.

1. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (codified at 31 U.S.C. §§ 5361–5367 (2006)).

2. See 18 U.S.C. § 1084 (2006).

3. See *id.*; 31 U.S.C. § 5363.

II. USE OF “THE BUSINESS OF BETTING OR WAGERING” IN FEDERAL GAMING LAW

The phrase “the business of betting or wagering” plays a central role in both the Internet Act and the Wire Act. Section 5363 of the Internet Act, entitled “Prohibition on acceptance of any financial instrument for unlawful internet gambling,” provides:

No person *engaged in the business of betting or wagering* may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—

- (1) credit, or the proceeds of credit . . . (including credit extended through the use of a credit card);
- (2) an electronic fund transfer . . . ;
- (3) any check, draft, or similar instrument . . . ; or
- (4) the proceeds of any other form of financial transaction⁴

This Act sets forth criminal penalties for violating § 5363, including up to five years imprisonment, a fine, and a permanent injunction against certain gambling-related activities.⁵

The Internet Act contains a lengthy and complex definition of the term “bet or wager.”⁶ The first facet of this multifaceted definition provides a relatively simple definition in line with what most people would probably expect “bet or wager” to mean:

[T]he staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.⁷

However, the Internet Act does not define the phrase “the business of betting or wagering.”⁸

4. 31 U.S.C. § 5363 (emphasis added).

5. *Id.* § 5366.

6. *See id.* § 5362(1).

7. *Id.* § 5362(1)(A).

8. The definitions section of the Internet Act references “the business of betting or wagering” by stating an exception to that term. *See id.* § 5362(2). Section

Enacted in 1961—forty-five years prior to the Internet Act—the Wire Act is also directed at those engaged in the business of betting or wagering.⁹ Section 1084(a) of the Wire Act, entitled “Transmission of Wagering Information; Penalties,” 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.¹⁰

As with the Internet Act’s provisions, § 1084(a) is a criminal statute. It states that a person violating its prohibition shall be fined, imprisoned, or both.¹¹ The criminal nature of these Internet Act and Wire Act provisions simply heightens the need for the public—including state-licensed and state-regulated businesses whose commercial activities relate to gambling—to understand precisely who is and who is not subject to these federal laws.

III. APPLICABLE PRINCIPLES OF STATUTORY CONSTRUCTION

Courts routinely interpret undefined statutory language by employing a number of interpretive tools. Each of these tools frames the discussion of what “the business of betting or wagering” means for purposes of the Internet and Wire Acts.

Statutory interpretation of federal law begins with the statute itself.¹² “The first step ‘is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute’”¹³ Courts must give effect to the meaning of statutes as written,¹⁴ giving

5362 states that “the term ‘business of betting or wagering’ does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service.” *Id.* Elsewhere, the Act imposes liability on such entities when certain additional criteria are met. *See id.* § 5367.

9. 18 U.S.C. § 1084 (2006).

10. *Id.* § 1084(a) (emphasis added).

11. *Id.*

12. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

13. *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

14. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (stating

undefined terms their ordinary or natural meaning.¹⁵ “The plain meaning of legislation should be conclusive” of its interpretation, except in the rare instance in which the “literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”¹⁶ The inquiry ends “if the statutory language is unambiguous and the statutory scheme is coherent and consistent.”¹⁷

Making that determination, however, “is a holistic endeavor” and, “at a minimum, must account for a statute’s full text, language as well as punctuation, structure, and subject matter.”¹⁸ Also, legislative bodies “generally use[] a particular word with a consistent meaning in a given context.”¹⁹ Thus, when Congress enacts law, it is presumed to be aware of all previous statutes relating to the same subject matter.²⁰ Therefore, related statutes should be construed together.²¹

Furthermore, when a statute appears ambiguous, courts look to legislative history and other extrinsic material to determine the legislative intent behind the language at issue.²² In doing so, “the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.’”²³

Finally, a special interpretive consideration termed the “rule of lenity” applies in the context of interpreting criminal statutes (as opposed

that the basic and unexceptional rule is “that courts must give effect to the clear meaning of statutes as written”).

15. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (stating that, in the absence of a definition, a statutory term must be construed “in accordance with its ordinary or natural meaning”).

16. *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

17. *Barnhart*, 534 U.S. at 450 (quoting *Robinson*, 519 U.S. at 340).

18. *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)).

19. *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972).

20. *Id.* at 243–44.

21. *Id.* at 244.

22. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991).

23. *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

to civil provisions). As the United States Supreme Court recently explained in *United States v. Santos*:

The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.²⁴

The rule of lenity “is rooted in fundamental principles of due process.”²⁵ Courts have consistently held that no individual should be forced to speculate—at the peril of being indicted for criminal violations—on whether his or her conduct is prohibited by law.²⁶ Courts decline to impose punishment for actions that are not “plainly and unmistakably” proscribed.²⁷ At the same time, courts are often reluctant to invoke the rule of lenity unless a statutory ambiguity cannot otherwise be resolved.²⁸

IV. ANALYZING THE STATUTORY LANGUAGE TO DEFINE “THE BUSINESS OF BETTING OR WAGERING”

A. Plain Meaning

Applying the foregoing principles, the proper starting point to define “the business of betting or wagering” is the plain language of the statutes themselves.²⁹ In both the Internet Act and the Wire Act, the first element to be proven by the prosecution is whether the defendant is engaged in the business of betting or wagering.³⁰ An initial consideration is whether that language is broad enough to encompass businesses that bet and wager as well as businesses that knowingly accept, place, receive, or facilitate the bets or wagers of others. Such a broad interpretation would encompass classic gambling businesses, such as bookmakers. Bookmakers, or

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24. *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (citations omitted).
 25. *Dunn v. United States*, 442 U.S. 100, 112 (1979).
 26. *See, e.g., id.* at 112–13.
 27. *Id.* at 113 (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)).
 28. *See, e.g., United States v. Cohen*, 260 F.3d 68, 76–77 (2d Cir. 2001).
 29. *See supra* Part III.
 30. *See* 18 U.S.C. § 1084 (2006); 31 U.S.C. § 5361 (2006).

“bookies,” are persons who have made it their business to enter into bets or wagers with others and thereby risk loss or stand to win something of value depending on the outcome of the events bet or wagered upon.³¹ This broad interpretation would also encompass businesses that do not themselves bet or wager, but that receive, place, or facilitate the bets or wagers of others, such as state-licensed and state-regulated race tracks and off-track betting offices (OTBs), which operate pari-mutuel wagering pools. Pari-mutuel pool operators receive bets or wagers from their customers and place such bets and wagers into pari-mutuel pools.³² The pari-mutuel pool operators have no stake in the outcome. Rather, state law permits these operators to retain a percentage of the bet or wager, called a “takeout,” and to distribute the remainder to the winners.³³ Pari-mutuel pool operators have no risk or stake in the outcome of the events bet or wagered upon.

This broad interpretation, however, lacks support in the plain meaning of the statutory language. A close examination of the language Congress chose to use shows that “the business of betting or wagering” does not simply refer to any business *involved in* the acceptance, placement, or facilitation of someone else’s bets and wagers. Rather, that phrase refers to the business *of* betting or wagering—that is, when the person or entity has made its betting or wagering into a business.

This narrow interpretation has grammatical support in the statutory language. The noun “business” is followed by the preposition “of.” A preposition expresses a relationship between two nouns.³⁴ “Betting” and “wagering” are verbs—that is, they are the *-ing* form of the verbs “bet” and “wager.” However, the placement of these words in the Wire and Internet Acts after the word “of” means these words are used as nouns, and *-ing* verb forms used as nouns are known as gerunds.³⁵ A gerund indicates the performance of an action, and the agent of a gerund’s action is the person performing the action.³⁶ Here, the gerunds “betting” and “wagering” are connected by the preposition “of” to the noun “business.”

31. BLACK’S LAW DICTIONARY 194 (8th ed. 2004).

32. *See id.* at 1147 (defining “parimutuel betting”).

33. *See* Wilson Shirly, *Where Does the Bet Go?*, OWNER’S CIRCLE, Winter 1997, at 9 (discussing takeout rules in California).

34. *See* DAVID CRYSTAL, THE CAMBRIDGE ENCYCLOPEDIA OF THE ENGLISH LANGUAGE 213 (1995).

35. *See id.* at 202; H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 224–26 (2d ed. 1965).

36. FOWLER, *supra* note 35, at 224–26.

Simply put, the language used by Congress indicates that the agent performing the betting or wagering activity is the business itself. If the business in which the person is engaged does not bet or wager, then the business is not engaged in “the business of betting or wagering;” rather, it is involved in some other type of business.

This narrow interpretation of the phrase “the business of betting or wagering” captures the classic bookmaker, because the bookmaker makes individual bets with each bettor and, in each instance, has a personal stake or risk in the outcome of the event at issue. It does not, however, encompass the pari-mutuel wagering operator, who has no stake in the event’s outcome and, thus, is not itself betting or wagering. By the plain meaning of the statutory language, a person engaged in the business of betting or wagering must be someone engaged in a business that bets or wagers.

B. *Legislative History*

If the plain meaning of the statutory language was not clear, a court attempting to interpret the meaning of “the business of betting or wagering” would undoubtedly turn to the legislative history surrounding the Internet and Wire Acts to determine if that history supports a particular legislative intent.³⁷ Because Congress is presumed to have been aware of the Wire Act and its meaning when Congress adopted the Internet Act,³⁸ one should begin by examining the legislative history surrounding the Wire Act.

1. *The Wire Act*

The Wire Act was first introduced in Congress in 1961 as part of Attorney General Robert F. Kennedy’s program to combat organized crime and racketeering.³⁹ In part, the bill initially read as follows:

37. See *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (looking to legislative history for the meaning of a compact between New Mexico, Texas, and Oklahoma); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (citing *Zuber v. Allen*, 396 U.S. 168, 186 (1969)) (examining the legislative history of 18 U.S.C. § 2114, which prohibits the assault or robbery of custodians of money of the United States).

38. See *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) (quoting *United States v. Stewart*, 311 U.S. 60, 64–65 (1940)) (holding that later legislative acts can be considered interpretations of an earlier act in the sense that legislative bodies will give consistent meaning to words in similar contexts).

39. See S. Rep. No. 87-588, at 3 (1961).

Whoever *leases, furnishes, or maintains any wire communication facility with intent that it be used* 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 knowingly uses such facility for any such transmission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.⁴⁰

The House of Representatives passed the bill in this form, and a House of Representatives Report showed the Wire Act was to have a twofold purpose: (1) “to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses,” and (2) “to aid in the suppression of organized gambling activities” nationally “by prohibiting the use of wire communication facilities . . . for the transmission of bets or wagers”⁴¹

The Senate, however, narrowed the bill’s scope by amending the proposed language to read:

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 not more than \$10,000 or imprisoned not more than two years, or both].⁴²

The Senate Report discussing that amendment explained the Senate’s belief that “the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed.”⁴³

Further comments and reports support the view that § 1084(a) ultimately targeted persons who made a business of their own betting or wagering—namely, the classic bookmakers. A House of Representatives

40. *Legislation Relating to Organized Crime: Hearings on H. 7039 Before the H. Comm. on the Judiciary, 87th Cong.* 18 (1961) [hereinafter *House Hearings*] (emphasis added).

41. H.R. REP. NO. 87-967, at 1–2 (1961), as reprinted in 1961 U.S.C.C.A.N. 2361, 2361.

42. S. REP. NO. 87-588, at 1 (emphasis added).

43. *Id.* at 2.

Report on the Senate bill stated that the bill was in response to “modern bookmaking.”⁴⁴ Representative Harris explained that the Wire Act “*deals primarily with the question of ‘bookmaking’* where there is a violation of the law of a particular State insofar as a business is concerned, and as a continuing operation.”⁴⁵ Representative Harris further stated that the Act “deals with booking as a gambling business, and would prevent the use of the wire services to carry on such business”⁴⁶

Representative Celler made an even more direct statement that the Wire Act’s prohibition was limited to persons who bet or wager. He explained that “[t]his bill *only gets after the bookmaker*, the gambler who makes it his business to take bets or to lay off bets.”⁴⁷ Representative McCulloch stated that the law was “directly aimed at *bigtime bookies and gamblers*, who must use the facilities of the telephone company to carry on illegal enterprises”⁴⁸ Similarly, Attorney General Kennedy explained, “*The people who will be affected are the bookmakers and the layoff men*, who need incoming and outgoing wire communication in order to operate.”⁴⁹ The Attorney General further explained that a bookmaker is dependent on wire communications both to receive information prior to, during, and immediately after each event or contest, and to communicate with other bookmakers to lay off bets to protect against a severe loss when betting becomes heavy on a particular event or contest.⁵⁰

Accordingly, the Wire Act’s legislative history demonstrates that Congress intended bookies and professional gamblers to be the persons engaged in “the business of betting or wagering.” The business in which the person engages must itself bet or wager—as is the case with the

44. H.R. REP. NO. 87-967, at 2.

45. 107 CONG. REC. 15,503, 16,534 (1961) (statement of Rep. Harris) (emphasis added).

46. *Id.*

47. *Id.* (statement of Rep. Celler) (emphasis added).

48. *Id.* at 16,535 (statement of Rep. McCulloch) (emphasis added).

49. *The Attorney General’s Program to Curb Organized Crime & Racketeering: Hearings on S. 1656 Before the S. Comm. on the Judiciary*, 87th Cong. 12 (1961) [hereinafter *Senate Hearings*] (statement of Robert F. Kennedy, Att’y Gen. of the United States) (emphasis added).

50. *House Hearings*, *supra* note 40, at 24–25. Attorney General Kennedy also explained that the Wire Act would not apply to the social wagerer, as opposed to the professional gambler. *Senate Hearings*, *supra* note 49, at 13. He noted the example of a man who proclaimed that he made only social wagers, yet earned a profit in excess of a half million dollars per year. *Id.* The Attorney General stated that the prohibition in the Wire Act would apply to that individual. *Id.*

bookmaker and professional gambler—or the business is not a “business of betting or wagering.”

2. *The Internet Act*

In May 2006, the House Committee on the Judiciary authored a report addressing the then-proposed Internet Act.⁵¹ The report used the term “engaged in the business of betting or wagering” to describe the persons to whom the bill would apply.⁵² The report explained that under current federal law, gambling businesses are generally prohibited from accepting bets or wagers over the Internet.⁵³ The report also acknowledged that the Internet Act did not amend the Wire Act.⁵⁴ This strongly indicated a congressional view that “the business of betting or wagering” should have the same meaning in each act.

C. *Statutes In Pari Materia*

Statutes relating to the same subject matter, known as statutes *in pari materia*, should be construed together.⁵⁵ Several federal laws related to the Wire and Internet Acts shed light on who those Acts govern by using the phrase “the business of betting or wagering.”

1. *Tax on Wagers*

First adopted in 1939, the Internal Revenue Code’s Tax on Wagers provisions draw a distinction between two groups of persons: (1) persons who are “engaged in the business of accepting wagers,” and (2) persons who “conduct[] any wagering pool or lottery.”⁵⁶ The former group is defined in terms nearly identical to the relevant language from the Internet and Wire Acts.⁵⁷

Thus, Congress’s interpretation of who qualifies as a person “engaged in the business of accepting wagers” is important when considering the meaning of “the business of betting or wagering” under the Internet and Wire Acts. In a 1951 House of Representatives Ways and Means Committee Report, congressional officials explained that persons “engaged

51. H.R. REP. NO. 109-412 (2006).
52. *Id.* at 21.
53. *Id.* at 8–9.
54. *Id.* at 14.
55. *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972).
56. 26 U.S.C. § 4401(c) (2006).
57. *See* 18 U.S.C. § 1084(a) (2006); 31 U.S.C. § 5361 (2006).

in the business of accepting wagers” are those who stake something of value on the outcome of an event.⁵⁸ In particular, the Report explained:

Wagers on sports events or contests, to be taxable, must be placed with a person engaged in the business of accepting such wagers. . . . A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account. The principals in such transactions are commonly referred to as ‘bookmakers,’ although it is not intended that any technical definition of ‘bookmaker,’ such as the maintenance of a handbook or other device for the recording of wagers, be required.⁵⁹

This language is clear and unambiguous. A person is considered to be engaged in the business of accepting wagers if he is engaged as a principal who accepts wagers “on his own account.”⁶⁰

A 1958 Senate Report accompanying an amendment to the Tax on Wagers statutes offered the same interpretation: “A person is considered to be in the business of accepting wagers only (1) if he is engaged as a principal who, in accepting wagers, does so on his own account; or (2) if he assumes the risk of profit or loss.”⁶¹ This language also demonstrates Congress’s view that a person is engaged in the business of accepting wagers for federal taxation purposes if the person has a stake in the wager.

The Court of Claims interpreted this taxation language in 1960, and consistent with the aforementioned legislative materials, held that the test for whether a person is engaged in “the business of accepting wagers” is “whether he is risking his money in a game of chance in which he may win, or lose, depending on the eventuality.”⁶² The court released that decision one year before Congress adopted the nearly identical language found in § 1084(a) of the Wire Act. Congress is presumed to have been aware of that decision interpreting the nearly identical language of the Tax on Wagers statutes. Those statutes, along with their legislative history and judicial interpretation, are strong evidence that when Congress referenced persons engaged in “the business of betting or wagering” in the Wire Act, it intended that language to refer to persons who bet or wager on their own account.

58. H.R. REP. NO. 82-586, at 55–56 (1951), as reprinted in 1951 U.S.C.C.A.N. 1839.

59. *Id.*

60. *Id.* at 56.

61. S. REP. NO. 85-2090, at 64 (1958).

62. *Rahke v. United States*, 180 F. Supp. 576, 578 (Ct. Cl. 1960).

Further evidence of this intent lies in the distinction Congress drew in the Tax on Wagers statutes between persons engaged in the business of accepting wagers and persons who conduct wagering pools or lotteries.⁶³ The latter category consists of persons who do not have a personal stake in the wagers, because winnings are distributed from the wager pool and the conductors are paid based on a percentage of all wagers made. The fact that Congress differentiated between these two distinct types of businesses strongly suggests that Congress does not consider a person engaged in the business of accepting wagers to include a person conducting wagering pools or lotteries (activities in which the businesses do not bet or wager, but merely conduct the pari-mutuel pool or lottery for others to bet or wager). This, in turn, supports the view that Congress did not intend persons engaged in “the business of betting or wagering” under the Wire and Internet Acts to include persons who conduct wagering pools or lotteries because such persons have no stake in the bet or wager.

2. *Interstate Horseracing Act*

In 1978, seventeen years after adopting the Wire Act, Congress adopted the Interstate Horseracing Act.⁶⁴ The Interstate Horseracing Act expresses a policy of regulating “interstate commerce with respect to wagering on horseracing, in order to further the horseracing and legal off-track betting industries in the United States.”⁶⁵ Though the Interstate Horseracing Act focuses on horseracing, it is notable that Congress expressly intended to “further” what it described as “the horseracing and legal off-track betting industries.”⁶⁶ The off-track betting (OTB) industry has a longstanding history of utilizing the interstate wires to conduct its business.⁶⁷ Thus, if the Wire Act broadly prohibited the conduct of pari-

63. 26 U.S.C. § 4401(c) (2000).

64. Interstate Horseracing Act of 1978, Pub. L. No. 95-515, § 2, 92 Stat. 1811 (codified at 15 U.S.C. §§ 3001–3007 (2006)).

65. 15 U.S.C. § 3001(b).

66. *Id.*

67. See Antonia Z. Cowan, *The Global Gaming Village: Interstate and Transnational Gambling*, 7 GAMING L. Rev. 251, 259 (2003). OTBs utilize “account wagering,” wherein the bettor

may cause wagers to be made from that account not only by appearing in person at the facility but also by sending instructions to the facility’s operator from a remote location using one or more choices of several different types of wire transmissions. Previously these instructions were sent by telephone but recent advances in technology now allow the instructions to be sent electronically via personal computer or other interactive electronic systems.

mutuel pools when the conductor has no stake in the outcome bet or wagered upon, then there would arguably be no legal OTB industry. The expressed intent behind the Interstate Horseracing Act is additional evidence that Congress does not consider the Wire Act's prohibition on those engaged in "the business of betting or wagering" to criminalize the pari-mutuel horse industry.

Subsequent legislative history surrounding the Interstate Horseracing Act, however, suggests that the Department of Justice (DOJ) holds, or at least has held, a different view of the Wire Act. In 2000, at the urging of a horseracing industry that was uneasy with the DOJ view that federal law prohibited the conduct of pari-mutuel pools involving interstate wires,⁶⁸ Congress amended the Interstate Horseracing Act to make clear that the Act authorized the interstate placement of pari-mutuel wagers on horse races when such wagers are lawful in each state involved.⁶⁹ The legislative history surrounding this amendment includes a statement by Representative Wolf, who, in objecting to the amendment, noted that it conflicted with DOJ's view of existing law:

[T]his conference report contains a provision that deeply troubles me. I want Members of 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 [the] legality of placing wage[r]s over the telephone or other electronic media like the Internet.⁷⁰

Notably, Representative Wolf referenced illegality under the Interstate Horseracing Act, not the Wire Act.

When President Clinton signed the bill amending the Interstate Horseracing Act, he issued a statement representing the DOJ's view that the Act, as amended, did not codify the legality of pool wagering:

Id.

68. Robert Penchina, *What Does DOJ Have Against the Interstate Horseracing Act?*, 10 GAMING L. REV. 446, 448 (2006).

69. District of Columbia Appropriations Act of 2000, Pub. L. No. 106-553, § 629, 114 Stat. 2762, 2762A-108 (codified at 15 U.S.C. § 3002(3)).

70. 146 CONG. REC. H11230, 11232 (daily ed. Oct. 26, 2000) (statement of Rep. Wolf).

[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.⁷¹

President Clinton referenced the Wire Act, along with the Travel Act⁷² and Illegal Business Gambling Act,⁷³ but his statement did not confirm that the DOJ actually viewed the Wire Act to prohibit pari-mutuel wagering involving interstate wires when the conductor does not have a stake in the bet or wager, whether or not horseracing is involved. Nonetheless, this aspect of the Interstate Horseracing Act’s history is significant and bears consideration.

The Internet Act expressly provides that it was “not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes.”⁷⁴ That language acknowledges the potential existence of disagreements regarding the scope of the Interstate Horseracing Act and other federal statutes, such as the Wire Act, and shows that Congress did not intend to address any such conflict when it again criminalized certain actions by those engaged in “the business of betting or wagering.”⁷⁵

3. *Professional and Amateur Sports Protection Act*

The Professional and Amateur Sports Protection Act of 1992 (Sports Act) generally prohibits gambling in the United States on amateur and professional sports events and contests.⁷⁶ The Sports Act includes several notable exceptions, two of which exclude “parimutuel animal racing or jai-

71. Statement by President William J. Clinton upon Signing H.R. 4942, Pub. L. No. 106-553, 5 U.S.C.C.A.N. (2762 Stat.) 2457–58 (Dec. 21, 2000).

72. 18 U.S.C. § 1952 (2006).

73. *Id.* § 1955.

74. 31 U.S.C. § 5362(10)(D)(iii) (2006).

75. *Id.* § 5362(1)(D).

76. 28 U.S.C. §§ 3701–3704 (2000).

alai games” from the Act’s prohibitions.⁷⁷ These exceptions support the view that the Wire Act and Internet Act prohibitions do not broadly encompass pari-mutuel wagering on animal racing. Nothing in the Sports Act suggests that it is excepting conduct made unlawful by the Wire Act.

4. *Income Tax Exclusion*

In October 2004, Congress created an exclusion to the federal income tax laws for “[g]ross income derived by a nonresident alien individual from a legal wagering transaction initiated outside the United States in a parimutuel pool with respect to a live horse race or dog race in the United States.”⁷⁸

From a practical standpoint, a wagering transaction initiated outside the United States and placed into a pari-mutuel pool on a live horse race or dog race operated in the United States necessarily requires a telephonic or electronic communication. If “the business of betting or wagering” under the Wire Act applies to pari-mutuel wagering pools in which the person conducting the pool does not bet or wager, then the income tax exclusion’s reference to a *legal* pari-mutuel wagering transaction involving dog races refers to a transaction that cannot exist under federal law.⁷⁹ The exclusion is entirely logical, however, if persons engaged in “the business of betting or wagering” do not include persons conducting pari-mutuel pools for dog races who have no stake in the outcome of the races.⁸⁰ This lends further support to a narrow construction of the phrase “the business of betting or wagering” as it is used in the Wire and Internet Acts.

D. *Case Law*

There are over 190 reported federal decisions that mention the Wire Act.⁸¹ Yet, no case construing the Wire Act squarely addresses whether “the business of betting or wagering” should be narrowly construed to require the business to bet or wager and thereby have a stake in the outcome of the event at issue. Indeed, with one exception discussed below, the case law suggests that no one has been prosecuted under circumstances

77. *See id.* §§ 3704(a)(2)(b), 3704(a)(4).

78. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 419(a), 118 Stat. 1418, 1513 (codified at 26 U.S.C. § 872(b)(5) (2006)).

79. *See* 31 U.S.C. § 5362(1)(D).

80. *Id.*

81. This result is based upon the following Westlaw search parameters: (“18 U.S.C.” w/1 1084).

in which this issue might have been raised.⁸² Furthermore, every reported decision upholding a Wire Act conviction involves bookmakers, professional gamblers, criminal organizations, or individuals associated with such persons.

Notwithstanding the absence of authority directly on point, numerous federal decisions involving the Wire Act lend support to the notion that—consistent with the discussion above—the Wire Act, and thus the Internet Act, should be narrowly construed to target the business that bets or wagers and thereby has a stake in the outcome of the event at issue. For instance, in *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, the court explained that Congress adopted the Wire Act to deal principally with professional gambling activities and that “bookmaking” was the particular activity Congress intended the Act to curtail.⁸³ Similarly, in *United States v. Ross*, the court explained that the Wire Act’s prohibition on the transmission of bets or wagers “applies to *bookmakers* who ‘hold [themselves] out as being willing to make bets or wagers over interstate telephone facilities, and [do] in fact accept offers of bets or wagers over the telephone.’”⁸⁴

In *United States v. Baborian*, the court explained that the difficulty in determining when a defendant is involved in “the business of betting or wagering” is due to a lack of guidance in the Wire Act.⁸⁵ After reviewing the Act’s legislative history, the court held:

[T]he business of gambling is a *bookmaking operation entailing the acceptance of bets and laying off of bets*. I conclude, after considering all of the foregoing legislative history, that *Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets*, and not mere betting.⁸⁶

Other courts have made similar observations.⁸⁷

82. See *infra* notes 98–100 and accompanying text.

83. *Tel. News Sys., Inc. v. Ill. Bell Tel. Co.*, 220 F. Supp. 621, 627, 630 (N.D. Ill. 1963).

84. *United States v. Ross*, No. 98CR. 1174-1(KMV), 1999 WL 782749, at *5 (S.D.N.Y. Sept. 16, 1999) (quoting *Sagansky v. United States*, 358 F.2d 195, 200 (1st Cir. 1966)) (emphasis added).

85. *United States v. Baborian*, 528 F. Supp. 324, 327–28 (D.R.I. 1981).

86. *Id.* at 328 (emphasis added).

87. See, e.g., *United States v. Sutera*, 933 F.2d 641, 645–46 (8th Cir. 1991) (finding that “engaged in the business of betting or wagering” means running a gambling business); *United States v. Sellers*, 483 F.2d 37, 45 (5th Cir. 1973) (holding

In *United States v. Scavo*, the defendant provided a bookmaker with odds and point spread information on sporting events.⁸⁸ The court found that the defendant played an important role in the bookmaker's operation and was, therefore, "engaged in the business of betting or wagering."⁸⁹ In *United States v. Miller*, a bookmaker's sources of information (i.e., information providers) and assistance (i.e., "sub-bookies") were also found to be subject to prosecution under the Wire Act.⁹⁰ In that case, a bookmaker routinely telephoned a source in Las Vegas to obtain the point spread on various sporting events and passed this information on to "sub-bookies," including the defendant.⁹¹ The defendant then passed the point spread information to bettors, gathered the resulting wagers, and telephoned the wagers back to the bookmaker.⁹² The Eleventh Circuit upheld the defendant's conviction under the Wire Act.⁹³

In some instances, an individual's betting activities might be so extensive that he is determined to be a professional gambler and, thus, to have turned his gambling into a business, as occurred in *Truchinski v. United States*.⁹⁴ In *Truchinski*, the defendant periodically contacted a long-time acquaintance to inform him of odds on sporting events.⁹⁵ The defendant obtained the acquaintance's wagers, shopped the bets with bookmakers, and kept a running account with the acquaintance that was periodically squared.⁹⁶ In total, the acquaintance placed fifty to seventy bets with the defendant.⁹⁷ Based on this activity, the court held that the defendant was engaged in "the business of betting or wagering."⁹⁸

that the Wire Act "deals with bookmakers—persons "engaged in business of betting or wagering"" (quoting *United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir. 1972), *receded from on other grounds*, *United States v. McKeever*, 905 F.2d 829 (5th Cir. 1990)); *United States v. Marder*, 474 F.2d 1192, 1194 (5th Cir. 1973) (holding that the government has the burden of proving that the defendant is "in the business of gambling or in common parlance, [is] a 'bookie'").

88. *United States v. Scavo*, 593 F.3d 837, 842 (8th Cir. 1979).

89. *Id.*

90. *United States v. Miller*, 22 F.3d 1075, 1077–79 (11th Cir. 1994).

91. *Id.* at 1077.

92. *Id.*

93. *Id.* at 1079.

94. *Truchinski v. United States*, 393 F.2d 627, 630–31 (8th Cir. 1968).

95. *Id.* at 628–29.

96. *Id.* at 629.

97. *Id.* at 628.

98. *Id.* at 630.

Cases holding that persons were not engaged in “the business of betting or wagering” are also instructive. In *Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass’n*, a horse track brought a civil claim against a company that accepted off-track wagers, including wagers for races at the plaintiff’s track.⁹⁹ The plaintiff contended that the defendant’s conduct was actionable under federal racketeering laws because it allegedly violated the Wire Act, but the defendant apparently did not argue that it was not in “the business of betting or wagering” for purposes of the Wire Act.¹⁰⁰ Nonetheless, the First Circuit examined the Wire Act’s legislative history and concluded that Congress intended to “allow[] off-track betting in venues where states chose to legalize such activity (thereby reserving to individual states some measure of control over what forms of gambling could occur within their borders).”¹⁰¹ Thus, the court accordingly held that the plaintiff failed to allege a Wire Act violation.¹⁰²

In *United States v. Donaway* the defendant was convicted of violating § 1084(a) in connection with bets he placed at a state-licensed and state-regulated pari-mutuel facility.¹⁰³ The government argued that the defendant was in “the business of betting or wagering” because, for three years, he obtained substantial portions of his income from such lawful pari-mutuel bets.¹⁰⁴ Reversing the conviction, the court observed that the defendant’s pari-mutuel betting was a lawful activity sanctioned by state law and held that the defendant was not the professional gambler targeted by the Wire Act.¹⁰⁵

The defendant in *United States v. Alpirn* was charged with violating the Wire Act by engaging in activities as a “turf advisor” and using the telephone to provide clients with predictions on horse races.¹⁰⁶ In considering whether the defendant’s activities of selling such information constituted “the business of betting or wagering,” the court noted that Congress intended the Wire Act to assist states in enforcing their laws

99. *Sterling Suffolk Racecourse Ltd. P’ship v. Burrillville Racing Ass’n*, 989 F.2d 1266, 1267–68 (1st Cir. 1993).

100. *Id.* at 1268.

101. *Id.* at 1272–73 (citing H.R. REP. NO. 87-967, at 2–3 (1961), as reprinted in 1961 U.S.C.C.A.N. 2631, 2632–33).

102. *Id.* at 1273.

103. *United States v. Donaway*, 447 F.2d 940, 941–42 (9th Cir. 1971).

104. *Id.* at 944.

105. *Id.*

106. *United States v. Alpirn*, 307 F. Supp. 452, 453 (S.D.N.Y. 1969).

against bookmaking activities.¹⁰⁷ The court concluded that the defendant was not engaged in “the business of betting or wagering.”¹⁰⁸

Finally, one reported decision reflects a Wire Act prosecution against a person who operated a pari-mutuel wagering pool and, as such, apparently did not bet or wager. In *United States v. Bala*, the government charged Racing Services, Inc. (RSI) and its president and sole shareholder, Susan Bala, with Wire Act violations.¹⁰⁹ The prosecution’s theory, however, was not that accepting pari-mutuel bets is unlawful under the Wire Act, but that failing to comply with state law regarding how the proceeds of such bets are disbursed gave rise to an unlawful gambling business and Wire Act violations.¹¹⁰ The Eighth Circuit Court of Appeals disagreed with the theory that how a licensed pari-mutuel business disburses its proceeds could transform a lawful business into an unlawful one and reversed the Wire Act convictions.¹¹¹

The *Bala* court concluded its Wire Act discussion with some notable dicta. Comparing the scope of § 1084(a) with that of § 1084(b)—which permits interstate transmission of wagering information when the transmission is lawful in all affected states—the court stated:

There is an aspect of this issue unnoticed by the parties that could have serious implications for the future of interstate account wagering. The prohibition in § 1084(a) encompasses bets and wagers as well as information assisting bets and wagers, whereas the exception in § 1084(b) is limited to information assisting bets and wagers. Thus, the plain language suggests that Congress intended to prohibit *all* interstate wagering by wire, whether or not legal in the States between which the bets are transmitted. There is explicit support for this interpretation in the legislative history. . . . Here, the trial record suggests that North Dakota passed the 2001 account wagering statute in an attempt to attract interstate electronic betting. If the reach of § 1084 is as broad as its legislative history suggests, the attempt if

107. *Id.* at 455.

108. *Id.* at 455–56.

109. *United States v. Bala*, 489 F.3d 334, 337 (8th Cir. 2007).

110. *See id.* at 338 (noting the government’s position that RSI’s activities did not fall within the limited exception to the broad prohibition on gambling because RSI did not disburse its net proceeds to one of the enumerated organizations).

111. *Id.* at 341–42.

successful will violate federal law. We leave that issue to another day.¹¹²

The *Bala* court's dicta was not informed by the arguments of any party, and the court did not consider the distinction between businesses that bet or wager—such as the classic bookmaker—and businesses that do not bet or wager (e.g., operators of pari-mutuel wagering pools).

Ultimately, the case law never directly addresses the issue of whether the phrase “the business of betting or wagering” requires the business itself to bet or wager. Nonetheless, the case law is consistent with the view that the Wire Act's target was the bookmaker who bets or wagers and therefore has a stake or risk in the outcome of the event at issue. In *Bala*, the single case in which the government prosecuted a person operating a pari-mutuel pool, the government's theory was predicated on the notion that failing to comply with state law regulating a lawful gambling business gave rise to an unlawful gambling business.¹¹³ The court never addressed whether the operator of a pari-mutuel wagering pool could be deemed to be in the “business of betting or wagering.”

V. CONCLUSION

The foregoing examination demonstrates substantial support for construing “the business of betting or wagering” under the Wire and Internet Acts to include only situations in which the individual's business bets or wagers—giving the business a stake or risk in the outcome of the event at issue. The plain language of the statutes supports this interpretation. The Wire Act's legislative history also confirms that, through the language at issue, Congress targeted only the bookmaker who bets or wagers. Furthermore, statutes read *in pari materia* with the Wire and Internet Acts demonstrate that Congress is aware of the distinction between businesses that bet or wager and businesses that conduct pari-mutuel wagering pools or lotteries, and that Congress's reference to the former is distinct from its reference to the latter.

Construing “the business of betting and wagering” to refer to businesses that bet or wager also harmonizes several key aspects of federal gaming law. As suggested by President Clinton's comments surrounding the 2000 amendment to the Interstate Horseracing Act, a significant conflict exists between that Act and both the Wire and Internet Acts if “the

112. *Id.* at 342.

113. *See id.* at 338.

business of betting and wagering” is not limited to businesses that bet or wager. Similar conflicts would exist with the Sports Act and the aforementioned income tax exclusion. Also, a distinction Congress clearly drew in the Tax on Wagers statutes would be completely ignored in similar language found in the Wire and Internet Acts. Fundamental principles of statutory construction require that such conflicts be avoided and that a reasonable, unifying interpretation of the gambling laws be followed. Ultimately, should the matter remain in doubt, the rule of lenity should be invoked and the statutory language should be construed to hold that a person engages in the business of betting or wagering only when the person engages in a business that itself bets or wagers.

The recommended interpretation is also consistent with the pari-mutuel business environment that has developed in the past decades notwithstanding the prohibitions of the Wire Act and, now, the Internet Act. States routinely license pari-mutuel wagering activities involving dog racing, horse racing, jai-alai, and other events, including pari-mutuel account wagering hubs that facilitate the placement of bets and wagers into pari-mutuel pools through the use of interstate telephonic and electronic communications. These are now billion-dollar, yet heavily regulated, industries. An interpretation of the Wire and Internet Acts that would threaten the lawfulness of their existence, as suggested by the gratuitous dicta in *Bala*, should be followed only if that result is plainly required by the rules of statutory construction. The preceding analysis demonstrates that such a result is not plainly required.

In sum, the Wire Act and Internet Act both prohibit certain activities by persons engaged in “the business of betting or wagering.” While neither Act defines that term, both Acts should be construed to require that, for a person to engage in such a business, the business itself must bet or wager and thereby have a stake or risk in the outcome of the event at issue to fall under the Acts’ prohibitions.