

Written Testimony of Jon C. Bruning

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before the

Crime, Terrorism, and Homeland Security and Investigations Subcommittee

of the

House Judiciary Committee

“Post-PASPA: An Examination of Sports Betting in America”

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2141 Rayburn Office Building

Chairman Goodlatte, Chairman Sensenbrenner, Ranking Member Nadler, Ranking Member Jackson Lee, and distinguished members of this Subcommittee. Thank you for holding this hearing and for having me here today. My name is Jon Bruning. I am the managing partner of Bruning Law Group and previously served as the Attorney General of Nebraska for 12 years. I am here to bring a law enforcement perspective to the sports betting discussion.

Allow me to make three points:

- (1) The striking down of PASPA by the Supreme Court will spur a “wild west” for sports betting, creating opportunities for criminal organizations and the potential for exploitation of society’s most vulnerable.
- (2) Because of the federal interests involved, Congress will need to enact legislation in response to the Court’s decision, and that effort is bound to take years – not months.
- (3) The federal Wire Act needs to be restored, and it, and other federal gambling laws, need to be fully enforced to prevent unlicensed and illegal online gambling sites and bookies from taking advantage of the spread of legalized sports betting across the nation.

Before going into law enforcement’s concerns with legalizing online sports betting, I think it’s helpful for the Subcommittee to understand the economics of sports betting. States that believe they can solve their budgetary problems by licensing and taxing sports books are going to find there is no pot of gold at the end of the rainbow. And, by taxing licensed sports books, they will drive sports betting to illegal sites and bookies – who do not pay taxes, have compliance costs, or report winnings to the IRS.

Sportsbooks are low-margin ventures. One casino company determined that of every \$100 bet in a sports book, the casino keeps only \$1.40 – and that is *before* the casino pays any state taxes or potential integrity fee. Last year, Nevada sportsbooks returned just .02% of the total casino wins from slot machines and table games. Of the nearly \$800 million in gambling taxes collected by Nevada, sports betting tax revenues generated a mere \$18.5 million in taxes.

The problem is that licensed sports books face more efficient competitors – illegal black market competitors. Even though broad sports betting was effectively legal only in Nevada before the Supreme Court tossed PASPA, over 90% of U.S. sports betting takes place outside of Nevada. Most is wagered through offshore sportsbooks located in the Caribbean and Central America. These offshore sites do not require gambler verification, pay taxes, or report large winnings to the IRS.

Likewise, local bookies stand to benefit. They do not report winnings to the Internal Revenue Service (IRS) or pay taxes or integrity fees. They offer credit, are conveniently located, and keep no banking records. And, they can use online tools such as bookiemarket.com to run their sportsbooks.

Bloomberg Businessweek reported earlier this year:¹

¹ Boudway, Ira; Novy-Williams, Eben. *The British Bookmaker Betting Big on American Sports Gambling*. Apr. 12, 2018, available at <https://www.bloomberg.com/news/features/2018-04-12/the-british-bookmaker-betting-big-on-american-sports-gambling>

Over the past decade, a cottage industry known as “pay-per-head” has sprung up on the internet, making it easy for small-time bookies to offer state-of-the-art online betting. Pay-per-head shops sell software to bookies so customers can bet via an app. . . [the] software lets bookies offer up-to-the-minute odds, a customer service call center, instant accounting, and, most important, ‘in-play’ betting.

A source quoted in the article estimated that “35 percent of illegal bets in the U.S. are made on these services.”

This Subcommittee will find through this hearing that there are differing opinions within the gaming industry. This reflects the fact that the industry is now broad, with all but two states permitting some form of legalized gambling, and foreign gaming companies specializing in online casinos have entered our market. But, I believe you will find widespread agreement on the need to take enforcement actions against illegal operators.

For example, there are those who suggest legalizing sports betting will bring this activity out of the shadows and into the open. But, it will have precisely the opposite effect. As advertising and promotions for licensed sports books splash across television, radio and the Internet, the total amount bet on sports will grow in response, with criminal operators taking their share – if not more – thanks to their ability to attract gamblers with bigger bonuses, better odds, and more “free play.”

The federal role in gambling was settled long ago – in 1961, when Congress enacted a package of criminal laws, including the Wire Act, to combat rampant organized crime in gambling. It is no different today. Only the technology has changed. Criminals will use the expansion of sports betting – especially online betting – in the wake of the Supreme Court’s decision to fund themselves, launder money, and exploit our most vulnerable citizens.

The FBI has warned Congress that “online casinos are vulnerable to a wide array of criminal schemes,” which may be used to “exchange money to launder criminal proceeds,” and could be exploited by organized crime to “generate revenue, steal personally identifiable information, and engage in public corruption.” Similarly, the Department of Justice (DOJ) has testified before this Committee that: “Internet gambling carries a potential for fraud and money laundering and the involvement of organized crime in online gambling.”

States with legalized sports betting simply do not have the resources to prevent their residents from migrating to these illegal offshore sportsbooks and local bookies where the odds are better, bonuses larger, and there’s no worry about reporting winnings to the IRS. Indeed, there is some doubt as to whether even the Federal Bureau of Investigation (FBI) and federal authorities have the resources to police a legalized online gambling industry.

States will be busy enough ensuring compliance with their licensed online gambling operators. While the states say they can handle regulating an industry without federal assistance, the fact is it’s a lot harder than it seems.

Just ask the state Attorneys General (AGs) enforcing marijuana laws. Relying on the promises of significant tax revenues, some states have rushed to legalize marijuana, thinking they can handle regulation without federal assistance.

But this summer, my good friends in Colorado and Oregon, shared with their colleagues the significant challenges they are facing in regulating an industry with no federal oversight. For example, there is no Food and Drug Administration (FDA) review of the safety of marijuana edibles. So the levels of THC and other safety and nutritional issues related to these products go largely unchecked.

In addition, without the Environmental Protection Agency (EPA) testing and approval of pesticide use for marijuana, Oregon had to run its own analysis and create its own list of approved pesticides. And the banking challenges faced by an industry still illegal under federal law has the states now asking for Congress to intervene.

At the same time, tax revenues from marijuana are falling far short of projections. In California, revenues for the first quarter of 2018 are a third less than projected. That's because it's hard to regulate an industry that already has a strong black market presence. Why would consumers pay more for the same product when it is easier to get it on the black market and there is minimal risk of prosecution?

And let's not forget the rights of states in which marijuana is illegal. Since marijuana was legalized in Colorado, Nebraska law enforcement has been overwhelmed with the amount of illegal marijuana flooding into the state.

In the border town of Sidney, Nebraska, the Police Chief has indicated that 5 out of every 10 traffic stops results in a marijuana arrest. Another sheriff said the county is getting so many felony drug cases involving Colorado marijuana that it's draining the county's resources to jail those arrested and to pay for criminal defense attorneys.

As Attorney General, I filed an original action against Colorado in the United States Supreme Court asking the Court to declare Colorado's marijuana laws violated the U.S. Constitution. But the Supreme Court refused to take our case. And to this day, Nebraskans continue to suffer from Colorado's legalization of marijuana with no legal recourse.

This same harm will come to Nebraska when states legalize online sports betting. Nebraska will be compelled to rely on the good graces, and regulatory capabilities, of those states that have legalized online sports betting – and trust the online casinos, including those located overseas. And when this good grace falls short, Nebraska law enforcement won't be stopping cars with illegal drugs along the interstate. They will be chasing foreign online companies with no physical presence in Nebraska.

States like Nebraska, and others where online gambling is not legal, have neither the resources nor the authority to protect their kids from nefarious illegal online gambling operations offering tempting games on their cell phones. Thus states legalizing online gambling without preventing the online gambling from being offered in Nebraska are violating our 10th Amendment right to control gambling within our borders.

The difficulty a State not wanting online casinos will face was recognized as far back as 2007 when Chairman Goodlatte correctly observed:

With the development of the Internet, however, state prohibitions and regulations governing gambling have become increasingly hard to enforce as electronic communications move freely across borders. Many gambling operations are beginning to take advantage of the ease with which communications can cross state lines in order to

elicit illegal bets and wagers from individuals in jurisdictions that prohibit those activities.

If anything, technological advances, and the ease of access to the Internet by children, makes the challenges imposed on states where Internet gambling is illegal even greater today.

Which is why Congress needs to implement federal enforcement guardrails, which work in conjunction with the states, to protect our most vulnerable citizens and assist those states wishing to earn revenue from legal online sportsbooks and gambling.

Without proper federal investigatory and prosecutorial resources, illegal online casinos – including those operated by organized crime – have every profit incentive to take advantage of consumers. And when it comes to illegal offshore sites, states simply do not have the legal authority or the resources to protect our citizens, including children and problem gamblers from these criminal ventures.

In order to understand what types of federal guardrails should be implemented, it's helpful to understand the current status of the law.

Since 1961, the Wire Act has prohibited *all* gambling involving interstate telecommunications, including online gambling. The Wire Act was enacted to fight organized crime by cutting off its funding sources from illegal gambling. In those days, people of means bet on horses, and to a lesser extent, sports. And those who could not afford a \$2 bet, gambled on lotteries run by the mob using the wires.

From the day President John F. Kennedy signed the Wire Act in 1961, and for 50 years thereafter, the DOJ consistently interpreted the Wire Act to cover all forms of gambling – whether it be on sports, horses, casino games or lotteries.²

In 2006, Congress enacted the Unlawful Internet Gambling Enforcement Act or (UIGEA) to give law enforcement additional tools to shut down online poker and other forms of Internet gambling.³ UIGEA prohibits any gambling business from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet. A review of the law and its legislative history reveal that Congress clearly intended for all online gambling to be unlawful under UIGEA.

But two days before Christmas in 2011, the DOJ's Office of Legal Counsel (OLC) quietly released an opinion claiming the Wire Act applies to sports betting only, and *not* to other types of online gambling.⁴

² 18 U.S.C. § 1084.

³ 31 U.S.C § 5361-5366.

⁴ See generally Virginia A. Seitz, Memorandum Opinion For the Assistant Attorney General, Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act (Sept. 20, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>.

Instead of debates and decisions in Congress, DOJ's opinion dismissed the rule of law and allowed the arbitrary decisions of individual government officials to stop enforcing a law in the manner it had been enforced for five decades.

What's worse, in developing the opinion on the Wire Act, the DOJ official simply got it wrong. The author of the opinion used tortured logic and selective passages of the legislative history of the Wire Act to limit the Wire Act's application to sports betting, despite DOJ's previous conclusion that it applied to all forms of gambling.

For example, to support its claim that the Wire Act does not cover any sort of gambling other than sports bets, the DOJ quoted testimony from 1961 in which a Justice Department official testified that "[this] bill, of course, would not cover [the numbers racket (lotteries)] because it is limited to sporting events or contests." What DOJ neglected to mention, is that the legislation about which its official testified in 1961 never became law. The passage to which the official was referring was redrafted *after* the hearing, and was done so to make sure the law was not limited to sports bets.

Also, if the goal of the Wire Act was to cut off gambling revenues to organized crime, it makes no sense why Congress would have exempted the "numbers" racket. The mob made on average 40% of the money bet on their lotteries, but only a small portion from each of the sports bets it received. It was clear from testimony before Congress that the mob used the wires to communicate the winning numbers to its bookies, and to lay off wagers across state lines.

It is also worth noting that the DOJ Wire Act opinion did not make online casinos legal. OLC opinions are guidance given to federal agencies as to how to enforce laws. They can be withdrawn or revisited at any time (as others have been in the past). And, they do not shield those companies that rely on them from liability or protect online casinos from private claims.

Interviewed by *Newsweek* in 2014, the Opinion's author, Virginia Seitz, conceded the document upon which online casinos are relying is "just that—an opinion. When asked during her nomination proceedings about the DOJ unleashing online gambling, former Attorney General Loretta Lynch explained she was not aware of "any statute or regulation that gives OLC opinions the force of law."⁵

Despite the questionable legal status of online gambling, Delaware, Nevada, New Jersey, and Pennsylvania have already legalized online casino gambling. Five more states, including Georgia, Illinois, Kentucky, Michigan, and New Hampshire, permit Internet gambling through their state lotteries. And with the United States Supreme Court tossing the federal sports betting ban in *Murphy v. NCAA*, additional states have started to look at legalizing online gambling and sports betting. But states looking to authorize online casinos and sports betting do so at some peril.

Even though the Supreme Court tossed the federal sports betting ban, *online* sports betting is still illegal. The Wire Act applies to all forms of gambling and even under DOJ's current interpretation, the Wire Act applies to sports betting. This means sportsbooks wanting to hedge their risk by establishing a national pool, creating interstate compacts, or laying off bets across state lines – all would do so in violation of the Wire Act.

⁵ Goodman, Leah McGrath. *How Washington Opened the Floodgates to Online Poker, Dealing Parents a Bad Hand*, Newsweek, August 14, 2014, available at <http://www.newsweek.com/2014/08/22/how-washington-opened-floodgates-online-poker-dealing-parents-bad-hand-264459.html>.

It has been suggested that licensed casinos may be able to layoff bets across state line pursuant to subsection (b) of the Act which states:

Nothing in this section shall be construed to prevent . . . 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 that sporting event or contest is legal into a State or foreign country in which such betting is legal.

This, however, is a misinterpretation of the law. Allow me to quote from the Committee Report accompanying the Wire Act in the House in referring to this subsection (b) exemption: “Nothing in the exemption, however, will permit the transmission of bets and wagers or money by wire as a result of a bet or wager from or to any State whether betting is legal in that State or not.” (*See* House Report No 87-967, Aug. 17, 1961).

As an aside, this same Committee Report also undermines the conclusion reached by the OLC regarding the reach of the Wire Act by noting that the first clause of prohibitions set forth in subsection (a) is related to sports wagering while saying nothing about the prohibitions in the second clause being similarly limited to just sports betting

The refusal of the Justice Department to enforce the Wire Act has left the states to protect our most vulnerable citizenry from the perils of online gambling. Not surprisingly, since 2011 online gambling has substantially expanded. Some of this gambling has occurred under the guise of state laws permitting online gambling but much more is occurring illegally thanks to the enforcement vacuum left by the federal government and the lack of resources available to state and local authorities. Left unchecked, illegal online gambling will continue to expand and enforcement will prove increasingly difficult as more states consider legalizing Internet gambling.

Technologically, online gambling activities are extremely difficult to monitor because users can remain largely anonymous. Any smartphone, tablet, or laptop can be a vehicle for online gambling and it is virtually impossible to pinpoint players joining from isolated networks, like those typically found in a home or office. An inability to regulate this online environment creates opportunities for operators to defraud players and launder money for nefarious purposes.

The foreign companies running online gaming operations in these states fully understand the difficulty of prosecuting illegal online gambling. Without exposure to a federal investigation, there is little incentive for these companies to invest in proper safeguards to prevent gambling by citizens in states where online gambling is prohibited. In fact, there is a distinct *disincentive* given that illegal gambling by out-of-state citizens lines the coffers of the foreign company.

Anyone doubtful of the nefarious nature of online gambling companies need only look to Great Britain, where online gambling is fully legal. There, the focus is on dialing back Internet gambling because they have seen the impact predatory online casinos have had on their most vulnerable.

A recent UK study found over a quarter million kids are placing bets with licensed operators.⁶ Thousands of those kids—some as young as 11 – are already seen as problem gamblers. And another report found that over half of online casino revenue comes from individuals with a gambling addiction.

The BBC tells us that online gambling links dot the landscape of soccer fan pages aimed at youth in the UK.⁷ It's not surprising then to learn that two out of three teens say they're bombarded by online gambling advertisements. In one instance, one 13 year old boy took his father's credit card after seeing online gambling ads while watching his favorite soccer team, and lost over \$140,000 dollars in a matter of days.

American online casinos are also targeting kids and problem gamblers with their advertising. A Business Insider report revealed online casinos are advertising on children's websites and offering cash incentives to problem gamblers searching for help to overcome their addiction. Mr. Chairman, we even caught online casinos advertising to young Packer fans searching for details about local NFL Play60 programs for kids.

Further complicating the situation is the fact that the primary online gambling companies licensed in the states where online gambling is legal are massive foreign companies. In states like Nebraska, where online gambling is prohibited, a state AG would have no means to effectively prosecute companies if the sites allowed access by Nebraskans. Even in states where online gambling is legal and there are resources dedicated to gambling enforcement, a foreign online gambling company could have its license revoked, but the state AG would have limited mechanisms to prosecute state law violations.

Back when the federal government was enforcing its gambling laws, even its ability to hold illegal foreign operations accountable was limited. On April 15, 2011, a day referred to by online gambling companies as "Black Friday" and shortly before the reinterpretation of the Wire Act, DOJ charged the founders of PokerStars (the largest online poker cardroom in the world) with bank fraud, money laundering, and illegal gambling offenses.

Despite the best efforts of the federal government, senior officials of Poker Stars *to this day* continue to avoid extradition. Meanwhile the family of one of its indicted founders received more than three billion dollars when the company, and its illegally-obtained assets, were transferred to a Canadian company pursuant to a scheme to get it licensed to take online wagers in New Jersey.

Where federal gambling enforcement has been successful, these investigations require extensive resources that are simply not available at the state level. In 2014 and 2015, four federal trials were held in Oklahoma City. The FBI and DOJ prosecuted 23 individuals and two companies for their involvement in an illegal online gambling operation called Legendz Sports. Legendz Sports was an international criminal operation that ran online and telephone gambling services based out of Panama City, Panama beginning in 2003. Over more than a decade, Legendz Sports took more than \$1 billion in illegal wagers, mostly from gamblers in the United States. The proceeds were then funneled from

⁶ Davies, Rob. *25,000 children in Britain are problem gamblers, report finds*. Dec. 12, 2017, available at <https://www.theguardian.com/society/2017/dec/12/children-britain-problem-gamblers-report>.

⁷ Robinson, Ben. *Betting links found on football clubs' junior fan pages*. Sept. 7, 2018, available at <https://www.bbc.com/news/uk-45423065>.

the U.S. to Panama. Convictions or pleas were reached for racketeering, conspiracy, operation of an illegal gambling business, and money laundering.

As Attorney General, my office would have faced significant challenges in effectively prosecuting illegal foreign online gambling companies. While I was in office, the Prosecution Section of the Nebraska Attorney General's Criminal Bureau consisted of 15 attorneys and investigators and three administrative assistants. They handled the most serious criminal cases in the state including homicide, sexual assault, drug trafficking, crimes against children, and domestic violence. The Prosecution Section also provided direct assistance to county attorneys throughout the state. Given this limited staff, it was very difficult for us to expend resources on white-collar crimes, like tax evasion, even when the offending company was located within the state.

When it came to civil enforcement, there was one instance when our office went through the Hague Convention to serve a company that failed to pay cigarette taxes. We got a default judgment against the company for their non-payment of taxes, but we were never able to collect on that judgment because of lack of legal authority to do so. Further, foreign companies subject to such a judgment have proven they will simply sell their website to another foreign company. That leaves the state to collect a judgment against a company with no assets.

States which have legalized gambling have similar issues. Earlier this month, the City of Lansing, Michigan passed a local ordinance prohibiting illegal gambling. The City concluded it needed to pass its own ordinance because the state had *only* two investigators dedicated to investigating illegal gambling.

There is also concern that the state standards for online gambling and sports betting are insufficient to protect consumers and the integrity of the game. In Pennsylvania, the age verification on an online gambling site consists of a click of the button confirming you are eighteen years of age.

Senator Orrin Hatch (R-UT) recently informed the Senate of how in West Virginia, regulations implementing sports betting do not prohibit players or coaches from betting on sporting events. Instead the regulations leave it to the sports betting operator to determine who can place bets. Recognizing the need to compete with illegal off-shore sports betting sites, the licensed online sports betting operators will have no motivation to limit who can bet on sporting events. This lack of regulation and oversight will serve to harm those most vulnerable, including youth tempted to bet on their own performance, whose wagers will frustrate the integrity of the game.

Which is why there needs to be some federal guardrails regulating online gambling. Our system of government reserves *intrastate* matters, including the regulation of gambling at brick-and-mortar facilities and intrastate lotteries, for the states. But, Internet gambling is inherently *interstate* in nature. States are ill-equipped to enforce gambling laws against interstate and international companies, particularly given the technological vulnerabilities of the Internet and age and location verification mechanisms that are subject to compromise.

Only through vigorous enforcement of the Wire Act will states be able to protect and earn revenue from legal online sportsbooks and gambling. But that can only occur if the Wire Act is fully restored and the law is aggressively enforced by DOJ. Without proper federal investigatory and prosecutorial resources, our citizens, including children and problem gamblers, will be protected only by the promises of foreign gaming corporations.