U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

September 4, 2019

Walker Davis
CREW
455 Massachusetts Avenue, NW
Washington, DC 20001
wdavis@citizensforethics.org

Re: DOJ-2017-005057 (AG)
DRH:ERH

Dear Walker Davis:

This responds to your Freedom of Information Act (FOIA) request dated and received in this Office on June 30, 2017, in which you requested (1) correspondence with Charles Cooper concerning certain named organizations and (2) correspondence concerning any recusal of Attorney General Jeff Sessions related to those organizations.

Please be advised that a search has been conducted in the Office of the Attorney General, as well as of the electronic database of the Departmental Executive Secretariat, which is the official records repository for the Office of the Attorney General, and twenty-six pages were located that are responsive to your request. I have determined that this material is appropriate for release without excision and copies are enclosed.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552 (2012 & Supp. V 2017). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaison, Valeree Villanueva, for any further assistance and to discuss any aspect of your request at: Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001; telephone at 202-514-3642.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of

Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal at https://foiaonline.gov/foiaonline/action/public/home. Your appeal must be postmarked or electronically submitted within ninety days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Douglas R. Hibbard
Chief, Initial Request Staff

Enclosures

Chuck Cooper

From:	Chuck Cooper
Sent:	Monday, May 22, 2017 5:16 PM
To:	Hunt, Jody (OAG)
Subject:	OLC opinion on internet gambling
Attachments:	2017-05-16 Letter to Sessions on Wire Act (3).pdf; Cooper and Kirk Wire Act memorandum.pdf

Jody,
Attached are (1) my firm's legal analysis rebutting the OLC opinion and (2) a letter from Senators Graham and Feinstein dated this past Friday asking for reconsideration of the OLC opinion. Below is a link to an interesting story on this.
Chuck

https://www.onlinepokerreport.com/23433/jeff-sessions-ag-hearing-online-gambling/

Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Ave., NW
Washington D.C., 20036
202-220-9660

United States Senate

WASHINGTON, DC 20510

May 16, 2017

The Honorable Jeff Sessions
Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Attorney General Sessions:

We are writing to inquire about the status of the September 20, 2011, Office of Legal Counsel opinion entitled "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." That opinion reversed longstanding Department precedent by interpreting the Wire Act to prohibit sports betting only, instead of prohibiting all forms of gambling online.

At your confirmation hearing, Senator Graham asked, and you responded:

> Senator Graham: About the Wire Act, what is your view of the Obama administration's interpretation of the Wire Act to allow online video poker, or poker gambling?
>
> Senator Sessions: Senator Graham, I was shocked at the memorandum, I guess the enforcement memorandum that the Department of Justice issued with regard to the Wire Act and criticized it. Apparently there is some justification or argument that can be made to support the Department of Justice's position, but I did oppose it when it happened and it seemed to me to be an unusual –
>
> Senator Graham: Would you revisit it?
>
> Senator Sessions: I would revisit it, or -- and I would make a decision about it based on careful study, rather than--and I have not reached--gone that far, to give you an opinion today.

It is our hope that your careful study of the opinion has exposed the flaws of the opinion, and that you will restore the Department's longstanding practice of enforcing the Wire Act against online gambling by revoking the opinion.

We look forward to your reply.

Sincerely,

Lindsey O. Graham
United States Senator

Dianne Feinstein
United States Senator

Cooper & Kirk
Lawyers
A Professional Limited Liability Company

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ATTORNEY-CLIENT PRIVILEGE
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MEMORANDUM

To: The Coalition To Stop Internet Gambling

From: David H. Thompson

Date: February 17, 2017

Re: The Scope of the Wire Act

The Wire Act criminalizes the knowing use of a "wire communication facility for the transmission in interstate or foreign commerce of bets or wagers" and other gambling-related transmissions. 18 U.S.C. § 1084(a). For 50 years after the law's enactment, the Department of Justice had "uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling."[1] In 2011, however, the Office of Legal Counsel (OLC) upended that longstanding position. With minimal textual analysis and extensive focus on the legislative history, OLC issued an opinion concluding that the Wire Act applies to only sports-related gambling.

This memorandum reexamines the Wire Act and concludes that the plain meaning of the statute clearly encompasses non-sports gambling. The Act sets forth a multi-part prohibition on interstate gambling transmissions, and only *one* part of that prohibition is confined to sports-related gambling. OLC reached a contrary conclusion by neglecting applicable rules of statutory construction and privileging its flawed reading of legislative history over the clear text.

BACKGROUND

The Wire Act bars the use of the interstate wires to transmit certain information, wagers, and funds for purposes of gambling. 18 U.S.C. § 1084(a) (codifying Pub. L. No. 87-216, § 2, 75

[1] Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division (July 12, 2010) ("Crim. Mem."), as quoted by Memorandum Opinion for the Assistant Attorney General, Criminal Division, from Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, 2011 WL 6848433 (Sept. 20, 2011) ("Seitz Mem.").

Stat. 491 (1961)). The Act was enacted in 1961, after a series of Congressional hearings and investigations revealed that organized crime syndicates had turned to gambling as their principal source of revenue after the repeal of Prohibition. A consensus developed throughout the 1950s that the federal government had an important role to play in preventing the use of interstate facilities, including telephone and telegraph wires, to enrich organized criminals. *Gambling & Organized Crime: Hearings Before the S. Comm. on Government Operations Permanent Subcomm. on Investigations*, 87th Cong. 2–3 (1961) (statement of Sen. John L. McClellan, Chairman). Accordingly, in 1961 Attorney General Robert F. Kennedy proposed a package of bills, including the Wire Act, designed to target organized crime syndicates at the federal level by cutting off their sources of illegal revenue. *Legislation Relating to Organized Crime: Hearings Before the H. Comm. on the Judiciary*, 87th Cong. 18–32 (1961) (statement of Robert F. Kennedy, Attorney General) ("House Judiciary Committee Hearing").

Subsection (a) of the Wire Act forbids anyone "engaged in the business of betting or wagering" from knowingly using the interstate wires

> 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

18 U.S.C. § 1084(a). Because only one of this section's several prohibitions is expressly limited to gambling "on any sporting event or contest," the Department of Justice long read the Act as applying more broadly to *any* type of gambling that utilizes interstate means of electronic communication. Indeed, from its enactment in 1961 until 2011, the Justice Department had "uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling." Seitz Mem. 2 (quoting Crim. Mem. 3).

There is little judicial precedent interpreting the scope of the Act, but the most persuasive authorities read the Act as applying to both sports gambling and non-sports gambling. In *United States v. Lombardo*, 639 F. Supp. 2d 1271 (D. Utah 2007), a federal district court concluded that the Act reached forms of online gambling unrelated to sporting contests. "The phrase 'sporting event or contest,' " the court noted, "modifies only the first of the[ ] three uses of a wire communication facility." *Id.* at 1281. "Giving effect to the presumably intentional exclusion of the 'sporting event or contest' qualifier from the second and third prohibited uses indicates that at least part of § 1084(a) applies to forms of gambling that are unrelated to sporting events." *Id.* Similarly, in *People ex rel. Vacco v. World Interactive Gaming Corp.*, a New York court concluded that the Wire Act prohibited "virtual slots, blackjack or roulette" and enjoined the conduct of a group of online gambling business on that basis. 714 N.Y.S.2d 844, 847, 861–62 (N.Y. Sup. Ct., N.Y. Cty. 1999); *see also* Report & Recommendation of U.S. Magistrate Judge Regarding Gary Kaplan's Motion to Dismiss Counts 7, *United States v. Kaplan*, No. 06-CR-337CEJ-2 (E.D. Mo. Mar. 20, 2008), ECF No. 606 ("[B]ased on the language of the statute, the legislative history, the logical interpretation of the statute and the available case law, the court finds that § 1084(a) is not limited to sports betting but includes other kinds of gambling as well."). *Lombardo* and *World Interactive* are consistent with a long history of criminal

convictions under the Wire Act predicated on non-sports gambling. *See, e.g.*, *United States v. Vinaithong*, No. 97-6328, 1999 WL 561531, at *1 (10th Cir. Apr. 9, 1999) (affirming sentence of defendants convicted under the Wire Act for transmission related to a "gambling enterprise which has been referred to as a 'mirror lottery' "); *United States v. Chase*, 372 F.2d 453, 457 (4th Cir. 1967) (upholding a conviction for conspiracy to violate the Wire Act where alleged gambling involved "writing bets on numbers"); *United States v. Manetti*, 323 F. Supp. 683, 687 (D. Del. 1971) (denying motion to dismiss criminal indictment which charged "a business enterprise involving gambling in the form of numbers writing, otherwise known as lottery policy writing" with conspiracy to violate the Wire Act).

In *In re MasterCard International, Inc.*, by contrast, a federal district court in Louisiana read the Wire Act to apply narrowly to sports-related gambling only. 132 F. Supp. 2d 468 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002).[2] But *MasterCard*'s reasoning on this point is sparse—and, as *Lombardo* convincingly demonstrates, does not withstand scrutiny. Although the court in *MasterCard* stated that it was relying primarily on "the plain language of the statute," *id.* at 480, it did not even discuss the "conspicuous" "absence of the 'sporting event or contest' qualifier in the second and third prohibitions" of subsection (a), *Lombardo*, 639 F. Supp. 2d at 1281. Further, while *MasterCard* seeks support from the "case law interpreting the statute," 132 F. Supp. 2d at 480, as *Lombardo* explains, none of the cases *MasterCard* cites "specifically address whether [the law] could be applied to communications related to non-sports betting," *Lombardo*, 639 F. Supp. 2d at 1280. And further still, while *MasterCard* also cites "the legislative history of the Act," its principal piece of legislative history evidence is a series of failed *post*-1961 attempts to expand the Wire Act's reach, 132 F. Supp. 2d at 480. It is well settled that this type of "post-enactment" legislative history is "a particularly dangerous ground" for statutory construction, *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001), and since the *Mastercard* decision, legislation has been introduced to *exempt* certain non-sports betting from the Wire Act. *See* Skill Game Protection Act, H.R. 2610, 110th Cong. § 3 (2007).

In 2011, the Criminal Division asked the Office of Legal Counsel for its opinion on whether the Department's longstanding reading of the Act conflicted with a more recent statute, enacted in 2006, which "appears to permit intermediate out-of-state routing of electronic data associated with lawful lottery transactions that otherwise occur in-state." Seitz Mem. 1. In other words, the Criminal Division sought OLC's view on whether the Wire Act still barred online gambling where the use of the interstate "wires" was confined to the out-of-state "routing" of data pertaining to an otherwise wholly *intra*-state gambling transaction.

Rather than answer this narrow question, OLC chose to discard the Criminal Division's premise that the Wire Act applied to non-sports-related betting at all. It concluded that it did not, reading the "sporting event or contest" qualifier in the middle of subsection (a) as limiting the scope of *all* of that subsection's prohibitions.

[2] On appeal, the Fifth Circuit stated that it "agree[d]" with the district court's interpretation of the Wire Act without any further analysis on the issue. *Mastercard*, 313 F.3d at 262.

ANALYSIS

I. The Plain Meaning of the Wire Act Clearly Encompasses Non-Sports Gambling.

"As with any other question of statutory interpretation, we begin with the text." *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016). The Wire Act opens with a two-part criminal prohibition:

> 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.

18 U.S.C. § 1084(a). This provision contains two major clauses, each set off by the phrase "for the transmission." Seitz Mem. 4. The first bars anyone engaged in the gambling business from knowingly using 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." *Id.* The second bars any such person from knowingly using a wire communication facility "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." *Id.* As OLC correctly noted, the most natural, grammatical reading of the second clause is that it prohibits a transmission that entitles the recipient to money or credit *either* in return for a bet or wager or for information assisting in the placing of bets or wagers. Seitz Mem. 4 & n.5.

The Act does not define the terms "bets" and "wagers," but the ordinary meaning of those terms clearly includes sports gambling and non-sports gambling alike.[3] Contemporaneous statutory definitions confirm that plain meaning. A provision of the Internal Revenue Code enacted six years before the Wire Act, for example, defines "wager" to mean not only gambling on "any . . . sports event or . . . contest" but also "a lottery," including "the numbers game, policy, and similar types of wagering." *See* 26 U.S.C. § 4421(1), (2) (68A Stat. 528 (1954)).[4]

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[3] *See* AMERICAN HERITAGE DICTIONARY (1969) (defining "bet" as "[a]n agreement between two parties that the one proved wrong about an uncertain outcome will forfeit a stipulated thing or sum to the other"; defining "wager" as "[a]n agreement under which each bettor pledges a certain amount to the other depending on the outcome of an unsettled matter").

[4] The term "policy" refers to a lottery-style game that was common prior to the Wire Act. *See* Robert F. Kennedy, *The Baleful Influence of Gambling*, THE ATLANTIC (Apr. 1962), https://goo.gl/nKmxEH.

Congress used the broad gambling terms "bets or wagers" four times in subsection (a) and attached the limiting phrase "on any sporting event or contest" to only one of those usages. OLC assigned an improbable reach to that phrase by ignoring a well-established canon of statutory interpretation rooted in rules of English grammar. The Supreme Court has recognized that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *see also Hays v. Sebelius*, 589 F.3d 1279, 1281 (D.C. Cir. 2009) ("Ordinarily, qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote."); ANTONIN SCALIA & BRYAN GARNER, READING LAW: INTERPRETATION OF LEGAL TEXTS 152 (2012) ("When the syntax [of a statutory provision] involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."). Because "on any sporting event or contest" follows the second usage of "any bet or wagers," that is the phrase it modifies. *See Fakhouri v. Ober Gatlinburg, Inc.*, 821 F.3d 719, 721–22 (6th Cir. 2016) (Sutton, J.) (applying the rule of the nearest reasonable referent); *United States v. Lockhart*, 749 F.3d 148, 152–53 (2d Cir. 2014), *aff'd sub nom. Lockhart v. United States*, 136 S. Ct. 958 (2016) (same).[5]

Under normal rules of construction, the Wire Act's prohibition on interstate transmission of "information assisting in the placing of bets or wagers on any sporting event or contest" is limited to sports gambling, but the other prohibitions are not. As a result, the first clause bans use of interstate wires "for the transmission in interstate or foreign commerce of bets or wagers"—including numbers games and other non-sports gambling about which Congress was keenly aware and concerned. *See infra* Part II. The first clause also bans interstate transmission of "information assisting" in sports gambling only. That limitation makes sense given Congress's evident understanding that dissemination of information such as horseracing odds and point spreads on other games were the currency of sports bookmakers, but were not

[5] The series-qualifier rule is inapplicable here because subsection (a) is clearly not "straightforward, parallel construction that involves all nouns or verbs in a series." SCALIA & GARNER, *supra*, at 147 (explaining the series-qualifier rule); *compare United States v. Lockhart*, 749 F.3d at 152–53 ("[T]his is not the prototypical situation in which the series qualifier canon is applied, since the list itself falls in the middle of a longer list of qualifying predicate crimes; that is, the modifier does not end the list in its entirety.") *with United States v. Bass*, 404 U.S. 336, 337–341 (1971) (applying the series qualifier rule to the phrase "receives, possesses, or transports in commerce or affecting commerce" where that series provided the sole list of conduct prohibited by the statute and "there [wa]s no reason consistent with any discernible purpose of the statute to apply" the limiting phrase to the last antecedent alone). In *Lockhart v. United States*, the majority and dissent disagreed on the proper application of the series qualifier canon, but both agreed that it is limited to when "the listed items are simple and parallel without unexpected internal modifiers or structure." 136 S. Ct. at 963; *id.* at 971 (Kagan. J., dissenting) (noting that the series qualifier canon applies to a " 'single, integrated list' of parallel terms . . . followed by a modifying clause"); *see also Wong v. Minnesota Dep't of Human Servs.*, 820 F.3d 922, 928 (8th Cir. 2016) ("[T]he series-qualifier canon generally applies when a modifier precedes or follows a list, not when the modifier appears in the middle.").

necessary in non-sports gambling. *See id.* The second clause targets financial rewards and inducements for illegal gambling by broadly prohibiting transmission of any entitlement to money or credit either "as a result of bets or wagers" or "for information assisting in the placing of bets or wagers." That prohibition addresses conduct such as wired payments for winning bets and compensation for the work of gambling intermediaries including "layoff men," who played a role in sports and non-sports gambling—as described in Part II, *infra*.

The structure of the Wire Act further confirms this interpretation. Subsection (a) regulates the role of senders and recipients in gambling-related transmissions. The statute's other substantive provision, subsection (d), regulates the role of the telecommunications carriers in facilitating those transmissions. That provision requires any "common carrier, subject to the jurisdiction of the Federal Communications Commission" to "discontinue or refuse" its services to any subscriber when the carrier is "notified in writing by a Federal, State, or local law enforcement agency" that its facilities are "being used or will be used for the purpose of transmitting or receiving *gambling information* in interstate or foreign commerce." 18 U.S.C. § 1084(d) (emphasis added). The term "gambling" is undefined, but its ordinary meaning clearly includes non-sports betting. *See* WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1966) (defining "gambling" as "the act or practice of betting; the act of playing a game and consciously risking money or other stakes on its outcome"). A related statutory definition that appears in the same chapter as the Wire Act confirms that understanding. *See* 18 U.S.C. § 1081 (defining "gambling establishment" to mean "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 any game of chance, for money or other thing of value"). OLC inexplicably declined to comment on the significance or meaning of this provision, Seitz Mem. 10 n.10, but its import is clear: Subsection (d) enlists the help of telecommunications carriers in preventing interstate transmission of sports and non-sports gambling information—the kind of transmissions that subsection (a) prohibits. It does not make sense that Congress would require telecommunications carriers to crack down on subscribers for transmitting any gambling information in subsection (d), while prohibiting only transmissions related to sports gambling in subsection (a).

Subsection (b) of the Act is also probative of subsection (a)'s meaning. That provision effectively carves out a safe harbor for transmission of "information for use in news reporting *of sporting events or contests*, or 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 that sporting event or contest* is legal into a State or foreign country in which such betting is legal." 18 U.S.C. § 1084 (emphases added). Subsection (b) demonstrates that when Congress meant to apply the modifying phrase "sporting events or contest" to multiple terms, it had no trouble either repeating the phrase three times in the same breath or using the right adjective to refer back to a preceding modifier ("*such* betting"). That deliberate inclusion of a similar qualifying phrase throughout subsection (b) suggests that its *exclusion* from all but one sub-clause of subsection (a) was deliberate. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ") (citation omitted). Subsection (b) suggests that, contrary to OLC's gloss, the Wire Act was not written in shorthand. Seitz Mem. 7. Moreover, it makes

sense that this information-sharing safe harbor would be limited to innocuous or permissible *sports-related* information because subsection (a)'s ban on transmission of "information assisting in the placing of bets or wagers on any sporting event or contest" is similarly limited. The safe harbor in subsection (b) tracks the prohibition in subsection (a).[6]

The plain language of the statute is also consistent with its preamble and caption. Congress described the Wire Act as "AN ACT To amend chapter 50 of title 18, United States Code, with respect to the transmission of bets, wagers, and related information," and titled the operative provisions, "Transmission of wagering information; penalties." Pub. L. No. 87-216 (1961). This broad and unqualified language supports the understanding that the Wire Act was not strictly limited to sports gambling. *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("[A]lthough the language in the preamble of a statute is 'not an operative part of the statute,' it may aid in achieving a 'general understanding' of the statute.") (citation omitted).

The Wire Act is not a model of precision draftsmanship, to be sure. But the text and structure clearly indicate that the law's reach is *not* limited to sports betting. OLC reached a contrary conclusion by committing two basic errors. First, OLC privileged its own flawed understanding of legislative history over the plain text; we describe those errors in Part II. Second, OLC strained to impose a symmetry on subsection (a) that the language does not permit.

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[6] Some have argued, based on subsection (b), that the Wire Act in its entirety must be limited to gambling that is independently illegal under state law, reasoning that "[i]t strains credulity that the prohibitions in § 1084(a) would ban transmissions assisting in wagering of any and all types, while § 1084(b) would exempt from those prohibitions wagerning related transmissions between two states where the underlying wagering is legal, only when the underlying wagering [is] related to sporting events or contests." *See* Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, 29 CTR. FOR GAMING RESEARCH 1, 3–4 (2014). But that argument merely restates—and then criticizes without explanation—*precisely* the line drawn by the Act's plain text. Put simply, it is hard to see how the inclusion of an express sporting-event limitation in subsection (b)—*in triplicate*—"bolsters the case for [a] narrow interpretation" of subsection (a), *id.*, which, by its plain text, is *not* so limited. One would think the natural inference would be precisely the opposite. *See Hamdan*, 548 U.S. 578. What is more, the argument fails on its own terms, for even if it is atextually limited to sports-related betting, subsection (a) still does more than merely assist States in enforcing their own gambling laws. Minton, *Original Intent*, *supra*, at 2. While subsection (b)'s "safe harbor" reaches only the transmission of gambling information, subsection (a) on any reading goes farther, prohibiting the transmission of wagers and gambling-related payments *whether or not* the underlying event or contest is legal under state law. Finally, far from "strain[ing] credulity," *id.* at 3, as demonstrated above, the lines drawn by subsections (a) and (b) dovetail perfectly. Subsection (b)'s "safe harbor" for "the transmission of information assisting in the placing of bets or wagers" is limited to wagering "on a sporting event or contest" because subsection (a)'s prohibition, in the first clause, of "the transmission . . . of . . . information assisting in the placing of bets or wagers" is *also* limited to sports-related betting; it is the other prohibitions in subsection (a) that extend more broadly.

In its relatively brief textual analysis, OLC began from the premise that it is "equally plausible" to read the phrase "on any sporting event or contest" as modifying the entire first clause or only "information assisting in the placing of bets or wagers." That premise is wrong: The rule of nearest reasonable referent creates a "presumption [that] 'qualifying phrases attach only to the nearest available target.' " *Maple Drive Farms Ltd. P'ship v. Vilsack*, 781 F.3d 837, 847 (6th Cir. 2015) (citation omitted). OLC overlooked that canon of interpretation altogether, and its interpretive errors did not end there.

Assuming incorrectly that the text was in equipoise, OLC adopted the reading that, in its view, "produce[d] the more logical result." Seitz Mem. 5. OLC found it "difficult to discern why" Congress would have wanted to ban transmission of all bets and wagers but limit its ban on transmission of information assisting in placing bets or wagers to sports gambling. *Id.* Here too OLC faltered, for there is a logical reason for that asymmetry: Congress was aware that sports gambling relies on a constant exchange of information assisting in the placing of bets—including up-to-the-minute race and game results, odds, and spreads, without which the bookmaker could not price his bets and exposure. *See infra* Part II. The Seitz Memorandum acknowledges this feature of sports gambling without recognizing its implications. *See* Seitz Mem. 9 (" '[I]nformation so quickly received as to be almost simultaneous . . . is essential to both the illegal bookmaker and his customers.' ") (quoting statement of Sen. Eastland). By contrast, non-sports gambling did not require the same constant flow of information assisting in the placing of bets and wagers, although it did rely on paid intermediaries who assisted in taking and "laying off" bets in person and by telephone. *See infra* Part II. This distinction may explain the clauses' difference in scope. Even assuming, however, that OLC's rendering is logically superior to the clear words Congress chose, the text prevails. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (cautioning against "read[ing] an absent word into the statute"); *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) ("Because our role is not to 'correct' the text so that it better serves the statute's purposes, we will not ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification." (quotation marks and citation omitted)).

OLC's analysis of the second clause was even more unmoored from the text. The qualifier "on any sporting event or contest" appears nowhere in subsection (a)'s prohibition on "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." 18 U.S.C. § 1084(a). But again ignoring applicable canons of construction, OLC applied that limitation to the entire second clause to "make[ ] functional sense of the statute." Seitz Mem. 7. OLC cited no authority for applying a qualifying prepositional phrase to not only every referent that it *follows*, but also to every referent that it *precedes*. Instead, OLC invoked the absurdity canon to justify this linguistic feat, *id.* at 7 (citing *Corley v. United States*, 129 S. Ct. 1558, 1567 n.5 (2009)), without coming close to showing that the plain meaning of subsection (a) would produce results so "nonsensical . . . that Congress could not have intended it." *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir. 2010) (describing the "high threshold" that must be met before concluding that a statute does not mean what it says). OLC observed that its preferred interpretation would yield a set of prohibitions that "serve the same end" and have "the same scope." Seitz Mem. 7. But an atextual construction is a high price to pay for symmetry, and OLC's reading does not even achieve that much: If subsection (a) addresses only sports betting, as OLC concluded, then the scope and ends of the Wire Act's prohibitions are much narrower

than the compliance requirements in subsection (d), which apply to "transmi[ssion] . . . of gambling information" without qualification. 18 U.S.C. § 1084(d). OLC's interpretation does not even achieve the consistency that it stretched the text to reach.[7]

OLC also relied on its erroneous interpretation of the first clause to justify its even more improbable reading of the second clause. The memorandum argues that it is "unlikely that Congress would have intended to permit wire transmissions of non-sports bets and wagers, but prohibit wire transmissions through which the recipients of those communications would become entitled to receive money or credit as a result of those bets." Seitz Mem. 7. But if the qualifying phrase "on any sporting event or contest" is limited to its nearest logical referent—as we presume under normal rules of construction—then this asserted anomaly disappears. The "counterintuitive patchwork of prohibitions" that the memorandum describes, *id.*, is largely a product of OLC's own cramped interpretation of the first clause. *Cf. Kloeckner v. Solis*, 133 S. Ct. 596, 606–07 (2012) ("[T]he Government's remedy requires our reading new words into the statute. We think a better option lies at hand. If we reject the Government's odd view of [the statute], then no absurdity arises in the first place.").

OLC's final textual argument turns on the significance of the Interstate Transportation of Wagering Paraphernalia Act, Pub. L. No. 87-218, 75 Stat. 492 (1981) (codified at 18 U.S.C. § 1953). Enacted the same day as the Wire Act, that statute provides in relevant part:

> Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.

18 U.S.C. § 1953(a). OLC understood this statute as the non-sports betting counterpart to the Wire Act because "it expressly address[es] types of gambling other than sports gambling" in clause (c). Seitz Mem. 10. But of course the Wagering Paraphernalia Act also expressly addresses specific types of *sports* betting, using different language than the Wire Act. OLC overlooked the obvious relationship between these two statutes: The Wagering Paraphernalia Act is not the non-sports gambling counterpart to the Wire Act; it is the *tangible* communications

[7] OLC defended its implied addition of the qualifying phrase "on any sporting event or contest" by pointing out that "the phrase 'in interstate and foreign commerce' is likewise omitted from the second clause [of the Wire Act], even though Congress presumably intended" that nexus to apply to "*all* the prohibitions in the Wire Act." Seitz Mem. 7. That comparison fails because default rules of construction *require* reading an "interstate commerce nexus" into a federal criminal statute absent a "clear statement" otherwise. *Bass*, 404 U.S. at 350. It is reasonable to think Congress left that nexus to be implied in the second clause of the Wire Act, but there is no clear statement rule to explain OLC's implied immunity for non-sports betting.

counterpart to the Wire Act, covering the sending and receiving of papers and other items for use in sports and non-sports gambling. Far from supporting OLC's position, the Wagering Paraphernalia Act undermines the neat symmetry that OLC strained to achieve. It would be very surprising indeed if Congress intended, on the same day, to *criminalize* the transmission of a lottery bet by courier (under Wagering Paraphernalia Act), but *permit* its more efficient transmission by telegram or telephone (under the Wire Act). But that is precisely what OLC's contrived interpretation of the Wire Act requires.

II. The Legislative History of the Wire Act Confirms that the Act Applies to Non-Sports Gambling.

A. The Act's History and Purpose Support—and Illuminate—the Plain Meaning of its Text.

When as here the statutory text is "straightforward," there is "no reason to resort to legislative history." *Zuni Pub. Sch. Dist. No. 89 v. Department of Educ.*, 550 U.S. 81, 109 (2007) (citation omitted). Nevertheless, the purpose and history of the Wire Act further support what is clear from its text alone: subsection (a) reaches use of the interstate wires for any type of gambling, not merely gambling on a sporting event or contest. OLC's contrary reading of the Act's legislative history both mistakes the Act's purpose and seriously misunderstands its drafting history.

The Wire Act was one of several pieces of legislation designed by Congress to combat the epidemic of organized crime that swept the Nation in the middle of the Twentieth Century. After the repeal of Prohibition, the Mafia, the Capone Syndicate, and other nation-wide criminal organizations turned to trades such as gambling, prostitution, and illegal drugs as a new source of revenue. And in the early 1950s, a decade before the Wire Act was passed in 1961, a series of Congressional committees began to investigate the extent, nature, and causes of nationwide criminal organizations—and what steps Congress could take to defeat them.

The best known of these committees was the Senate's Special Committee to Investigate Organized Crime in Interstate Commerce—widely known as the "Kefauver Committee," after its Chairman, Senator Estes Kefauver. From 1950 through 1951, the Kefauver Committee held hearings in fourteen cities across the Nation, taking the testimony of over 600 witnesses. WILLIAM N. THOMPSON, GAMBLING IN AMERICA 207 (2001). Because many of its hearings were nationally televised, the Kefauver Committee became something of a media sensation—and its findings gained widespread publicity and influence. S. REP. NO. 82-307, at 24–25 (1951). After its hearings were concluded, the Kefauver Committee issued a series of four reports—three interim reports and a final report—which detailed its conclusions that "the tentacles of organized crime reach into virtually every community throughout the country," S. REP. NO. 82-725, at 2 (1951), and that "the Federal Government must provide leadership and guidance in the struggle against organized crime, for the criminal gangs and syndicates have Nation-wide ramifications," S. REP. NO. 82-307, at 6.

While the Kefauver Committee found that organized crime received its revenue from many different sources—including some legitimate business interests—it concluded that "[g]ambling profits are the principal support of big-time racketeering and gangsterism." *Id.* at 2.

"Since prohibition has been repealed, organized criminal gangs have found a new bonanza in the conduct of various forms of gambling." S. REP. NO. 82-141, at 11 (1951). And critically, organized crime's involvement extended *beyond* sports-related betting to gambling in all of its "various forms," including "slot machines, the numbers or policy game, punchboards, [and] gambling casinos." *Id.* at 7. "No form of gambling is overlooked." *Id.* at 12. Indeed, as a contemporaneous report by another Senate Committee put it, lottery games such as "[n]umbers or policy, as it is known in some places, unquestionably [constitute] the most widely followed gambling activity in this country; and, despite the fact that the individual bets are small, the total in play is probably four or five times that in horse-race betting." S. REP. NO. 81-1752, at 6 (1950). Moreover, the numbers racket generally involved wagers that were multiples lower than the minimum bets accepted in sports-related gambling, and it was thus seen as "the most tragic kind of gambling because it is indulged in by people who can't afford to spend a quarter or 50 cents every day." *Gambling & Organized Crime: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Government Operations*, 87th Cong. 25 (1961) (statement of Goodman A. Sarachan, Chair, N.Y. State Commission of Investigation) ("Senate Investigations Committee Hearing").

The Kefauver Committee made several policy recommendations as a result of its investigation. Most relevant here, the Committee proposed that "[t]he transmission of gambling information across State lines by telegraph, telephone, radio, television, or other means of communication or communication facility should be regulated so as to outlaw any service devoted to a substantial extent to providing information used in illegal gambling." S. REP. NO. 82-307, at 12. Over the following decade, Congress considered multiple proposed bills drawn to limit such interstate communications. While some of those pieces of draft legislation were confined to the use of the interstate wires in relation to sports-related gambling, *see, e.g.*, S. 2116, 82d Cong. (1st Sess. 1951); S. 2314, 83d Cong. (1st Sess. 1953), others extended to gambling of any kind, *see, e.g.*, S. 1624 § 1304, 82d Cong. (1st Sess. 1951); *see also* AMERICAN LAW INST., MODEL ANTI-GAMBLING ACT §§ (2)(6) & (5), *reprinted in The Attorney General's Program to Curb Organized Crime & Racketeering: Hearings Before the S. Comm. on the Judiciary*, 87th Cong. 123, 140 (1961) ("Senate Judiciary Committee Hearings").

When the Congress that ultimately passed the Wire Act began to consider anti-crime legislation, like the Congresses before it, it considered bills of *both* scopes. The House bill, H.R. 3022, which imposed certain reporting requirements on wire communications carriers who transmitted "gambling information," defined that term to include *both* "any wager with respect to a sports event or a contest" *and* "any wager placed in a lottery conducted for profit." H.R. 3022, 87th Cong. (1st Sess. 1961). The Senate bill that ultimately became the Wire Act did not, as initially proposed, reach non-sports-related betting. But it was amended by the Senate Judiciary Committee—which rewrote subsection (a) and added the second clause discussed above—after an important exchange in which Senator Kefauver criticized the failure of the draft bill to reach non-sports gambling.

As initially introduced in the Senate and referred to the Judiciary Committee, the Senate bill that became the Wire Act—S. 1656—appears to have been limited to the wire transmission of bets, wagers, or gambling information relating to "any sporting event or contest." S. 1656 § 1084(a), 87th Cong. (1st Sess. Aug. 18, 1961) (as introduced). But near the close of the

Judiciary Committee's hearings on the bill, Senator Kefauver homed in on precisely this limitation, in an exchange with a representative of the Department of Justice (which had proposed the legislation). "The bill," Senator Kefauver noted, "seems to be limited to sporting events or contests. Why do you not apply the bill to any kind of gambling activities, numbers rackets, and so forth?" Senate Judiciary Committee Hearings 277. The witness, Assistant Attorney General Herbert Miller, responded that it was principally "wagers on a sporting event or contest" that "indispensabl[y]" involved the use of the wires, and that "your numbers game does not require the utilization of communications facilities." *Id.* Senator Kefauver was, however, unsatisfied with that response, noting that in his extensive investigations a decade earlier he had found the interstate wires to be "used quite substantially in the numbers games, too." *Id.* at 278.

Significantly, when the Judiciary Committee reported out an amended version of the bill, it had entirely rewritten subsection (a) and added a second clause which, as discussed in detail above, on its face is not limited to sports-related gambling. S. 1656, 87th Cong. (1st Sess. July 24, 1961) (as reported). The timing alone of this crucial revision raises a strong inference that these changes were made *precisely* to address Senator Kefauver's concerns that the unamended bill would not extend beyond sports-related wagering.

This inference is strengthened by the other changes the Judiciary Committee made. In addition to adding the second clause of subsection (a), the Committee significantly rewrote the first clause to apply to individuals who *used* the interstate wires for gambling purposes rather than the communications carriers themselves. The Committee also eliminated a critical set of commas in subsection (a) that would have applied the modifying phrase "on any sporting event or contest" to both uses of "bets or wagers" in that clause. *See* Appendix A (attached) (replacing "of bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest" with "of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest"). That revision was an economical but perfectly sensible way to narrow the application of the modifying phrase. *U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 454 (1993) ("A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation."); *see also* SCALIA & GARNER, *supra*, at 161 ("Punctuation in a legal text will rarely change the meaning of a word, but it will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part.").

In addition, the Committee added a new provision, subsection (d), further delimiting the communications carriers' responsibility to discontinue services to a subscriber who was using the wires for gambling purposes, upon notice of such use by a law enforcement agency. This change, like the addition to subsection (a), closely tracks a proposal made by Kefauver, in his exchange with Assistant Attorney General Miller, that communications carriers ought to be obligated to discontinue service only upon request by a "State or Federal Official." Senate Judiciary Committee Hearings 276. Finally, as amended by the Committee, the second clause of subsection (a) is also drawn to target "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers"—language which appears to follow Sen. Kefauver's suggestion that the bill "be expanded to include transmission of money." *Id.* at 278. This drafting history strongly indicates that subsection (a) was revised precisely for the purpose of expanding the Wire Act to reach non-sports-related gambling.

The legislative history also provides valuable insight into the rationale for the varied scope of the prohibitions in subsection (a). As noted above, the first clause bans interstate transmission of "any bets or wagers"—including numbers games and other non-sports gambling about which Congress was acutely concerned. The first clause also bans interstate transmission of "information assisting" in sports gambling only. The second clause targets financial incentives for illegal gambling by broadly prohibiting transmission of any entitlement to money or credit either "as a result of bets or wagers" or "for information assisting in the placing of bets or wagers." This set of prohibitions raises a fair question: Why did Congress target the *sending* of gambling-related information with respect only to sports-related betting, but target the wiring of *money in exchange* for gambling-related information with respect to all forms of gambling? While nothing in the legislative history directly explains why Congress chose to draw these lines, the record does offer some important clues.

In rebutting Assistant Attorney General Miller's suggestion that the numbers game did not involve interstate wires, Senator Kefauver described his earlier investigative work in 1951. He indicated that those investigations had uncovered heavy use of interstate communications "in connection with policy and the numbers game" in "New York and in New Jersey." Senate Judiciary Committee Hearings 278. It appears that Senator Kefauver was referring at least in part to the popular form of the numbers game known as the "Treasury Daily Balance" game, which his 1951 report described as follows:

> The Treasury-balance lottery, according to testimony obtained by the committee, operates in most of the Eastern States and in sections of the Midwest. Tickets are sold for 25 cents and 50 cents, with occasional "specials' during the year selling for $1. The last five figures of the daily balance issued by the United States Treasury determine the winners . . . A special service of the Western Union Telegraph Co. speeds the number daily from Washington to 51 subscribers who have been identified either as the principals or chief agents in the operation of the racket throughout the East.

S. REP. NO. 82-725, at 52 (1951). While "the profit of the racketeers who run the lottery [wa]s enormous," *id.*, the racket was difficult to reach by legislation because some of those *transmitting* the information that facilitates the gambling—the communications carriers themselves—are innocent. Indeed, a Western Union executive emphasized that point in 1951 testimony on the topic before the Senate Interstate and Foreign Commerce Committee. *Anticrime Legislation: Hearings before the S. Comm. on Interstate & Foreign Commerce*, 82d Cong. 78–79 (1st Sess. 1951). With respect to sports-related gambling, those *sending* gambling information—such as odds and spreads—were themselves part of the criminal enterprise. *See* House Judiciary Committee Hearing 24–25. Hence Congress's decision to ban individuals from *sending* such transmissions in the first clause. In the numbers racket, however, the wrongdoers were not the communications carriers that *sent* the publicly available information—such as the daily balance of the Treasury—but rather those who *solicited the receipt* of otherwise innocent information to aid in gambling. Hence Congress's decision in the second clause to reach only those *paying* "for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a).

The second clause of subsection (a) also appears to address the role of gambling intermediaries, including "layoff men." As Senator Kefauver noted in response to Miller, both sports-related "bookmaking" *and* non-sports-related numbers rackets involved a form of secondary betting known as "layoff betting." Senate Judiciary Committee Hearing at 278; *see also* Senate Investigations Committee Hearing at 26 (noting that the layoff was "part of the established modus operandi of the gamblers," including those who run the numbers game).[8] Attorney General Kennedy's testimony introducing the legislation explained "layoff" betting as follows:

> [The local bookie] cannot control the choices of his customers and very often he will find that one horse is the favorite choice of his clientele. His "action," as he calls it, may not reflect the "action" of the track. Therefore, he must reinsure himself on the race in much the same fashion that casualty insurance companies reinsure a risk that is too great for it to assume alone. To do this the bookmaker uses the "layoff" man, who for a commission, accepts the excess wager. The local layoff bettor also will have limited funds and his layoff bets may be out of balance. When this occurs he calls the large layoff bettors, who because of their funds, can spread the larger risk. These persons are gamblers who comprise a nationwide syndicate or combine. They are in close touch with each other all the time and they distribute the bets among themselves so that an overall balance is reached on any horserace.

Senate Judiciary Committee Hearing 3. While it is clear that Congress meant the Wire Act to target this layoff betting, there was some confusion about which part of the initial draft—the ban on wagers themselves or the ban on gambling information—captured the layoff. *Legislation relating to Organized Crime: Hearings Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 363 (1st Sess. 1961). Layoff betting does plainly involve, however, the transmission of entitlements to money "as a result of bets or wagers" and in exchange "for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a). As Senator Kefauver noted in a 1950 hearing, layoff men generally transmitted the wagers they were laying off to each other by wire for compensation. *Transmission of Gambling Information: Hearings before the S. Comm. on Interstate and Foreign Commerce*, 81st Cong. 634 (2d Sess. 1950) ("Transmission of Gambling Information Hearing"). It thus seems reasonable to conclude that this first part of the second clause in subsection (a) was designed to capture the use of the wires for the layoff—with respect to sports-related and non-sports-related gambling alike, as it was employed in both.

[8] An Internal Revenue Service regulation adopted in 1959 makes clear that the federal government was aware that "layoffs" were a key part of both non-sports and sports betting. *See* 26 C.F.R. § 44.4401-2(c) (1959) ("Lay-offs. If a person engaged in the business of accepting wagers or conducting a lottery or betting pool for profits lays off all or part of the wagers placed with him with another person engaged in the business of accepting wagers or conducting a betting pool or lottery for profit, he shall, notwithstanding such lay-off, be liable for the tax on the wagers or contributions initially accepted by him.").

The purpose and history of the Wire Act thus support what the text itself demonstrates: the law applies, by design, to all forms of gambling, not merely sports betting. And the history helps to explain the choices Congress made with respect to the varying scope of the prohibitions in subsection (a). As that history shows, there were plausible reasons for Congress to target the *sending* of gambling information with respect to sports-related gambling alone, but to shift its sights to the *wiring of money* from bets or wagers and *paying* for gambling information when it came to other types of gambling.

B. OLC's Contrary Reading of the Act's Legislative History Fails to Persuade.

OLC read the legislative history as supporting its blinkered interpretation of the Wire Act by making two errors. First, OLC misunderstood the basic purpose of the Wire Act and the other anti-crime legislation that Congress passed contemporaneously. "Congress's overriding goal in the Act," according to OLC, "was to stop the use of wire communications for sports gambling in particular." Seitz Mem. 8. But as already canvassed, there is *abundant* evidence—going all the way back to the Kefauver report—that Congress was concerned about organized crime's dependence on gambling of *all* kinds—including the numbers racket. Indeed, the legislative history shows that lotteries like the numbers racket were *far more profitable* than sports betting, *see* S. REP. NO. 81-1752, at 6 ("[D]espite the fact that the individual bets are small, the total in play [in numbers] is probably four or five times that in horse-race betting."); Senate Interstate & Foreign Commerce Committee Hearings 81 (Treasury lottery "has reached staggering proportions"); S. REP. NO. 82-307, at 46 ("The principal organized crime [in Philadelphia] is the numbers game."); *id.* at 64 ("The principal source of revenue for the gambling fraternity in Tampa is a variation of the numbers racket . . ."). And the legislative history also shows that lotteries like the numbers game were *regressive* in a way that sports wagering was not. Senate Investigations Committee Hearing at 25.

Moreover—as also detailed above—Congress had a great deal of evidence before it that like bookmaking, the numbers racket and other forms of lottery did involve use of the interstate wires (though for different purposes than sports betting). *See* Senate Judiciary Committee Hearings 278; S. REP. NO. 82-725, at 52; Senate Investigations Committee Hearing at 26; Transmission of Gambling Information Hearing 634. The Seitz Memorandum not only did not rebut any of this wealth of evidence that the purposes behind the Wire Act extended to non-sports-related gambling; *it did not even address it.*

OLC also misunderstood the specific drafting history of the Wire Act. "There is no indication," OLC opined, "that Congress intended the prohibition on money or credit transmissions to sweep substantially more broadly" than the first clause's bar on sports-related wagers. Seitz Mem. 8. That is simply not so. To the contrary, as discussed in detail above, there is a *highly persuasive indication* that the Senate Judiciary Committee's late-breaking revision of subsection (a) was designed to accomplish *precisely* this result: that change was made directly after the Senate's leading expert on criminal gambling organizations, Senator Kefauver, criticized the previous draft of the bill for reaching only sports betting. At a minimum, the Kefauver-prompted revisions preclude OLC's excessive reliance on statements made before that major revision.

The Seitz Memorandum did mention (in a footnote) Senator Kefauver's exchange with Assistant Attorney General Miller. Seitz Mem. 10 n.7. But the only conclusion OLC drew from the exchange was that "Congress was well aware" of what the memo characterized as the Justice Department's understanding that "the bill . . . reach[ed] only . . . sports-related wagering and communications." *Id.* That conclusion is deeply flawed, and twice over. First, the memorandum does not note, after discussing Kefauver's colloquy with Miller, that the bill was *re-written* in apparent response to the limitations that Senator Kefauver identified in that exchange. And second, the memorandum wholly neglects to mention that while the Justice Department may have understood the *unamended* bill to be limited to sports betting, it has *uniformly* understood the Act *as amended and passed* to apply to non-sports-related gambling such as the numbers racket. Seitz Mem. 2 (quoting Crim. Mem. 3).

OLC's conclusion that "[n]othing in the legislative history" of the Judiciary Committee's revision of subsection (a) "suggests that . . . Congress intended to expand dramatically the scope of [the Wire Act] . . . to *all* 'bets or wagers,' " Seitz Mem. 6, thus simply does not withstand scrutiny.

* * *

The text and structure of the Wire Act make clear that its criminal prohibition extends to interstate wire transmissions of non-sports bets and wagers, as well as financial inducements for such activity. The analysis should end there. Notwithstanding the Seitz Memorandum's excessive reliance on legislative history, there is simply no evidence sufficient to overcome the presumption here "that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citation omitted). The Congress that enacted the Wire Act was keenly aware that organized crime thrived on revenue from the "numbers racket" and other non-sports gambling, and the Act's drafting history supports the view that those activities were not impliedly exempted from the law's prohibition.

Chuck Cooper

From:	Chuck Cooper
Sent:	Thursday, May 25, 2017 5:36 PM
To:	Hunt, Jody (OAG)
Subject:	RE: OLC opinion on internet gambling
Attachments:	Sessions OLC Online Gambling 5.25.17.pdf

And here is a new letter, dated today, from three Dem congressmen asking for reconsideration.

Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Ave., NW
Washington D.C., 20036
202-220-9660

From: Chuck Cooper
Sent: Monday, May 22, 2017 5:19 PM
To: 'Hunt, Jody (OAG)' <Jody.Hunt@usdoj.gov>
Subject: OLC opinion on internet gambling

Jody,
Attached are (1) my firm's legal analysis rebutting the OLC opinion and (2) a letter from Senators Graham and Feinstein dated this past Friday asking for reconsideration of the OLC opinion. Below is a link to an interesting story on this.
Chuck

https://www.onlinepokerreport.com/23433/jeff-sessions-ag-hearing-online-gambling/

Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Ave., NW
Washington D.C., 20036
202-220-9660

Congress of the United States
Washington, DC 20515

May 25, 2017

The Honorable Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Sessions:

We are writing to ask you to consider withdrawing a December 2011 Opinion issued by the Department of Justice (DOJ) Office of Legal Counsel (OLC) which has opened the doors for the legalization of online gambling in a handful of States across the country. We believe there are strong legal and policy arguments for the Department to consider withdrawing this Opinion and allow Congress to more closely examine the public policy implications of making gambling so accessible in our society.

We appreciate your pledge to take a second look at this opinion, which was issued without consideration of policy concerns expressed by former Senate Democratic Leader Harry Reid and others on both sides of the political landscape. As you settle into your new position in the Administration, we know you will be addressing a number of polarizing and partisan issues in the coming months. Internet gambling is not a partisan issue, and its one we believe should be more closely examined by policy-makers in Congress before being allowed to expand any further.

Thank you very much for your serious consideration of these concerns.

Sincerely,

Henry Cuellar
Member of Congress

Daniel Lipinski
Member or Congress

Emanuel Cleaver II
Member of Congress

Chuck Cooper

From:	Chuck Cooper
Sent:	Monday, June 19, 2017 3:37 PM
To:	Hunt, Jody (OAG)
Subject:	Cooper & Kirk client matters adverse to DOJ
Attachments:	client matters adverse to doj (06-19-17).docx; ATT00001.txt

Jody,
As discussed, I attach a list of pending matters in which my firm, Cooper & Kirk, represents clients adverse to the Department of Justice and/or its client agencies. I believe the list is complete, but will of course supplement it if we have overlooked any such matter. Please let me know any further steps that my firm needs to take to ensure compliance with all Department ethics rules and practices.
Best,
Chuck

LIST OF COOPER &KIRK MATTERS ADVERSE TO DOJ

Arkansas

Lea v. Unites States, No. 1:16-cv-00043-EDK (Fed. Cl.).
C&K Clients: We represent the plaintiff Andrea Lea, who is the Auditor of the State of Arkansas.

Description: The suit alleges breach of contract in connection US Savings bonds in the possession of the state.

Advance America and CFSA

Community Financial Services Association of America, Ltd. v. FDIC, No. 1:14-cv-00953-GK (D.D.C.)
C&K Clients: We represent the plaintiffs, Community Financial Services Association of America, Ltd. (which has been dismissed), Advance America, Cash Advance Centers, Inc., Check Into Cash, Inc., NCP Finance Limited Partnership, NCP Finance Ohio, LLC, Northstate Check Exchange, PH Financial Services, LLC, and Richard Naumann.

Description: We are challenging the legality of Operation Choke Point under the APA and the due process clause. The suit alleges that the banking regulators have adopted a sweeping and amorphous conception of "reputational risk" that is unauthorized by statute and was adopted without notice and comment.

Advance America, Cash Advance Centers, Inc. v. FDIC, No. 17-5045 (D.C. Cir.).

Description: We are representing the clients described above in an appeal from the denial of a preliminary injunction in a suit alleging a due process violation resulting from Operation of Choke Point.

CFPB

State National Bank of Big Spring v. Lew, No. 1:12-cv-01032-ESH (D.D.C.).
C&K Clients: We filed an amicus brief in support of plaintiffs on behalf of Congressman Sean Duffy and Consumers' Research.

Description: This case challenges the CFPB's structure as violating constitutional separate of powers principles.

Coalition to Stop Internet Gambling

C&K Client: Coalition to Stop Internet Gambling.

Description: We represent the Coalition to Stop Internet Gambling in petitioning the Department of Justice to reconsider its 2011 interpretation of the Wire Act.

Fannie Mae and Freddie Mac

Perry Capital, LLC v. Mnuchin, No. 14-5243 (D.C. Cir.).
C&K Clients: Fairholme Funds, Inc., The Fairholme Fund, Berkley Insurance Co., Acadia Insurance Co., Admiral Indemnity Co., Admiral Insurance Co., Berkley Regional Insurance Co., Carolina Casualty Insurance Co., Midwest Employers Casualty Insurance Co., Nautilus Insurance Co., Preferred Employers Insurance Co.

Description: This suit challenges the legality under the APA of the "net worth sweep," an agreement between the Treasury Department and the Federal Housing Finance Agency, as conservator of Fannie Mae and Freddie Mac, to pay 100% of Fannie's and Freddie's profits into the U.S. Treasury.

Fairholme Funds, Inc. v. United States, No. 13-465 (Fed. Cl.)
C&K Clients: Fairholme Funds, Inc., The Fairholme Fund, Berkley Insurance Co., Acadia Insurance Co., Admiral Indemnity Co., Admiral Insurance Co., Berkley Regional Insurance Co., Carolina Casualty Insurance Co., Continental Western Insurance Co., Midwest Employers Casualty Insurance Co., Nautilus Insurance Co., Preferred Employers Insurance Co.

Description: This suit challenges the government's payment of 100 percent of Fannie's and Freddie's profits into the U.S. Treasury as violations of binding contractual commitments and of the takings clause of the Fifth Amendment.

Collins v. FHFA, No. 17-20364 (5th Cir.)
C&K Clients: J. Patrick Collins, Marcus J. Liotta, William M. Hitchcock.

Description: We are challenging the legality of the net worth sweep of all of Fannie Mae and Freddie Mac's profits into the US Treasury. Our suit claims that the sweep violates the APA.

Robinson v. FHFA, No. 16-6680 (6th Cir.)
C&K Client: Arnetia Joyce Robinson.

Description: We are challenging the legality of the net worth sweep of all of Fannie Mae and Freddie Mac's profits into the US Treasury. Our suit claims that the sweep violates the APA.

Roberts v. FHFA, No. 17-1880 (7th Cir.)
C&K Clients: Christopher M. Roberts, Thomas P. Fischer.

Description: We are challenging the legality of the net worth sweep of all of Fannie Mae and Freddie Mac's profits into the US Treasury. Our suit claims that the sweep violates the APA.

Saxton v. FHFA, No. 17-1727 (8th Cir.)
C&K Clients: Thomas Saxton, Ida Saxton, Bradley Paynter.

Description: We are challenging the legality of the net worth sweep of all of Fannie Mae and Freddie Mac's profits into the US Treasury. Our suit claims that the sweep violates the APA.

Inseego

C&K Client: Inseego Corp.

Description: We represent Inseego in its effort to gain approval under the CFIUS process for a sale of one of its product lines to a foreign purchaser.

Shell Oil, et al.

Shell Oil Co. v. United States, 2017-1695 (Fed. Cir.) (in CFC 06-141 & 06-1411)
C&K Clients: Shell Oil Co., Atlantic Richfield Co., Texaco, Inc., and Union Oil Co. of California.

Description: We represent Shell, Unocal, Atlantic Richfield Co., and Chevron-Texaco in a contract dispute with the United States government. Our clients seek compensation for environmental remediation costs that they have incurred as a result of their performance of World War II contracts for the federal government.

Mississippi River Gulf Outlet

St. Bernard Parish, et al. v. United States, Nos. 16-2301, 16-2373 (CFC 05-1119)
C&K Clients: St. Bernard Parish and a class of residents.

Description: We represent the Parish and a class of residents of the Parish and the Lower Ninth Ward of New Orleans in a takings claim against the U.S., alleging that the

U.S. Army Corps of Engineers' construction, operation, maintenance, and dredging of 76-mile long navigational channel connecting Gulf of Mexico and Port of New Orleans caused severe flooding on our clients' properties during Hurricanes Katrina and Rita and further water damage thereafter for which the Fifth Amendment requires just compensation.

North Carolina Medicaid Legislation.

Berger v. Price, No. 5:17-cv-25 (E.D.N.C.).
C&K Clients: We represent the plaintiffs, Phil Berger and Tim Moore, who are the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives.

Description: This suit challenges under the APA the legality of the Governor's plan to submit a request for approval to expand Medicaid.

National Black Chamber of Commerce

Chamber of Commerce of the United States of America v. U.S. Department of Labor, 17-10328 (5th Cir.).
C&K Clients: National Black Chamber of Commerce.

Description: We filed an amicus brief in support of the plaintiffs on behalf of the National Black Chamber of Commerce when the case was in district court. The case involves the legality of the Department's new fiduciary duty rules.

OPM

Bonner v. United States, No. 1:15-cv-01617-ABJ (D.D.C.), *In re: U.S. Office of Personnel Management Data Security Breach Litigation*, No. 1:15-mc-01394-ABJ (D.D.C.).
C&K Clients: We represent plaintiff Ryan Bonner, and we are on the steering committee for the plaintiffs in the consolidated MDL proceeding.

Description: This suit seeks relief against the government and its contractor under the APA and various common law doctrines in connection with the data breach affecting more than 21 million past and present government workers.

Susquehanna International Group.

Susquehanna International Group, LLP v. SEC, No. 16-1061 (D.C. Cir.).
C&K Clients: We represent the petitioners, Susquehanna International Group, LLP, KCG Holdings, Inc., Miami International Securities Exchange, LLC, and Box Options Exchange LLC.

Description: This suit challenges under the APA a plan that converts the Options Clearing Corporation into a for-profit monopoly.

Other

US ex rel. Cloninger v. DynCorp Int'l Inc., 14-cv-00581 (DDC).
C&K Client: We represent a whistleblower-relator, Fred Cloninger.

Description: We're not adverse to DOJ in *Cloninger*, and DOJ has not entered an appearance, but the United States has an interest and DOJ is monitoring the case. We represent a relator in a qui tam action arising under the False Claims Act, who alleges multiple violations of the FCA arising out of the defendants' actions in connection with a Government contract to provide logistical and operational support for the U.S. Counter Narcoterrorism Technology Program Office in Afghanistan. The defendants are the prime contractor (Northrop Grumman Corp.) and a subcontractor (DynCorp International). In addition to raising claims under the FCA, the relator also raises claims under state employment law.

Board of Education of the Highland Local School District vs. U.S. Department of Education, No. 2:16-cv-00524-ALM-KAJ (S.D. Oh.). We filed an amicus brief in support of the school district on behalf of the State of Texas. We are not sure if this case is still live.
Description: This case involved a school board's challenge to the Obama Administration's interpretation of Title IX as requiring schools to allow students to use bathrooms of their chosen gender.