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The Committee on the Judiciary's Subcommittee
on
Crime, Terrorism, Homeland Security, and Investigations
Hearing on H.R. 707,
the
Restoration of America's Wire Act

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To the Honorable Bob Goodlatte, Chairman, U.S. House Committee on the Judiciary,
the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations,
and the Honorable Members and staff of the Subcommittee:

As a private citizen having probably-unique and specialized experience, background, and training concerning the issues raised by Internet gambling, I am pleased to submit testimony in this Subcommittee's hearing entitled "H.R. 707, the Restoration of America's Wire Act." The Subcommittee's time constraints may limit the details I might otherwise be able to provide on this issue; however, via the contact information on the letterhead of this document I remain available to the Subcommittee for further consultation and/or expansion of these remarks. By way of my background, I have attached at the end of this document a "biographic blurb" which at times has been used when I have given speeches or conducted training.

In sum, I served my state and nation for approximately thirty years as a prosecutor of felons, including money-launderers and racketeers, with the greatest portion (25 years) of that time being an Assistant U.S. Attorney for the Eastern District of Missouri. Post-9/11, I was selected to head our District's anti-terrorism efforts and did so for six-and-a-half years, learning about and overseeing investigations concerning terrorist financing methods. Presently, I do consulting/advisory work for, and train, governmental bodies and corporations on a wide variety of topics, as described on my letterhead, above. I am neither a Democrat nor a Republican, but an apolitical independent (with a small "i").

As the career federal prosecutor once responsible, with more-talented others, for the most, and the most successful, enterprise-based prosecutions and forfeitures of illegal unregulated commercial Internet gambling enterprises, their operators, and their facilitators, I have thought long and hard about the costs and benefits associated with Internet gambling.

Business applications of the Internet have been both positive and negative. On the negative side, Internet commerce has often been characterized as destroying or, at least, significantly and adversely changing previously well-established trades (look what's happened to, e.g., newspapers, bookstores, broadcast radio, CD stores, the postal service). Bricks-and-mortar casino and poker room operators vary on whether they'll survive, shrink, or prosper if online gambling expands in the U.S. Facing the efficiencies and 24/7/365 availability of expanded Internet gambling, would these offline casino and poker room operators fare the same as, worse

than, or better than newspapers/bookstores/radio/CD stores/the postal service? Should we care about the real-world casino operators and their employees versus Internet-based gambling enterprises' far fewer and boilerroom-type low-paid employees? If maximizing the number of jobs for persons employed in the commercial gambling industry is the sole criterion, any legislation that increases Internet gambling's availability would seem extremely unwise. Some predict that Internet gambling may initially help drive a small segment (8-10%) of Internet gamblers to visit and use actual casinos, but ten or so years ago people thought access to information on the Internet would drive people to increased reliance on newspapers, too—and look how that's turned out.

Of course, the more important question is how would "We, The People" fare? What is the likely answer to *that* question, informed by independent (non-industry-funded, non-religious-affiliated) academic studies? At least at the state level, why do legislators frequently seem to ignore, disregard, or unrealistically discount the costs imposed by commercial gambling and accept pro-commercial gambling advocates' rosy estimates of revenue? (These studies consistently show that for every dollar of tax revenue generated by legal commercial gambling, approximately three dollars are incurred in direct and indirect economic costs—not to mention the largely non-quantifiable human costs.) And, apart from the academic studies, what does experience and history tell us about the likelihood of crime flowing from or being facilitated by an Internet-fueled increase in online gambling?

As one of the few persons who've been as deep as one can be in monitoring, investigating, and prosecuting Internet gambling, I know there is no way that the federal government, or any individual or combination of state governments, can expand to the degree necessary to effectively police and regulate the likely scale of legalized Internet casino, poker, and/or sportsbook gambling (i.e., there will be millions of data transactions—informational and financial--involving billions of lines of code in malleable, disguisable formats with anonymizing and proxy tools readily available, use of manipulative techniques and subliminal messages, as well as easily-disguised traditional and electronic collusive and corrupting behaviors). Realistically: No police force/regulatory body will be big enough/skilled enough/funded enough.

Despite this truth, in December 2011, an opinion issued by the U.S. Department of Justice's Office of Legal Counsel (OLC) gutted a major aspect of a federal statute, 18 U.S.C. §1084 (commonly known as the "Wire Act," or the "Wire Wager Act"). In a lengthy addendum to this written testimony (see, Addendum, at p. 14, *infra*), a detailed analysis of that OLC memorandum establishes (i) that its' conclusion (that the Wire Act applies only to sports gambling) is as likely mistaken, or worse, than correct, and (ii) that the OLC memo seemingly is the product of someone trying to find a reason to allow online gambling's expansion rather than to discern and implement Congress' sensible and comprehensive scheme from 1961 to preclude organized crime from all types of illegal gambling-generated funds, not just funds generated from illegal sports bookmaking.

Passing a law to restore ("fix") the Wire Act, which was broken by the DOJ reinterpretation, would help fight crime and limit economically non-productive and personally-destructive behavior; yet, today Internet gambling proponents seek to use H.R. 707 and this legislative process to fix something not broken, by adding a legislative carve-out to authorize online poker-based gambling. Of course, no one presently is barred in the United States from playing poker online—they just can't legally gamble on it for money or other assets of value through a gambling business—or couldn't, under the historic and correct interpretation of Wire Act. People could always, however, play poker online without wagering assets or, if wager they must, they can wager valueless points, for example, and still entertain themselves, compete, sharpen skills, and gain prestige as superior players. Thus, any online poker carve-out language sought to be included in the present version of the bill is, in truth, *not* to enable online poker but to enable online *gambling.*

This is a strategic purpose of the commercial gambling industry, and it underlies this push for legalized online poker. That becomes clear when the effort is examined in light of the industry's behavior over time. In 1988, Congress passed the Indian Gaming "Regulatory" Act – in the lame duck year of President Reagan's second term – and by which many members of Congress were led to believe they were supporting small tribal bingo parlors and card clubs in rural areas of the country. In reality, IGRA was the starting gun for the massive and unrelenting wave of casino gambling that has spread across most states.

Because of the purposely vague way the proponents of IGRA defined the various forms of gambling permitted under the law, casino interests pushed the scope of the law to proportions never intended by Congress. While nearly every state has its own story about the failure of IGRA, Connecticut's may be Exhibit A. Anxious to take advantage of the state's position between the metro New York and Boston population centers, gambling interests used IGRA to build two of the biggest casinos in the world, hijacking the state's "Las Vegas Night" law which had allowed charities to conduct occasional social, small stakes gambling nights for fundraising purposes. *Boston Globe Magazine*, Charlie Pierce. "High Stakes." July 30, 2006, http://www.boston.com/news/globe/magazine/articles/2006/07/30/high_stakes/

Another highly-relevant historical example of the casino gambling lobby's playbook in action is "bingo." Like "poker," most would consider bingo a less extreme form of gambling. Yet in a deliberate effort to circumvent gambling laws, casino interests designed "electronic bingo machines" which are virtually indistinguishable from casino-style slot machines and forced them into states across the U.S. that permitted traditional bingo games. "Is It Bingo, Or A Slot Machine?" *Gambling and the Law*, Prof. I. Nelson Rose, Whittier Law School, 2002. http://www.gamblingandthelaw.com/columns/90-82nigcregulations.html

Similar "slotification" of online poker is entirely predictable. This is especially concerning, given that a line of studies found that "individuals who regularly played video gambling devices became addicted three to four times more rapidly than other gamblers (in one year, versus three

and a half years), even if they had regularly engaged in other forms of gambling in the past without problems." Natasha Dow Schull, in Addiction by Design, *infra*.

Internet poker casinos presently represent a minor portion of the casino business, largely because the house collects a small part (the "rake") of each pot. For example, live poker in Nevada makes only a tiny piece of overall gambling revenue. The major profits to be had are in online slots which make up 65%-80% of all gambling traffic. *Card Player*, December 3, 2012. http://www.cardplayer.com/poker-news/14556-commercial-casinos-in-full-court-press-to-legalize-online-poker-during-lame-duck; *Casino City Times*, June 8, 2011. Legalizing internet poker casinos is simply to build the framework for casino interests to bring in online slots. This Trojan Horse strategy must be seen for what it is—the commercial gambling industry's historically-proven device for undermining informed majority rule.

In the single classic, comprehensive work studying electronic machine gambling, Addiction by Design (Princeton U. Press 2012), MIT Professor Natasha Dow observed, at p. 296, that "It has become commonplace in public discussions to hear that purveyors of commercial gambling, along with the governments that draw taxes from them, have themselves become "addicted" to gambling revenue….Some have gone so far as to enumerate the classic defense mechanisms of addiction by which industry stakeholders, caught in the maximizing momentum of a drive for revenues, rationalize their actions: "blaming others, belittling contrary viewpoints, disavowing responsibility for negative outcomes, preferring to avoid conflict, and not tolerating straight talk, honesty, or directness." "[Governments] start chasing their losses just like the addict does." (citations omitted) That a deliberative body of the central government of the greatest nation on earth would even consider stooping to so put its citizens at risk reflects a public-relations-firm-driven acute misunderstanding of commercial gambling's harms.

"[P]roblem gambling often presents as an acute disorder. Problems can emerge within a relatively short period of time and the effects are often thought to extend to as many as, '10 to 15 people who have contact with the gambler, including spouse, children, parents, and fellow gamblers, people stolen from, employers and employees.'" Johnson, *infra*, citing Lesieur and Custer, "Pathological Gambling: Roots, Phases, and Treatment," 148. Thus, it is evident that gambling industry-supplied statistics (which already are known to significantly misrepresent and understate the prevalence of problem and pathological gambling) typically fail to report the true scope of harmful impact the industry causes: industry statistics fail to take into account these "networks of misery" resulting from addicted gamblers' behaviors—in that 10 to 15 people, beyond the gambler himself, are negatively impacted by industry-fostered addictive behaviors (e.g., thefts, embezzlements, robberies, frauds, bankruptcies, suicides). "As an independent governmental commission in Australia recently reported, 'problem gambling prevalence rates expressed as shares of the adult population are misleading measures of the real risks when most of the adult population do not gamble regularly, or do not gamble at all.' Schull, Natasha Dow, Addiction by Design, p.320, fn.58 (Princeton U. Press 2012).

"[B]ehavioral research case studies…have indicated that a relationship exists between insiders conducting fraud and embezzlement, and addiction to gambling or pain prescription medication." Johnson, Paul R., "Trusted Insiders are Committing Fraud and Embezzlement within Organizations: Is There a Connection to Addiction, as the Motivating Factor for Their Illegal Activities?," Naval Post-Graduate School published thesis (July 2014), p. 5, *citing* Jay Albanese, "White Collar Crimes and Casino Gambling: Looking for Empirical Links to Forgery, Embezzlement, and Fraud," *Crime, Law & Social Change* 49, no. 5 (June 2008): 333–47; Virgil W. Peterson, "Why Honest People Steal," *Journal of Criminal Law and Criminology* 38, no. 2, art. 2 (1947): 94–103. Perhaps most

> alarming is the frequency of trusted insiders conducting fraud and embezzlement within government agencies to finance and support their addiction. Many of these trusted government employees who have committed illegal activities have had access to sensitive information concerning their particular municipalities, and in some cases, have had access to some of this nation's most guarded secrets and intelligence programs, which when revealed compromises the reputation and integrity of their oaths of office, and potentially, national security.

Johnson, id., at 5-6 (internal footnotes omitted). Examples Johnson's study cites, at p.6, include: Nolan Clay, "Ex-FBI Agent in Oklahoma Gets Six Months in Prison for Embezzling," *NewsOK.com*, accessed March 14, 2014, http://newsok.com/ex-fbi-agent-in-oklahoma-gets-six-months-inprison-for-embezzling/article/3738422; Larry Lebowitz, "Ex-FBI Agent Sentenced to Five Years in Prison," *Sun Sentinel*, November 24, 1998, http://articles.sun-sentinel.com/1998-11-24/news/9811240441_1_sentence-sullivan-s-role-gambling-debts; Associated Press in Washington, "U.S. Nuclear Commander Tim Giardina Fired Amid Gambling Investigation," *The Guardian*, October 9, 2013, http://www.theguardian.com/world/2013/oct/09/us-nuclear-commander-tim-giardina-fired-amid-gambling-investigation. These shocking examples would only become more frequent should Government give its imprimatur to online gambling, including online poker.

Of course, these days prosecutors and criminal defense lawyers typically can tell multiple tales of cases they've handled involving less newsworthy, but more frequent, crimes traceable to problem and pathological gamblers. Rates of thefts, frauds, embezzlements, tax cheats, burglaries, robberies (armed, some resulting in murder, and some otherwise), failures to provide child support and alimony-type payments—all are boosted in varying ways by commercial gambling-driven desperation and the gambling industry's ethically-numb marketing. The increase in the above-listed street-type crimes combines, of course, with Internet gambling's established utility for money launderers and, now, terrorist financiers. These are not fanciful concerns. FinCen recently had to send land-based casinos stern warnings about their repeated

failures to comply with anti-money laundering measures (such as Bank Secrecy Act provisions and regulatory reporting requirements). Even the biggest and well-funded U.S. gambling operating companies have failed to develop effective compliance mechanisms, leading to their being used to launder *huge* amounts of illegal proceeds, primarily from illegal narcotics trafficking.

Nothing suggests that Internet gambling operators would "do compliance" better and, indeed, recent history suggests they would do worse—especially as some propose, as cost-saving measures, to outsource to offshore operators various financial and bookkeeping functions. Lesser amounts of funds than are generated by illegal drug trafficking, of course, are needed by terrorists to conduct their operations, typically. These smaller amounts are easily conveyed and disguised via online gambling accounts. Convictions have already occurred in the UK for terrorists' use of online gambling as a vehicle for funding, and multiple investigations in many parts of the world continue, often in a classified setting, to find further evidence of terrorist financiers' reliance on online gambling. (That the Federal Criminal Investigators Association recently endorsed passage of H.R. 707 (so long as it is without any provision which would permit a carve-out for, say, online poker) is strong evidence that the experienced investigators who develop evidence of money laundering and terrorist financing recognize the dangers posed by online gambling and the need for the Wire Act's restoration. (See, *infra*, the attached Feb. 27, 2015, letter from Richard Zehme, president of the Federal Criminal Investigators Association.)

It's worth recognizing that online poker, like all forms of online gambling, necessarily takes the form of "machine gambling" which, academic study has established, results in much faster descent into pathological addiction (1.08 years, as compared to 3.58 years for non-machine gambling). Breen & Zimmerman, Brown U. School of Medicine, Rapid Onset of Pathological Gambling in Machine Gamblers, Journal of Gambling Studies, Vol. 18, No. 1, Spring 2002. Indeed, practical experience bears out what independent academic studies establish:

> Internet wagering is—or has the potential to be—the most concentrated, most habit-engendering gambling environment known to humankind. I speak from experience….[Apart from losing "roughly $50,000…"], I bore the additional expense of lost time, lost pride, of disorientation and fear. Beginning—as addictions will—casually, poker changed me, and before I dropped the first 10k I was dependent on the feelings it delivered. I felt alive only when I was in action."

Josh Axelrad, "Online gambling may be too powerful for regulation," guardian.co.uk/commentisfree/2011/apr/21/. Axelrad, a noted author, continues,

> Regulations can't make gambling safe. The people of Nevada—the American state with the longest history of casino regulation—suffer from gambling-related pathologies at nearly double the national rate….There's no escaping the potential for harm. The peril is

> intrinsic to the pastime….Perhaps regulating and licensing casinos sends entirely the wrong message. If gambling is inherently unsafe—and unsafe in unpredictable ways, causing harm to some but not to others—perhaps the illusion of protection is the last thing players need.

Id. Others' experiences mirror Axelrad's:

> [P]eople don't write about the ugly side of gambling…. I had sat around enough poker tables to realize that none of the people you play with are really happy about it, especially these guys who have been playing for a long period of time…[Y]ou see them slowly deteriorate…By year two or three or four, you can see that if they somehow *could* stop, they probably would. There's no worse way to make several thousand dollars than playing poker all the time….You start to become numb to everything else that's happening in your life….My job became meaningless. Ultimately, the relationship I was in that time became kind of meaningless, too, because it didn't compare to the fast life that playing cards seemed to offer… .

Jay Caspian Kang, writer, in interview published on Nieman Storyboard, Nov. 12, 2010 http://niemanstoryboard.org/stories/jay-caspian-kang-gambling-narratives-interview/ (See, also, Kang's essay, The High Is Always the Pain and the Pain Is Always the High, at http://www.themorningnews.org/article/the-high-is-always-the-pain-and-the-pain-is-always-the-high) (revealing the disturbing ease with which even literate, educated people succumb to gambling addictions). And Kang was writing about in-person poker in bricks-and-mortar settings; the risks of harm would only metastasize if legislation makes even more available the astonishing speed, multiplicity of games, and ubiquity of online poker. Passing laws to further enable commercial gambling's already-rapid spread would ignore the import of recent published research reflecting that compulsive gambling is already more common in the United States than alcoholism. Welte, et al., Journal of Gambling Studies, April 2011, Research Institute on Addictions, University of Buffalo.

Additionally, entwined with and driving increased gambling behavioral changes would be a concurrent adverse environmental, quality-of-daily-life change in America: online poker enterprises inevitably would heavily market their brands over TV and radio, in online and print ads, on billboards and public buses, and on mobile devices, further shaping American behavior toward unproductive economic activity. No Congressperson was elected to diminish the quality of life in America, but that is precisely what would result from passing H.R. 707 with its present online poker "carve out" language intact.

To paraphrase the writer, Mark Slouka, a Guggenheim Fellowship awardee:

If we lack the awareness to right the imbalance between the crassly commercial and the civic;

If government's role, in America and in its' states, is no longer the business of producing the kind of statesmen-and-women and the quality of civic life promoting traditional values of work and dedication—***not*** luck and chance—as the primary determinants of success and reward;

It's in large part because the time-honored ***civic*** function of our governmental system has been ground up, as if into a radioactive paste and called off-limits, a surrender to bankers and investment managers and gambling syndicates, at the expense of quality of life and family stability.

Is it any wonder then, that our governmental priorities should be determined more by business leaders than by ***values*** leaders, or that the relationship between commercial gambling and government should increasingly resemble the relationship between a company and its' suppliers? Or that the "suppliers" (governments' delivering citizens to an expanded commercial gambling market) should seek to please commercial gambling management in any way possible, in order to make the payroll?

But, perhaps, there's still time to invest our capital in what makes us human, rather than as commodities to be manipulated toward "maximum time on device," toward "playing to extinction."

> ---that manipulation is the unstated goal of commercial gambling operators planning new machine gambling via the Internet, with online poker serving as an entrée, as a "teaser;"
>
> --It is beyond time to end the corrosive relationship by which government is in symbiosis with commercial gambling. Social gambling, charity gambling, and tribal gambling are ***plenty***: after all, there's no shortage of outlets for people to gamble; passing laws to expand commercial gambling fills no shortage. Despite what the commercial gambling interests will tell you, increasing efficiency in gambling need ***not*** be the end game: **enabling more efficient exploitation of citizens is *not* why governments exist. It's the *antithesis* of the civic function of government.**

Prove wrong the cynical view that many people have of Congress: promote and protect the public welfare by passing H.R. 707 in a form that simply restores and clarifies the Wire Act's reach to that which was commonly understood for the fifty years before December 2011. This can be readily accomplished by modifying H.R. 707 to follow the below suggestion. It's that simple.

18 U.S.C. §1084 presently reads:

(a) 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.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce 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.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

Amending the above statute, minimally, to (1) correct the misinterpretation recently given subparagraph (a) by the DOJ's OLC; (2) to ensure the amendment does not impair First Amendment reporting freedoms; and (3) to update the helpful remedial notice provision in subparagraph (d), would result in the revised Wire Wager Act reading as follows (proposed changes in **bold** typeface):

(a) Whoever**,** being engaged in the business of betting or wagering**,** knowingly uses a wire communication facility **(i)** 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 **or non-sporting** event or contest, or **(ii)** for the transmission **in interstate or foreign commerce** of a wire communication which entitles the recipient to receive money or credit as a result of bets or

wagers **on any sporting or non-sporting event or contest,** or **(iii)** for **the transmission in interstate or foreign commerce of** information assisting in the placing of bets or wagers **on any sporting or non-sporting event or contest,** shall be fined under this title or imprisoned not more than two years, or both.

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

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier **or communications service provider doing business in interstate or foreign commerce and operating, in whole or in part, in the United States, […]** is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by **the common carrier or communications service provider** is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, **the common carrier or communications service provider** shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility **or service**, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier **or communications service provider** for any act done in compliance with any **such** notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility **or service** should not be discontinued or removed, or should be restored.

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

This suggested language entirely obviates the decades-long but largely irrelevant and misleading argument over whether poker, for example, is predominantly a game of skill. Interstate betting on *any* games, skill or non-skill, is essentially what the Wire Act outlawed and should continue to outlaw. Organized crime, money launderers, terrorist financiers, tax evaders, and fraud artists really don't care whether they use gambling on skill or non-skill games to move funds

clandestinely—they're just looking for vehicles to do so, and Internet gambling provides them with a near-perfect vehicle.

Gambling on the internet, of course, is where almost ALL commercial gambling is trying to go, in some large measure, whether we're talking about commercial poker or other commercial gambling operations. Because of my background, experience, and present consulting work involves counterterrorism and anti-money laundering, anti-terrorism financing, law enforcement, and privacy issues, and because I'm also on the board of a cyber counterintelligence firm, let me make some additional observations, based on a Department of Defense study out of Sandia Labs:

1. The Internet contains ***intrinsic*** features which

> --support anonymity, and
>
> --inhibit or defeat forensic attribution of (a) fraud, (b) use of aliases, (c) underage access/use, and (d) cyberattacks.

Our best minds, using the most sophisticated forensic tools can only sometimes—and, often, never—determine, after the fact, a sophisticated intrusion or attack from, say, China, Romania, India-based hackers into the Defense Department's ***most secure computers***.

> --What makes you think a state, local, or even a federal regulatory/investigative agency would consistently do better? What's an acceptable level of loss of private data? Of gambler's funds? Of corporate/state revenue?
>
> --You ***can't*** hire/train/retain enough investigators/regulators to limit or eliminate the losses/risks. (The expenses of adequate security would entirely "eat" the expected revenue to the states, and then some.)

Moreover:

2. The technical evolution of anonymizing services is accelerating (in part, due to recent events in copyright enforcement).

3. Few, if any, plausible ways exist, or are anticipated, to overcome the barriers to forensic-based attribution by these features and services (Tor/"onion" router; proxy servers, etc.).

4. We cannot state with confidence that future versions of Internet Protocol (IP) addressing will have any significant effect on the ability to attribute misuse of Internet services and cyberattacks.

5. In the limited number of cases where forensic-based technical attribution ***is*** possible, it is most likely to be achieved in the reconnaissance phase of an attack—which is resource-intensive and best achieved through mass surveillance, which many people find offensive to privacy values.

6. Alternatives to forensic-based attribution exist, but are often considered illegal (such as "hack-back"-type counterattacks) or costly, and, perhaps, raising ethical/Constitutional concerns, such as aggressive covert intelligence-gathering on potential attackers and fraudsters. These non-technical obstacles ***are*** obstacles, nonetheless.

7. Even if perfect technical attribution becomes achievable, in only a minority of cases would there be a significant deterrent effect, at least where significant disruptive cyberattacks, and thefts of information, of funds, and of services are contemplated by parties hostile to a state's authorized gambling concerns (or to the interests of the US government).

8. At least with respect to cyberattacks against the US government or privately-owned but critical infrastructure (e.g., utility power grids, water plants, etc.), experts assess that pre-emptive covert operations ***may*** have a significant deterrent effect, by raising uncertainty of success, owing to the possibility that facilities controlling an attack may contain latent subversions; ***however,*** it is regarded as extremely unlikely that a state's intra-net-based gambling enterprise (or even multi-state enterprises linked by gambling compacts) will ***ever*** be considered critical infrastructure or key assets meriting preemptive covert operations and implanting latent subversions in potential attackers'/unauthorized users' machines.

As troubling as these observations should be about online gambling, it's even more troubling that some lawmakers really believe there's a pot of gold, for example, in online poker tax revenue. I hate to burst their bubble, but if gamblers can figure out the odds on a football game, or how to count cards, or when to hold or fold, they certainly can figure out that they'll save a bundle in taxes by gambling with offshore online entities. That, of course, will simply put us back to the enforcement issues that started in the 1990s, only now we'll be calling it revenue protection instead of illegal gambling enforcement, and we will have created a vastly-larger (indeed, an impossible-to-adequately-oversee-larger) market of gamblers' transactions—which, of course, is the true strategic aim of the commercial gambling industry. (The shortfall in gambling revenue that was projected for the states which have legalized some form of Internet-based gambling versus what they have actually realized already bears this theory out.) There is no reason to believe that legalizing online poker will, somehow, set boundaries that will remain unchanged and immune from erosion. Given the history of commercial gambling's post-legalized-lottery growth in America, such boundaries (*e.g.*, ones designed to protect youth, student-athletes, the elderly, the needy, the cognitively-impaired) will necessarily evaporate over time. Greed corrodes. People who fall back on the weariness argument ("We don't really approve of gambling, and recognize that it's clearly classified as a vice for good reason, but it's already here") are simply surrendering their good judgment. After all, **lots of harmful conduct is "already here," but that is no excuse for purposefully creating more of it.**

Of course, an argument can be made that *some* segment of the public wants Internet poker or other online gambling and that providing it would somehow allow law enforcement to direct its resources elsewhere; but legalization requires regulation, and politicians <u>will</u> tax the

industry. Regulation and taxes means more enforcement costs, not less. It's a myth to argue legalization will reduce the need for law enforcement. Requiring the already-overburdened law enforcement and regulatory communities to do more simply creates more opportunities for criminals and for cheats to succeed, on the Internet and off it, and whether in the world of gambling-related crime or non-gambling-related crime.

I appreciate your consideration of my testimony.

ADDENDUM TO WRITTEN TESTIMONY OF MICHAEL K.FAGAN

The Muffy Opinion: Wrong on Multiple Levels

[The following examines the December 2011 Department of Justice, Office of Legal Counsel, opinion that controversially--and without public input or notice--re-interpreted a key portion of the Wire Act, 18 U.S.C. §1084(a). The opinion can, and should, first be read. It is accessible at http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf]

Soon after taking her perch high in the U.S. Department of Justice (DOJ), Assistant Attorney General Virginia A. Seitz issued a gambling-related Office of Legal Counsel (OLC) opinion (dated September 20, 2011, but inexplicably not made public until December 23, 2011). Her opinion was that the federal Wire Act's prohibitions did not reach non-sports gambling conduct on the Internet.

Coincidently, Ms. Seitz' publicly-stated nickname is "Muffy," (see http://www.judiciary.senate.gov/nominations/112thCongressExecutiveNominations/upload/VirginiaSeitz-PublicQuestionnaire.pdf) and, now, it is deservedly so, since she "muffed" this Internet gambling opinion (much as a football punt or pass receiver "muffs" a catch by dropping the ball). For ease of reference, then, this memorandum will call the December 2011 OLC opinion "the Muffy opinion."

Born to privilege, academically gifted, a multi-millionaire, and never a legislator, prosecutor, nor an attorney working in a setting likely to regularly encounter individuals or small businesses harmed by pathological gambling (whether on the Internet or otherwise), see id., it is unsurprising that Muffy Seitz' interpretation of the Wire Act varied from the previous, decades-old understanding of this 1961 law enacted to protect people from organized crime and the serious pathologies of essentially-unrestricted commercial gambling. Her opinion doesn't protect the vulnerable or reflect the will of the majority; instead, it favors moneyed corporate interests. Indeed, at the time she issued her opinion on behalf of the OLC, Muffy was a newcomer to the DOJ. She had only been confirmed for her AAG position on June 28, 2011; yet, fewer than 90

days later (and as an entirely unelected official with no direct responsibilities to U.S. voters, unlike the accountability of a congressperson to an electorate), Muffy took it upon herself to upset both the DOJ's and several federal judges' contrary and reasoned interpretation of the statute—the Wire Act, 18 U.S.C §1984, particularly subsection (a). Moreover, according to her written opinion, she evidently upset the prior interpretation without seeking any input beyond that of letters from two states' lottery officials and a governor and the two DOJ Criminal Division transmittal memoranda accompanying them (*see* Sept., 20, 2011, OLC opinion, p. 1). The states' letters seeking DOJ guidance on the point were dated in 2009 and 2010 and had not been directed to the OLC. Rather, one (from New York) had gone to DOJ's Office of Intergovernmental Affairs in 2009 and two (from Illinois) had gone, respectively, to Attorney General Eric Holder in 2009 and to DOJ Organized Crime and Racketeering Chief Bruce Ohr in 2010. The September 20, 2011, Muffy opinion never clearly explains how these letters came to settle on the desk of the DOJ Criminal Division's then-boss, Lanny Breuer, nor how or why he felt it his obligation to defer to the OLC when his Division had long had a written interpretation of the Wire Act, Title 18, U.S.C. Section 1084—one which did recognize the illegality of online gambling via interstate facilities.

This context at least raises concerns, especially in light of unstated, undisclosed experiences of the three highest-ranking DOJ officials—political appointees, all--involved in events leading to the Muffy opinion. After all, before their recent forays into government service, Attorney General Holder, Assistant Attorney General Breuer, and Muffy Seitz all represented—and, presumably, earned substantial fees from—huge clients, either to advocate for increased Internet gambling or to avoid liability for the client's role in facilitating and promoting Internet gambling (i.e., in recent years, Muffy Seitz represented the State of Delaware in its unsuccessful litigation efforts to expand into Internet gambling against federal law, whereas Mssrs. Holder and Breuer represented a major Internet search engine firm seeking to minimize its federal forfeiture liability and avoid criminal prosecution for promoting, for profit, illegal Internet gambling). Thus, none of the three came at the question of the scope of the Wire Act without, at least, a past personal financial interest in the topic, generally, nor likely without an eye to the day when they might again return to the large fees they commanded in civil practice from clients such as these. Should these past interests have been disclosed? Should the three have recused themselves from the issue to avoid an appearance of impropriety? Whatever the conclusion, the lack of transparency on the point does not auger well for the matter of public confidence in the Muffy opinion.

Of course, given the multiple duties the head of the OLC has, it seems unlikely that the Muffy opinion flew entirely alone from one person's mind. The legal staff of the OLC largely consists of bright young attorneys, some of likely worked on what became the Muffy opinion. Which ones did so having previously played (or while still playing) online poker or engaged in other online gambling behavior seems relevant. Given the huge participation of youth in online

gambling, this issue is no idle speculation. Having engaged in or enabled behavior that, under the traditional interpretation of the Wire Act, has been illegal for decades, a natural bias would exist, as well as a temptation to, with a stroke of the pen--or, more modernly, with the pounding of a computer keyboard—to make legal that which had been prohibited. Thus, disclosure remains appropriate, both (i) of who else worked on, and reviewed, what became the Muffy opinion and (ii) of what each of those persons' experience has been in engaging in Internet gambling. If, so to speak, there were foxes guarding the chicken coop, the American public would seem to have a right to know.

Likewise, with Ms. Seitz having joined the DOJ from the law firm Sidley & Austin, it is not an untoward request to require disclosure of which of that huge law firm's many clients stood to benefit from the Muffy opinion. The same can be said of Mssrs. Holder's and Breuer's pre-DOJ employer, Covington & Burling, a law firm which stands to benefit (via its lobbying efforts on behalf of the NFL and NCAA) from the maintenance of Wire Act applicability to sports gambling while removing the restriction of the Act's applicability to the conduct of other, non-sports clients. This is not to impute chicanery or allege conspiratorial misconduct on the part of any of these three DOJ officials, but only to note that they, too, are human and, as such, are prone to favors and biases, unconscious and otherwise, as well as to understandably looking down the road to the day when they return to private practice (which, in fact, Ms. Seitz and Mr. Brewer have done, and Mr. Holder will soon be able to, as well). Good judgment and an effort to build respect for the Muffy opinion would have resulted in these disclosures long ago, prior to or concurrently with the release of the opinion. Non-disclosure of this information, combined with the delay in the *public* release of the opinion, in these clouded circumstances, certainly does little to inspire confidence in the independence which should have undergirded it.

Apart from the above, the Muffy opinion reads reasonably-enough—until a closer look and consideration both of what federal judges having decades of decisional experience have said about the Wire Act's reach, as well as more the timely-issued DOJ interpretation of the Wire Act (timely, in the sense that the prior interpretation came at a time closer to the 1961 enactment of the statute). No one contends that Section 1984 was a model of clarity. And, as noted in the Muffy opinion, more recent enactments can be read (if one is of a mind so to read) to conflict at some level with the Wire Act.

For example, the Unlawful Internet Gambling Enforcement Act (UIGEA) defines unlawful Internet gambling by reference to what state or federal law prohibits, 31 U.S.C. §5362(10)(A), and it explicitly points out that this does not include "bets…made exclusively within a single State," *id.* §5362(10)(B), and that the electronic data of a bet's "intermediate routing…shall not determine the location…" where the bet was made, id. §5362(10)(E). The new-era formerly-Breuer-led Criminal Division and the OLC view this UIGEA language as creating some tension, supposedly suggesting that some electronic transmission of gambling

information is legal, whereas the Wire Act says otherwise (as previously-interpreted). Yet the tension is ephemeral. Fairly read, the UIGEA language simply allows that technologically necessary or interstate transmission of data shall not be determinative, alone, of the location of a bet; plainly, the UIGEA language does not *prohibit* consideration of this factor, along with other factors, in making that determination. Hence, early-on in the Muffy opinion, one can see that a predilection exists to find, rather than resolve or avoid, statutory conflict. As the opinion continues, the further predilection to misconstrue or ignore relevant sources further undercuts the Muffy opinion's persuasiveness.

An example of misreading precedent (i.e., prior cases supposedly supporting the Muffy opinion's conclusion) comes early-on in part II of the opinion. There, the OLC refers to the "sparse case law on this issue [being] divided." First, a reference to "sparse" case law is wholly unpersuasive, for the important factor in interpretation is the *logic* of the case law (rather than the mere number of cases interpreting a statute). More important, the "divided" nature of the case law, upon review, is hardly that. The sole case cited in the OLC opinion to support its "divided" conclusion is In re Mastercard Int'l, Inc., Internet Gambling Litig., 132 F. Supp. 2d 468, 480 (E.D. La. 2001), aff'd., 313 F.3d 257 (5th Cir. 2002). In that case, the Fifth Circuit merely agreed with a district court's analysis of the Wire Act. That lower court had found that Section 1084 concerns sports gambling and, as the Internet gambling at issue was not sports gambling, the RICO plaintiffs, an unsympathetic bunch seeking to evade gambling debts, had no case; however, the Muffy opinion fails to note that *the district court only considered the first clause of Section 1084 and did not make any distinction between the different subparts of the Wire Act.* Further, the district court relied upon the existence of unenacted legislation (that would have amended Section 1084 to more clearly include casino-style gambling), speculating that the proposal's existence tended to show that the Wire Act did not extend to non-sports gambling. The Muffy opinion, however, entirely failed to consider, much less credit, the at least equally-likely speculation that the reason the unenacted legislation did not pass was that the majority of Congress felt that the Wire Act, in light of the statute's then-prevailing interpretation, did not need further clarification: it already prohibited wire communications involving casino-style gambling, as well as sports gambling. (While a DOJ witness commenting, in 1999, on the proposed amendment to Section 1984 noted that the Department supported the clarification (given the development of the Internet), he did not say that the unamended Wire Act failed to extend beyond sports gambling; rather, he simply supported clarification that the act did apply to interactive casino betting. Testimony of Kevin V. DiGregory, Deputy Asst. Attorney General, Department of Justice, addressing Internet Gambling and Indian gaming Before the Senate Committee on Indian Affairs, June 9, 1999.)

In the Mastercard case, the district court did not consider the statutory phrase "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers," which is a part of Section 1084(a); thus, the OLC over-reaches to say

that the Fifth Circuit's rote acceptance of the district court's reasoning somehow can be relied upon as if it created a split of opinion with cases that did consider that phrase. Additionally, the term "bets or wagers" is not defined in Section 1084 or elsewhere. This provision of the statute (i.e., the second clause of Section 1084) does not include the limiting words "sporting event or contest." Under any accepted plain-language definitions of the term "bets or wagers," casino-style gambling falls within the prohibition. Hence, Mastercard's, and by extension, the Muffy opinion's reliance on unenacted legislation that might have been helpful, but which was not necessary, is ill-advised.

This is particularly so in that the two cases, U.S. v. Lombardo, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) and U.S. v. Kaplan, No. 06-CR-337CEJ (E.D. Mo. Mar. 20, 2007)(R&R of U.S. Magistrate Judge Medler, adopted by District Judge Jackson) that the Muffy opinion cited as the opinions conflicting with Mastercard, actually did consider the disjunctive language of the Wire Act, language which describes the second distinct offense created by Section 1084. In other words, Lombardo and Kaplan were more on-point than Mastercard.

Curiously, after noting what it termed a divide in the case law, the Muffy opinion never again mentions these on-point cases. One would expect the OLC to directly point out where each opinion had gone wrong. The Muffy opinion not only does not do this, it also fails to defer to the collective experience of federal judges having decades of experience who decided the Lombardo and Kaplan cases. Nothing, of course, requires a newly-minted AAG, heading the OLC without any practical experience in organized crime-fighting, investigation, or prosecution, to so defer; but, again, one would have thought that at least directly addressing the supposed shortcomings of these judges' opinions would help meet the need to garner confidence in an opinion 180 degrees from the considered rulings of long-time judges and of career, non-political DOJ personnel. Rookie mistake? If so, it was compounded by the fact that the Muffy opinion also failed to delve into the parties' arguments in the Lombardo and Kaplan cases which led to the rulings disregarded by the OLC. These pleadings were available to the OLC, but appear not to have been considered.

Similarly unaddressed was the fact that, for over many decades, DOJ had used Section 1084 to prosecute non-sports wagering, with evident federal court approval. *See, e.g.*, U.S. v. Vinaithong, 1999 U.S. App. LEXIS 6527 (10 Cir. April 9, 1999) (upheld sentencing of individuals who pled guilty to information charging section 1084 violation for operation of a "mirror lottery" based upon the numbers drawn in the Illinois state lottery); U.S. v. Chase, 372 F.2d 453, 457 (4th Cir. 1967); and U.S. v. Manetti, 323 F. Supp. 683, 687 (D. Del. 1971). Also ignored were the observations in U.S. v. Corrar, 512 F. Supp. 2d 1280 (N.D. Ga. 2007), *citing* Martin v. U.S., 389 F.2d 895, 898 (5th Cir. 1968), (i) that the Wire Act is to be broadly interpreted, especially given that assistance to the states in enforcing their gambling laws was only part of the reason for the federal statute; and (ii) that the Wire Act was a part of an omnibus

crime bill that recognized the need for federal action to combat interstate gambling operations and did so as part of an independent federal policy aimed at those who would, in furtherance of any gambling activity, employ means within direct federal control.

Less controlling, but nonetheless worthy of consideration, is the fact that no known federal circuits' pattern jury instructions for criminal cases (typically crafted by teams of federal judges and experienced criminal law practitioners within each circuit) found that Section 1084 was limited to sports gambling. Lombardo, *id.* (noting, at 1281, that "the Tenth Circuit's Criminal Pattern Instructions…do not attach the "sporting event or contest" qualifier to either providing information assisting in the placing of bets or wagers or informing someone of his entitlement to money or credit resulting from bets or wagers). In the face of all this precedent, the Muffy opinion's deviation from reasonably-settled departmental, bar, and court interpretation puzzles the bench and bar, save for those advocates paid handsomely by the gambling industry to advance strained and theoretical arguments against plain but imperfect phrasing.

The structure of the Muffy opinion is itself curious. Rather than first demonstrating that the Criminal Division's long-held interpretation was based on an incorrect premise, the OLC begins by assuming a faulty premise exists in that earlier interpretation and only then puts forth support for its preconceived conclusion. OLC next spends effort arguing that §1084's two broad clauses are both modified by the term "on any sporting event or contest," despite the fact that the phrase only appears in the first clause. Part of the reason the Muffy opinion concludes that the phrase modifies both clauses is the lack of a comma after the first reference to "bets or wagers." Yet it seems the height of inconsistency—or, at least, of pre-ordained, result-oriented reasoning--to credit the lack of a comma with persuasive meaning while not crediting the likelihood that the lack of the phrase "on any sporting event or contest" has the plain meaning that judges and the DOJ have long ascribed to it. That the latter meaning most likely comports with Congress' intent is decidedly not "counterintuitive," despite the Muffy opinion's repeated use of that conclusory descriptive.

At p. 6 of the Muffy opinion, a quote from the Senate Judiciary Report is cited. The quote helps explain the purpose of the amendment of the bill which became the Wire Act. Nothing in the quote ties the amendment to sports gambling or limits the reach of the amendment only to sports gambling. Ignoring this obvious point, the Muffy opinion states that "Nothing in the legislative history of this amendment suggests that, in…adding subsection 1084(a)'s second clause, Congress intended to expand dramatically the scope of prohibited transmissions…to *all* bets or wagers…." (emphasis in original) Drawing sweeping pronouncements from silence hardly constitutes strong reasoning. After all, by the same token, nothing, of course, suggests Congress *didn't* intend to reach non-sports gambling—and, indeed, some legislative history does indicate a broader reach was intended by the amendment. Further, not only is it not "counterintuitive" that Congress would do so (i.e, extend the reach of the Wire Act to non-sports

gambling), it would be counterintuitive for Congress not to do so. Why would Congress have enacted a ban solely on sports gambling via interstate facilities, leaving legal other gambling avenues for organized crime to use to fund itself and to defeat local and state laws? More likely, and entirely rationally, the statute's second clause serves as a catch-all of sorts, enabling law enforcement to fight organized crime and racketeering enterprises no matter how the criminals chose to use illegal gambling to fund themselves. Limiting the ability of law enforcement to fight only the then-most prevalent type of illegal gambling (sports gambling) gives too little credit to Congress and its obvious purpose to provide a broadly useful tool to fight organized crime.

Later in the Muffy opinion, the OLC notes that on the same day that Congress passed the Wire Act it also passed the Interstate Transportation of Wagering Paraphernalia Act (ITWPA), 18 U.S.A. 1953. The opinion cites the latter act as some evidence that Congress knew how to explicitly make an act apply to non-sports forms of gambling. Yet the ITWPA can equally be cited as proving that Congress sometimes uses catch-all provisions in criminal statutes, for that act prohibits (among other things) interstate shipments of physical items used in a "numbers, policy, bolita, or similar game…." The catch-all ("or similar game") expands the type of lottery-type gambling games affected by that statute. Likewise, the unrestricted language in the second clause of 1084(a) expands the type of interstate wagering information in catch-all fashion, a sensible legislative response to the common-sense realization that, by restricting organized crime's abilities via the Wire Act's primary sports gambling thrust, non-sports illegal gambling efforts were likely to rise to fill the void. This conclusion not only is *not* "counterintuitive," it is the one which comports with the duty to interpret federal statutes in a common-sense manner.

Relatedly, it merits noting that the ITWPA, as amended, regulates physical items useful in sports and non-sports betting, not electronic communications over wires (otherwise it would be redundant with the Wire Act). As a parallel provision in purpose, why wouldn't a similarly-broad, if differently-worded, reach exist in Section 1084(a)? Congress should hardly be assumed to have intended that one statute had a broader reach than the other, given the similar goals of the legislative effort.

The Muffy opinion also argues that since the jurisdictional phrase "in interstate and foreign commerce" was left out of the second clause of §1084(a), that's some evidence that "Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause." Of course, what the OLC doesn't say is that Congress had to have jurisdiction to act, and citing that Commerce Clause-based language cements that jurisdiction, so it is easier and obvious to infer that the jurisdictional clause applies to the second clause of §1084(a); but no such obviousness nor necessity applies to the "sporting event or contest" language of the first clause—especially given (i) the breadth of Congress' anti-organized crime goal and (ii) there would be no reason to *allow* non-sports illegal gambling via interstate or foreign facilities, whether by organized crime (or anyone else). Hence, OLC misreads the

"suggestion" it imagines and blatantly ignores the legislative history that does not serve its purpose.

For example, the Muffy opinion cites H.R. Rpt. No. 87-967, at 1-2, reprinted in 1961 U.S.C.C.A.N. at 2631, as supporting the truism that the bill reached acts "in interstate or foreign commerce," but the opinion fails to credit that the same language in the House Report plainly states that "the purpose of the bill is to…aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information…." This legislative report plainly does not state the Wire Act is limited to sports wagering; it does not include a qualifier that the bill's purpose is to suppress only organized sports-gambling activities; and it does not say that the bill only reaches the transmission of sports bets or wagers. Rather, the report's language says what Congress must have sensibly meant in the circumstances, which is hardly a "dramatic" expansion. It would have been more dramatic, in a tragedian sense, for Congress to not have broadly aimed to restrict organized crime's illegal gambling income (i.e., by allowing criminals to freely utilize interstate and foreign commerce facilities for non-sports gambling). That result would have been "absurd," *Cf.*, Corley v. United States, 129 U.S. 1558, 1567 n.5 (2009), yet that is the absurd result left America by the Muffy opinion, if it is allowed to stand.

Oddly, the opinion's fn. 6 observes that the Department of Justice played a significant role in drafting S. 1656 as part of the Attorney General's program to fight organized crime and syndicated gambling. Why, then, does today's OLC not credit the Department's older, more-contemporary interpretation of the law that Congress eventually passed, rather than reject the Criminal Division's long-held interpretation? Instead, the Muffy opinion selectively credits earlier DOJ statements about the bill before Congress in 1961, when doing so helps achieve what seems a pre-conceived conclusion. The Muffy opinion's fn. 7 reveals this.

There, a colloquy between Senator Kefauver and then-AAG Herbert Miller is excerpted, showing that the Department's representative saw the bill—which had been earlier sent to Congress without the amendments adding the broad second clause to 1084(a)—as limited to "sporting events or contests." But the Justice Department's then-understanding of a bill yet in process can provide little support to the OLC's present conclusion, especially since the OLC glosses over the fact that, *in that very colloquy*, Senator Kefauver plainly expresses concern that telephones would be used "quite substantially in the numbers game, too…and laying off bets in bigtime gambling[.]" The Attorney General's Program to Curb Organized Crime and Racketeering, Hearings before the Committee on the judiciary, U.S. Senate, 87th Cong., 1st Sess. 277-279 (June 20, 1961).

The new OLC opinion also inexplicably and selectively edits out additional specific observations in that same legislative history by Senator Kefauver about a 1951 New York and

New Jersey investigation with which he was familiar, in which "a lot of telephones were used across state lines in connection with policy and the numbers game up there" and that he evidently could see no reason "Why should not S. 1656 be expanded to include the transmission of money? Money is frequently sent by Western Union, is it not?" *Id.* In other words, the Senator (widely acknowledged as the then-leader in the fight against organized crime) recognized that non-sports gambling seemed to be reached by the legislative proposal and, at least, *needed* to be reached. By the time the amended bill was enacted into law, it was reached.

OLC stands the concept of legislative history on its head to ignore what the *legislator* said (about the law he and his colleagues would ultimately pass) in favor of what the *bureaucrat* said about a mere bill his department had presented, knowing it could be modified in the legislative process—which it was! In any event, AAG Miller responded, on behalf of the DOJ, that "I do not believe that we would have any objection to that, Senator," referring to Senator Kefauver's expressed intention to expand the bill beyond sports gambling. *Id.* (This response, too, was not included in the Muffy opinion, apparently because it would have undercut the pre-ordained conclusion.)

The Muffy opinion, of course, cites (at p. 10) other instances of testimony during the legislative hearings which led to the Wire Act's passage, observing that this testimony sensibly focused on sports-related betting as "the principal gambling activity for which crime syndicates were using wire communications at the time,"--but the observation sets up a straw-man. The true question is not whether Congress, in 1961, recognized and sought to limit the obvious (i.e., illegal sports gambling); rather, did it make sense for Congress to reach in its legislation *beyond* sports wagers? As noted, above, it would make little sense for Congress *not* to have extended the Wire Act to non-sports illegal gambling transmissions and, instead, to have left open a loophole for criminals to exploit. The fact that multiple references to sports gambling exist in the legislative history is unsurprising, because the statute unquestionably includes sports betting—but observing that to be the primary goal of the statute does not diminish the logical conclusion that Congress then used catch-all-type broad language, unrestricted to sports wagering, in the statute to ensure that organized crime could not profit from operating *other* types of gambling by using interstate communication facilities.

After all, the "Purpose of the Bill" section of the relevant committee report, H.R. 967, 87th Cong., 1st Sess. (1961), broadly refers to gambling and betting, and contains no specific limiting reference to sports betting. Likewise, the "Sectional Analysis" states that certain sports betting is prohibited and then states, again without limiting language, that the statute "also prohibits the transmission of a wire communication which entitles the recipient to receive money or credit as a result of a bet or wager or for information assisting in the placing of bets or wagers." 2 1961 U.S.C.C.A.A.N. at 2632. Entirely overlooked by the OLC is that Attorney General Robert F. Kennedy's statements at the time did not limit the bill to sports gambling

alone—his April 6, 1961, press release explained that the proposal that was enacted as Section 1084 "would make the interstate use of telephones and telegraph for bookmaking or other gambling a criminal offense" (emphasis supplied), and his transmittal letter accompanying the forwarded bill to the House of Representatives stated that "[t]he purpose of this legislation is to assist the various states, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking , and like offenses and to aid in the suppression of organized [illegal] gambling activities…." Letter dated April 6, 1961, from Attorney General Robert F. Kennedy to the Speaker of the House of Representatives. "[T]heir laws," largely meaning the states' anti-gambling laws, both then and now, were and are not limited to prohibitions of sports gambling—in other words, Attorney General Kennedy explained that §1084 helps states enforce their non-sports and sports gambling laws. With the present-day DOJ chiefly housed in a building now named after Robert F. Kennedy, the present OLC's wholesale disregard of his input, contemporaneously made with the legislative effort, most charitably could be termed embarrassing. (Likewise embarrassing, at least academically, is a Sept. 2014 UNLV Center for Gaming [sic] Research "occasional paper," titled "The Original Intent of the Wire Act and Its Implications for State-Based Legalization of Internet Gambling," which tries to defend the OLC opinion, but does so making numerous obvious errors and assumptions; for example, claiming that DOJ's Criminal Division's interpretation that the Wire Act is not limited to sports gambling "only dates back to 2002." The author of the memorandum you are reading knows from personal experience and employment in the DOJ that the Criminal Division's interpretation dates further back than that—which also should have been evident to the UNLV researcher from the mere fact of the multiple non-sports gambling cases DOJ attorneys have prosecuted using §1084. Other flaws in the UNLV document can be pointed out, upon request.)

The Muffy opinion appears rushed, biased, and flawed by reliance on intuition rather than careful analysis. Keeping with this theme, the opinion fails to draw upon recent legislation which perhaps provides guidance as to how Congress understands the law it passed in 1961. For example, if Congress wanted to expand the ability of people to use the Internet or wire communications to lawfully gamble, it certainly knows how to do so, for it apparently did so in amending the Interstate Horseracing Act in 2000 (by adding language to the definition of "off-track wager"). No such amendment to the Wire Act has been made, however. Instead, Congress passed the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) to further inhibit efforts to evade the prohibitions of the Wire Act. Critics of that statute complain that UIGEA fails to clarify what type of internet gambling is unlawful—but they ignore that what they see as a "failure" reflects that the majority of Congress thought that the predominate interpretation of the Wire Act was correct: it reaches sports *and* non-sports gambling communications. UIGEA allows for Wire Act-permitted wholly intra-state gambling to have payments processed, if the gambling is authorized by that state's law, but nothing about UIGEA reflects any intent by

Congress that the Wire Act's proscriptions were to be changed. Yet, by decree, the Muffy opinion did just that.

Rather than give Congressional activity a chance to develop citizen-driven responses to American social desires to expand or restrict Internet gambling, the Muffy opinion overreaches and, so, erodes democratic values. It may be that Congress moves more slowly than warring interest groups prefer when it comes to Internet gambling legislation, but to ignore the Constitutional process in favor of expediting an opinion, especially one so clearly flawed and so clearly benefitting wealthy interest groups and business concerns associated with recent major clients of present DOJ leadership, reflects poorly on the OLC and, more broadly, the DOJ. Virginia A. Seitz, like Eric Holder and Lanny Breuer, are or were bright and hard-working public servants juggling scores of sensitive and difficult issues at any one time, but they are also human and prone to occasional error. Here, they muffed their chance at accurately ascertaining the will of Congress.

In effect legislating by fiat, the Muffy opinion these officials created or allowed unleashes pathological effects across America, no matter what a particular state's or locality's laws that ban or restrict non-sports gambling. If allowed to have continuing effect, the Muffy opinion's encouragement to expand Internet-based non-sports gambling will soon provide a sonic boom of problem and pathological gambling, underage gambling, increased fraud, money laundering, and terrorist financing opportunities, uncollectable debts, bankruptcies, suicides, all compounded by government's inability to provide resources even remotely approaching those needed to enforce laws, administer regulations, and preclude collusion in supposedly-regulable non-sports gambling. Millions of state border-crossing electronic bets per day simply cannot be policed effectively without a massive, expensive, unprecedented, and unrealistic expansion of federal authority—hence, no better recipe for fraud and corruption could be proposed than that subsumed in the Muffy opinion.

Unleashing or increasing such risks on the American public, one would think, is a matter for legislative judgment—a political question, if you will. Why the OLC did not recognize this and decline the invitation to express an opinion remains a key avenue for inquiry. Merely asserting that OLC would not shy away from difficult questions of statutory interpretation may be its answer, but that truly answers nothing, in the circumstances. Given the consequences of the new interpretation of the Wire Act, it is certain that careful public inquiry should determine which pro-Internet-gambling lobbyists (or attorneys associated, for example, with past law firm employers of DOJ officials involved in this interpretation) informally or otherwise spoke to or communicated with OLC or DOJ leadership and staff on these issues during the period between the two states' letters to DOJ and the eventual, publicly-released Muffy opinion. Every American, and both pro- and anti-Internet gambling advocates, deserved a better process than the one which resulted in the substantially-flawed Muffy opinion.

[Below: electronic reproduction of text of Feb. 27, 2015, letter of Richard Zehme, president of the Federal Criminal Investigators Association]

Federal Criminal Investigators Association

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February 27, 2015

Hon. Bob Goodlatte
Chairman and U.S. Representative
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-3951

Re: H.R.707, the "Restoration of America's Wire Act"

Dear Chairman Goodlatte and Members of the Subcommittee,

As President of the Federal Criminal Investigators Association, I head the premier nationwide organization of Federal Law Enforcement Professionals—a highly-trained membership who must constantly adjust to changing technologies, new enforcement strategies, and a criminal element that is increasingly sophisticated, violent, well-funded, and often international in scope. The nature of our membership's work give us, more so than many of our law enforcement brother and sisters, opportunities to engage in complex, long-term investigations and to consider social implications of policies incorporated by our nation's criminal laws.

Because of this vantage point, I am confident that our experience and training provides our membership with a valuable, informed insight regarding H.R. 707, the "Restoration of America's Wire Act," a bill which is presently under consideration by the subcommittee's membership and staff.

H.R. 707 seeks to re-implement the long-standing federal prohibition on illegal gambling businesses' use of communication facilities affecting interstate and foreign commerce. Since the Wire Act (18 U.S.C. §1084) was enacted in 1961, federal courts, federal law enforcement agencies, and the U.S. Department of Justice (DOJ) had understood that law to prohibit both sports and non-sports

wagering over interstate and foreign-commerce affecting communications systems. This fifty-year history was upended when, in December 2011, the DOJ's Office of Legal Counsel issued an opinion that the Wire Act suddenly, somehow, did not reach non-sports gambling. History, tradition, legislative intent, and precedent mattered less than the placement of a comma, apparently, to the author of the new interpretation who, apparently, assumed that Congress in 1961 would ban organized crime from making money from illegal sports bookmaking yet allow the same criminals to continue operating numbers rackets and bolita and other lottery-like illegal enterprises. The illogic of such an approach evidently escaped the attention of the author of the revisionist interpretation of the Wire Act.

Fortunately, members of this Congress have seen through the policy weakness of the DOJ's recent opinion regarding the Wire Act and have introduced H.R. 707, which seeks to both clarify Congressional intent and return the law to its' original and comprehensive purpose as a key tool in the fight against organized crime and today's intertwined concerns of fighting money laundering and terrorist financing. Thus, our organization fully supports H.R. 707's intent and endorses the passage of this important provision, but with an important amendment or modification: the so-called carve-out, which would permit online poker wagering via usage of interstate and foreign communication facilities, needs to be removed from the bill before its' final passage.

No good policy reason supports the carve-out. People can, and have long been able to, play poker online for fun and entertainment, without wagering money or other assets of value. Indeed, advocacy groups who seek legalization of online wagering merely use poker as a façade: their real interest is not in playing poker but in promoting the corporate profits to be made by wagering, yet these gambling industry profits will only serve to further divide the haves from the have-nots in our society. Nothing about legalizing online gambling, whether involving poker or any other game, is designed to mitigate the growing income inequality that worries Americans.

Experience with investigating wide varieties of existing illegal online gambling, whether centered in offshore or onshore operations, has shown us that, whether the game is poker, blackjack, roulette, other casino games, or sports bookmaking, these enterprises invariably attract organized crime figures; serve as convenient vehicles for money laundering, tax fraud, and terrorist financing schemes; and lure thousands of Americans into wholly non-productive losses of vast sums which could have been better saved, invested, or spent on real goods and services rather than, effectively, thrown away. Simply re-drawing a legislative line to say that such illegal enterprises are now legal would be a naïve and ineffectual decision, doing nothing to eliminate or mitigate the societal harms long known to stem from commercial gambling—indeed, the carve-out for online poker in H.R 707, if allowed to stand, simply would be step one in a slow surrender of the public interest to corrupting, mercenary, greed-driven forces.

Importantly, our experience and knowledge of the time- and resource-intensive nature of investigations of commercial gambling-based crimes conclusively shows us that no realistic level of increases in law enforcement resources, staffing, IT capability, and training would be sufficient to effectively police or regulate the millions of rapid electronic transactions by which expanded online gambling would operate. The costs of expansion of the law enforcement and regulatory workforce to a level needed to provide even minimally-acceptable levels of protection from criminal misuse of legalized online gambling is beyond that which the American taxpayer will, or should, bear. The carveout in H.R. 707 does not begin to address this concern and, for that reason alone, should be stripped from the bill before its' passage.

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To be clear, our organization decries the recent gutting of the Wire Act and wholeheartedly endorses its restoration, this time using clearer language than was used in 1961, so that no one can misapply its terms—i.e., the Act reaches sports and non-sports betting activities using interstate and foreign wire communications, including the Internet. This solution fully protects the values of federalism by recognizing individual states' rights to choose to legalize, or not, such intra-state gambling activities as their citizens may choose. It precludes interstate compacts or other measures some might seek to use to evade the Wire Act's standards. It further advances the federal interest in protecting the integrity of interstate and foreign communications systems from misuse for tax evasion, fraud, money laundering, and terrorist financing, while assisting states who resist the corrupting influence of the commercial gambling industry.

I trust the Subcommittee will take this endorsement to heart and, as always, we stand ready to provide you and the American people with further our service and informed views.

Respectfully submitted,

< e-signature on original>

Richard Zehme
President, FCIA

Cc: Robert Parmiter,
Counsel, House Committee
on the Judiciary

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Biographic Summary: MICHAEL K. (MIKE) FAGAN

Michael Fagan served as an Assistant U.S. Attorney (AUSA) for the Eastern District of Missouri for twenty-five years, until February 2008, and now consults on domestic and transnational criminal law and procedure, anti-money laundering, counterterrorism, intelligence, and emergency planning issues. Selected as Coordinator of the Anti-Terrorism Advisory Council in 2001, Mike governed regional counterterror efforts in that role for over six years, and continues today as a Special Advisor to the Missouri Office of Homeland Security, recently completing a near-decade on the St. Louis Area Regional Response System Advisory Board. He presently serves as counsel to the St. Louis Fusion Center—Terrorism Early Warning Group.

As an Adjunct Professor at Washington University School of Law, Mike teaches upper-level law school courses addressing International Money Laundering, Corruption, and Terrorism, as well as asset recovery. Additionally, since 2008, he has taught multiple undergraduate courses for Transportation Security Administration officials and has testified as an expert before federal and state legislative committees. During the prior fifteen years, he frequently lectured at the DOJ's National Advocacy Center and, at various times, lectured at international, law school, corporate, law enforcement, and college training sessions. The U.S. Department of Justice conferred on Mike the National Exceptional Service Award and the EOUSA Director's Award.

The Department of Justice conferred on Mike the National Exceptional Service Award and the EOUSA Director's Award. Then-U.S. Attorney General Michael B. Mukasey more recently noted Mike's "aggressive and creative prosecution of deserving defendants," citing as examples Mike's victories in the longest criminal trial in the history of the Eastern District of Missouri and crippling of the multi-billion dollar illegal offshore Internet gambling industry. The Chief of the Defense Intelligence Agency's USTRANSCOM Forward Element observed that Mike's "understanding of complex terrorist threats is second to none," enabling him to "powerfully contribute to the nation's security...." The Chief of the Justice Department's Organized Crime and Racketeering Section stated "Mike has single-handedly dealt a major blow to the illegal business of Internet gambling, making a difference in the lives of United States citizens throughout the country." The Director of the Executive Office for United States Attorneys praised Mike's "tenacity and creativity in identifying and developing new cases of an increasingly complex nature...." Former federal judge and CIA and FBI Director William Webster remarked that a May 2008 terrorism intelligence presentation by Mike at a conference held at Washington University in St. Louis was "the best of its kind that [Judge Webster] had ever seen." In addition to decades of gaining convictions in highly-sensitive and complex cases, Mike was the architect of proceedings resulting in approximately $150 million in forfeiture and tax judgments in favor of the United States.

Mike served as a Special Attorney to the United States Attorney General from 1995 to 1997. He also served for three years as the Regional Coordinator for the USDOJ's Organized Crime Drug Enforcement Task Force. Prior to joining the Department of Justice in 1983, he spent a year as a litigator at Bryan, Cave, McPheeters, and McRoberts (now, Bryan Cave LLC), in St. Louis. Mike began his law career with five years as an Assistant Circuit Attorney (state prosecutor) for the City of St. Louis, after graduating from Washington University School of Law in 1977.