

THE SMART MONEY IS ON PROSECUTIONS: USING THE FEDERAL INTERSTATE WIRE ACT TO PROSECUTE OFFSHORE TELEPHONE GAMBLING SERVICES

I. INTRODUCTION

Placing a wager on a sporting event in the United States has never been easier than it is today. One need not leave the comforts of home in order to be transported to a part of the world where gambling on sports is not only legal, but the only business in town.¹ While advances in communications technology allow individuals to instantaneously conduct business throughout the world, these same advances also permit people to engage in some less than desirable communications, like telephone sports gambling.

Gambling on sporting events is illegal in every state except Nevada.² For many years a person who wished to bet on an athletic event either had to take a vacation to Las Vegas, or much more commonly, place an illegal bet with a local bookie. While this practice is still quite common,³ many Americans are now taking their gambling money overseas where gambling is legal. The islands of the Caribbean have become the home of a booming telephone sports gambling industry which takes advantage of the fact that the practice of betting on sports in most of America is illegal. The market for offshore sports betting services can be seen from conservative estimates that place the number of these services in the Caribbean and Central America at sixty,⁴ twenty-five of which are located on the island country of Antigua.⁵

1. See The Antiguan government's Free Trade Zone & Processing Homepage (visited Sep. 25, 1998) <<http://www.atgftpzone.com>>. The government of Antigua created a free trade zone in which it licenses businesses to operate within their country for an annual licensing fee. The businesses receive considerable tax and economic benefits. All of the nearly 30 companies who are licensed within the zone are either telephone sports gambling services or online casinos.

2. Nevada permits many forms of gambling including sports books. Sports books are operated by many casinos and permit individuals to wager on all different types of sporting events. The State of Oregon permits an unusual form of sports gambling through their state lottery system. Individuals may try to correctly predict the scores of National Football League games in order to win prizes. Profits from the lottery go to support athletic programs at various public universities in the state of Oregon. In 1997, the lottery gave \$441,899 to the University of Oregon; \$427,571 to Oregon State University; and \$265,423 to Portland State University. Ken Goe, *To NCAA Tournament, Oregon Is a Bad Bet*, PORTLAND OREGONIAN, Mar. 17, 1998, at E1.

3. The Council on Compulsive Gambling estimated that Americans bet \$84 billion illegally on sporting events in 1995. The number was up from \$8 billion in 1983 according to a study by Christiansen/Cummings Associates, a New York-based research firm. Dan McGraw, *The National Bet: Laying an Illegal Wager on a Sports Games Has Never Been Easier, and More Americans Are Doing It Than Ever*, U.S. NEWS & WORLD REP., Apr. 7, 1997, at 50.

4. See Brent Pulley, *Some Bookies Heading Offshore to Make a Quick, Tax-Free Buck*, DALLAS MORNING NEWS, Feb. 6, 1998, at 42A.

5. *Id.*

Others have even placed the total number of offshore betting services to be closer to one hundred.⁶ The number of services is sure to grow considering that they have only just begun to operate within the past several years. Additionally, there is no reason to believe that America's appetite for gambling will diminish within the foreseeable future.

With so many of these services eagerly seeking the business of American citizens and the large number of people who are more than willing to press their luck betting on sporting events,⁷ it becomes necessary to examine the legality of the rapidly increasing phenomenon of American citizens placing wagers with offshore telephone sports betting services. The Federal Interstate Wire Act of 1961 (Wire Act)⁸ is the most relevant U.S. statute which deals with the use of telephone communications in conducting gambling activities. The statute prohibits the use of wire communication for the transmission of bets or wagers in interstate or foreign commerce.⁹ While this statute would seem to apply to someone who uses a telephone to place a wager on a sporting event with a foreign service, no court has successfully prosecuted an American citizen for placing a bet with one of these services. Additionally, only persons who are citizens of the United States have ever been convicted of violating this Act by providing a service through which American citizens are able to wager on sports.

The U.S. government faces many problems in attempting to enforce the Wire Act against individuals involved in this enterprise. First, many questions arise as to whether a U.S. court can maintain jurisdiction over an individual or company which is located completely outside of the United States. Second, because a court has held that in drafting this statute, "Congress did not contemplate prohibiting the acts of mere players,"¹⁰ it is unclear who may be prosecuted under this statute. Finally, the government's policy of leaving gambling regulation to the states has created the impression that it is unwilling to spend valuable crime fighting resources enforcing gambling laws.¹¹

6. See Dan McGraw, *All Bets Are Off for Offshore Bookmakers*, U.S. NEWS & WORLD REP., Mar. 16, 1998.

7. While it is difficult to determine the number of people who are utilizing these services, one may surmise that the number is quite large when you consider that World Wide Tele-Sports, a telephone betting service in Antigua, takes an average of 35,000 bets per week. See Mike Fish, *Places Better Known for Beaches Are Now Havens for the Legally Dubious Business of Phone/Internet Betting*, ATLANTA J. CONST., Dec. 28, 1997, at E1.

8. 18 U.S.C. § 1084 (1994).

9. *Id.*

10. *United States v. Barborian*, 528 F. Supp. 324 (D.R.I. 1981).

11. Many have criticized the federal government's policy of leaving gambling regulation to the states. Robert Goodman, a prominent critic of the policy of allowing individual states to regulate gambling, argues that the federal government should implement some national reforms and controls of gambling in the United States. He contends that stricter federal control and oversight of gambling will help to diminish the competition that exists among states to promote their gambling opportunities. Goodman recommends the creation of a "national commission

While the history of enforcing current U.S. laws prohibiting Americans from wagering on sporting events with offshore services is limited at best, the Wire Act should provide a basis on which the government can prosecute offshore services. The issue likely will not be whether the government can prosecute these services under the Wire Act, but rather whether the government will have the motivation to do so. The United States must make every effort to control this burgeoning industry, or existing state laws prohibiting sports gambling will be made obsolete. Absent these efforts to enforce the Wire Act, betting on sports in America will continue to be as easy as picking up the phone.

Part II of this Note will describe the recent growth of offshore telephone sports gambling services, detailing both some of the reasons for the rapid increase in the number of services operating and some of the sociological problems that accompany gambling. Part III will outline existing U.S. laws that could be applied to offshore gambling services. In addition, Part IV will examine some of the difficulties that U.S. courts have faced in trying to prosecute cases under current laws. This Part will include a discussion of jurisdictional issues, enforcement problems, and concerns relating to the conflicting laws of the United States and many of the nations which host offshore gambling services. Part V of the Note will forward the proposal that the United States should attempt to aggressively prosecute offshore services under the Wire Act.

II. OFFSHORE TELEPHONE SPORTS GAMBLING SERVICES

Part II will provide background on the recent proliferation of telephone sports gambling services located in the Caribbean and Central America and describe some of the concerns which have arisen with them. It will also briefly compare telephone sports gambling services with their more publicized competitors on the Internet.

A. *The Growth of Offshore Betting Services*

When considering the immense size of America's gambling appetite, there is little wonder that offshore betting services have enjoyed such an astonishing period of growth since their beginnings in the early 1990s. It is estimated that the amount of money wagered in the United States each year

to assess the local and national impact of expanded gambling on the American economy . . . [and] [t]he development of innovative investment opportunities for the public, to provide alternatives to the present attractions of pure gambling opportunities." Robert Goodman, *We Need a Federal Plan To Control Gambling*, in LEGALIZED GAMBLING FOR AND AGAINST 307, 317-18 (Rod L. Evans & Mark Hance eds., 1998).

may exceed \$500 billion.¹² Indeed, it was estimated that in 1989, thirty-one percent of all American adults gambled weekly in some form or another.¹³ While there is little doubt that gambling is much more prevalent today than it once was with the spread of riverboat gambling and state lotteries, the increasing number of states that permit various forms of gambling act to legitimize the activity. Nelson Rose, a respected gambling law expert, argues that “[g]overnment no longer merely *allows* some form of gambling to exist—it now actively *promotes* gambling” through its operation of state lotteries.¹⁴

Of the \$500 billion wagered both legally and illegally each year in the United States, the Council on Compulsive Gambling estimates that nearly \$100 billion was wagered illegally on sporting events.¹⁵ To put some perspective on that figure, the drug trade in the United States is only estimated to be approximately \$49 billion.¹⁶

While most bettors still place wagers with the traditional neighborhood bookmaker, offshore betting services have been increasingly offering competition and attempting to get a bigger piece of the American gambling market. Some say that these services already capture between one and five percent of the \$100 billion wagered illegally on sports each year.¹⁷ This figure is sure to rise as more and more Americans become aware of the relative convenience of placing wagers over the telephone.

As a consequence of the large amount of money that could be available to offshore gambling services, it is not surprising to learn that their numbers have grown dramatically within the past few years. The island nation of Antigua provides a point of reference with which to gauge this increase. In the early 1990s, there were only four small telephone sports gambling services located on the island; today, there are more than twenty-five.¹⁸ An average service may have an operation budget of five million dollars per year, taking wagers as large as twenty thousand dollars.¹⁹ These numbers are likely to increase considering that offshore betting services have only been in operation for less than ten years.

12. Evan I. Schwartz, *Wanna Bet*, WIRED, (visited October 12, 1999) <<http://wired.com/wired/3.10/archive/3.10/gambling.html>>. This statistic includes money wagered through state lotteries, money wagered in American Indian, Nevada, and New Jersey casinos, and money wagered in the many states which now permit river boat casinos.

13. Ante Z. Udovicic, *Sports and Gambling: A Good Mix?*, 8 MARQ. SPORTS L.J. 401 (1998).

14. Nelson Rose, *Gambling and the Law—Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 97 (1992).

15. See McGraw, *supra* note 3.

16. *Id.*

17. See Pulley, *supra* note 4.

18. See Fish, *supra* note 7.

19. See *id.*

B. *Reasons for the Growth of Offshore Betting Services*

Sandy beaches and warm climates are not the only reasons why gambling entrepreneurs have been drawn to the Caribbean. A number of island nations have taken great steps toward attracting these services to their countries. For instance, Antigua created a free trade zone which offers a number of benefits to the gambling services which have located there. The free trade zone encompasses one hundred acres of prime real estate on which businesses enjoy complete freedom from personal taxes and all corporate taxes.²⁰ Among the other benefits to operating a sports betting service in Antigua is the availability of confidential offshore bank accounts which can be used by both the services and their clients.²¹ One critical advantage to operating a service in Antigua, as compared to some other less advanced nation, is that Antigua maintains an undersea fiber optic link connecting itself to the United States.²² The import of an advanced telephone communication link capable of handling millions of calls at the same time should not be overlooked when considering the attractiveness that countries like Antigua offer for companies whose entire business involves quickly answering telephone calls from the United States.

While the benefits of operating a betting service in a country like Antigua seem fairly clear, there is little doubt that the host country receives a great deal in return from this symbiotic relationship. The most tangible benefit to a country such as Antigua in licensing these betting services is receiving an annual licensing fee of \$75,000.²³ Taxes on overseas phone calls also offer an additional source of revenue from which a host country can enjoy. One estimate has the average betting service phone bill running between \$50,000 and \$100,000 per month.²⁴ A country collecting twenty percent of that would receive between ten and twenty thousand dollars per month for each betting service. In addition to the revenues which are collected by these host countries, betting services, like any industry, create jobs. Up to this point, nearly four hundred jobs have been created in the small island nation of Antigua alone.²⁵ The economy has also benefitted from the influx of wealthy entrepreneurs.²⁶

20. See Antigua's Free Trade Zone Homepage, *supra* note 1.

21. See Fish, *supra* note 7.

22. See *id.*

23. See *id.*

24. See *id.*

25. See *id.*

26. "The real benefit to the country's economy comes from the rather lavish lifestyle of the expatriate Americans and other foreigners who tend to buy the biggest houses, drive the most expensive cars and eat gourmet food." Matthew McAllester, *High-Tech Gambling*, NEWSDAY, May 4, 1997, at F8.

C. Concerns Regarding Offshore Betting Services

While both the operators of betting services and the countries that host them receive benefits from their association, a number of concerns have been raised about the social problems for which these services help to contribute.²⁷ One of the main concerns raised by many is that because these services are so accessible and one needs only a telephone and a credit card to start betting, people will be able to get in over their heads very quickly. Tom Grey, Director of the National Coalition Against Legalized Gambling, notes that "gambling is a disease to five percent of the population. That group will, if we let them, entertain themselves into bankruptcy. So obviously, the more available and accessible you make gambling, the more you compound the problem."²⁸ In addition to bankruptcy,²⁹ evidence indicates that some gamblers turn to crime in order to support their habit. Of the five percent of the population for whom gambling is an addiction, ninety percent will turn to stealing, embezzling at work, insurance fraud, and writing bad checks in order to support their gambling habit.³⁰ As with many other crimes, the costs of paying for these activities are spread to society as a whole.

While the accessibility of telephone gambling contributes and probably worsens the problems and costs of compulsive gambling to gamblers and society alike, offshore betting services have government officials worried for another reason. Many government officials fear that the proliferation of these services will provide American criminals with a fairly easy means of laundering criminal profits. John M. Winer, a high-ranking State Department official, claims that "if you want to launder money, this is the way to do it."³¹ Winer fears that criminals will set up sophisticated wagers on games in which the criminal will bet enough money on each team involved in a game so that they will only lose the vigorish, the small percentage of a wager which is kept by the service. Winer claims that this money would then become an invisible

27. For a critical analysis of the perceived relationship between legalized gambling and the harm it causes society, see Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L. REV. 579, 600-608 (1997).

28. Steven Crist, *All Bets Are Off*, SPORTS ILLUSTRATED, Jan. 26, 1998, at 82.

29. One study estimates that more than 20% of all compulsive gamblers will file for bankruptcy as a result of their gambling losses. *Gambling and Bankruptcies* (visited Nov. 14, 1998) <<http://www.800gambler.org/bankrupt.htm>>. The study also revealed that "[t]he 298 counties which have legalized gambling within their borders had a 1996 bankruptcy filing rate that was eighteen percent higher than filings in counties with no gambling, and the bankruptcy rate was thirty-five percent higher than the average in counties with five or more gambling establishments. *Id.* George Yacik, vice president of SMR Research, the firm that conducted the study, indicated that "gambling may be the fastest growing cause . . . [of all personal bankruptcy filings.]" *Id.*

30. McGraw, *supra* note 3. "Up to eighty percent of all compulsive gamblers contemplate suicide, and fourteen percent actually attempt it." *Id.*

31. See Crist, *supra* note 28.

profit that now appears to be clean.³² Because these services do not report to the Internal Revenue Service regarding the bets and potential winnings of customers, there is no way for the government to detect a criminal's money laundering scheme using an offshore betting service.

Another concern that the government has with regard to these services is that, unlike licensed casinos and other forms of legalized gambling, the U.S. government cannot regulate these services to ensure their legitimacy. As one might expect with an industry that is already blurring the line between legality and illegality, there have been several scam operations that have accepted wagers of bettors and then disappeared with their money.³³ Because the U.S. government does not retain any control over these operations, bettors who lose their money in many Caribbean and Central American countries are left without remedy.

D. *Internet Gambling Versus Telephone Gambling*

The increase in popularity of offshore telephone gambling services has led to the birth of a new type of overseas gambling called on-line gambling.³⁴ On-line gambling services have begun springing up on the same Caribbean islands that play host to telephone services. While they have yet to gain the same popularity as telephone services, Internet casinos and gambling services have the potential to dominate the gambling market of the next decade.³⁵ The

32. *See id.*

33. Panama and Belize, in particular, have seen gambling operations vanish without paying their customers. . Mike Fish, *Gamblers Virtual Paradise: Should It Be Outlawed? Regulated? Or Left Alone*, ATLANTA J. CONST., Dec. 28, 1997, at E9.

34. *See generally* Seth Gorman & Antony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L.J. 667 (1996) (arguing that Internet gambling services that agree to submit to United States jurisdiction and who block access to minors should be conditionally legalized); Claire Ann Koeger, *Here Come the Cybercops 3: Betting on the Net*, 22 NOVA L. REV. 545 (1998) (arguing that federal regulation of Internet gambling is not needed, and that such regulation should be left to the states who wish to prohibit the activity); Scott M. Montpas, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163 (1996) (urging the United States to seek agreements with countries hosting Internet gambling services creating uniform policies regarding their regulation); Mark G. Tratos, *Gaming on the Internet*, 3 STAN. J.L. BUS. & FIN. 101 (1997) (hypothesizing that Internet gambling will not be able to sustain significant financial success until customers are able to feel confident that they will actually receive the money that they may win).

35. It is estimated that Internet gambling might take in as much as \$10 billion in revenue from the United States alone. *Chance a Flutter on the Internet: Hi-Tech Firms Scent Big Profits as Betting and Blackjack Make Their Debuts on the Information Superhighway*, EVENING STANDARD, June 5, 1995, at 38. One Internet gaming service, Interactive Gaming Communications Corp., claims to have taken bets totaling \$47.8 million in 1995, with a profit of \$2.5 million. Rick Weber, *Offshore Services Sidestep U.S. Law*, NEWS PRESS, Jan. 26, 1997, available in WL 9360393.

same uncertainty exists as to the legality of Internet gambling sites as it does to telephone gambling services. While some urge that the Wire Act prohibits placing wagers on sporting events over the Internet because phone lines are being used to transfer the wager,³⁶ there has only been one conviction for operating an Internet gambling service overseas.³⁷

III. APPLICABILITY OF U.S. LAWS TO OFFSHORE GAMBLING SERVICES

The Wire Act³⁸ and the Travel Act³⁹ are statutes that govern the placing of wagers by Americans with these overseas services. Because these statutes were drafted long before the first offshore gambling service opened its door, their direct applicability has been questioned by many.

A. *The Federal Interstate Wire Act*

The Federal Interstate Wire Act provides:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.⁴⁰

Courts have read this statute to require two elements which must be

36. See Gorman & Loo, *supra* note 34, at 671.

37. In September 1998, the state of Missouri gained the first conviction for operating an Internet gambling site. Michael Francis Simone plead guilty to a misdemeanor count of promoting gambling. His publicly-traded company, the Pennsylvania-based Interactive Gaming & Communications Corp., was also found guilty on the same charge. The company will pay a \$5000 fine while Simone was fined \$2500.

38. 18 U.S.C. § 1084 (1994).

39. 18 U.S.C. § 1952 (1998).

40. 18 U.S.C. § 1084(a). Section 1084(b) contains an exception to the statute "for the transmission of information assisting in wagering from a State or foreign country where betting on that sporting event or contest is legal." *Id.* at § 1084(b). Notice how this exception is not applicable in the case of Americans calling offshore services because the telephone call is not being made from a place where betting on sporting events is legal; rather, it is being made to a place where betting on sporting events is legal. A further exception to the statute allows the transmission of information assisting in the placing of bets or wagers when it is used for the purpose of news reporting of that sporting event or contest.

present in order to convict under this statute: (1) the defendant must be in the business of betting or wagering; and (2) the defendant must knowingly use a wire communication facility to transmit information assisting in the placing of bets or wagers.⁴¹ Because wagers and information assisting in the placing of wagers are being transmitted over telephone lines from individuals in the United States to companies in the Caribbean and Central America, thus meeting the interstate or foreign commerce requirement explicitly stated in the statute, the Wire Act seems applicable to this activity.

The element which requires the defendant to be in the business of betting or wagering has opened quite a large loophole through which many bettors are able to escape prosecution. Although there is no requirement that the defendant be exclusively engaged in the business of betting or wagering,⁴² the court in *United States v. Barborian* held that "Congress did not contemplate prohibiting the acts of mere bettors."⁴³ In this case, the court said that a person wagering an average of eight hundred to one thousand dollars per day, three or four times per week, did not meet the requirement of "being engaged in the business of betting or wagering,"⁴⁴ as is required by the statute. Further, the court held that "Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets, and not mere betting."⁴⁵ The court reasoned that including bettors within the definition of "being in the business of betting" would "make the implication of criminality turn on the expertise of the bettor and the quantum of money wagered."⁴⁶

The implications of this decision are quite significant with respect to offshore betting services and the people who use them. A strict reading of the case would prohibit the government from prosecuting Americans who simply place wagers with these overseas services.⁴⁷ While the case was correctly decided based on the limited legislative history regarding the definition of a

41. *United States v. Alpin*, 307 F. Supp. 452 (D.N.Y. 1969). See also *United States v. Florea*, 541 F.2d 568 (6th Cir. 1976) (upholding the conviction of individuals found guilty of transmitting wagering information across state lines where defendants were found to have engaged in the business of betting or wagering and that information assisting in the placing of bets was transmitted across state lines).

42. See *United States v. Reeder*, 614 F.2d 1179 (8th Cir. 1980). See also *United States v. Scavo*, 593 F.2d 837 (8th Cir. 1979) (upholding a jury instruction excluding a "mere bettor or customer from liability under § 1084.").

43. *United States v. Barborian*, 528 F. Supp 324, 328-29 (D.R.I. 1981). See *United States v. Scavo*, 593 F.2d 837, 843 (8th Cir. 1979).

44. 18 U.S.C. § 1084 (1994).

45. *United States v. Barborian*, 528 F. Supp. at 328.

46. *Id.* at 329.

47. While the *Barborian* ruling prevents individual bettors from being prosecuted for placing wagers with offshore services, some states including California and Massachusetts have enacted gambling statutes that permit the prosecution of individuals who place wagers via telephone. See Cal. Penal Code Sec. 337(a)(i) (West 1988); Mass. Gen. L. ch. 271, Sec. 17 (West 1995).

gambling or betting business,⁴⁸ the outcome severely limits the means by which the U.S. government may attempt to prohibit Americans from placing wagers with foreign services. As a result of the *Barborian* decision, the U.S. government must now attempt to prosecute the operators of offshore gambling services because they, and not the individual gamblers back in the United States, are the only ones who are "in the business of betting or wagering."⁴⁹

B. *The Travel Act*

While the Wire Act seems to apply to betting services that accept wagers via telephone calls from the United States, the Travel Act may also serve to prohibit this activity. The Travel Act provides for a fine, up to twenty years in prison, or both for anyone who,

travels in interstate or foreign commerce or uses the mail or any facility in interstate commerce with intent to distribute the proceeds of any unlawful activity . . . mean[ing] any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States.⁵⁰

The elements necessary for a conviction under the Travel Act are: (1) defendants be found to have traveled in interstate or foreign commerce or to have used a facility in interstate or foreign commerce; (2) with the intent to take certain types of actions in pursuit of an unlawful activity.⁵¹ Courts have

48. At the time Congress passed the Wire Act into law, the United States was in the midst of its fight against organized crime. Gambling rings traditionally have been one of the biggest money makers for organized crime. The Wire Act represented an attempt by Congress to enhance law enforcement's ability to control organized crime and gambling. The legislative history behind the statute underscores this concern with organized crime's control of illegal gambling in the United States.

The purpose of the bill is to assist the various 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 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 in interstate and foreign commerce. H.R. REP. NO. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631.

While the statute may have provided an effective tool to prosecute individuals involved in an on-going, gambling business, it did nothing to prohibit individuals from simply placing wagers with gambling operations.

49. 18 U.S.C. § 1084 (1994).

50. 18 U.S.C. § 1952 (a)-(b).

51. *United States v. Slack*, 408 F. Supp. 190 (D. Del. 1975).

held that a "facility," for the purposes of this section, includes a telephone,⁵² because when someone uses a telephone, "a voice or a message can be and is actually transported over state lines to the same extent as materials are transported over state lines in moving vehicles."⁵³

While a person who uses a telephone to place bets with an offshore betting service meets the requirement necessitating the use of a "facility in interstate or foreign commerce,"⁵⁴ the statute also requires the activity to be an unlawful activity. For the Travel Act to be applicable to this type of gambling activity, a court would have to either find that placing bets with an offshore service is a violation of a state or federal law, or that a service's acceptance of a bet from a citizen residing in the United States is a violation of a state or federal law. Because the Wire Act seems to at least prohibit a foreign service from accepting wagers made by U.S. citizens,⁵⁵ the Travel Act could also be used to prosecute offshore services accepting wagers from Americans.

The Travel Act, like the Wire Act, does not seem to apply to cases where an individual bettor places wagers with an offshore betting service because the Act refers to activities of "business enterprise[s]"⁵⁶ involved in gambling. Courts have uniformly read the Travel Act to apply to business enterprises that are involved in a continuous course of conduct and not just sporadic, casual involvement in a proscribed activity.⁵⁷ It is doubtful that a court would include an individual who places wagers with an offshore betting service within the definition of a business enterprise. Rather, a court would likely hold that a "mere bettor" did not constitute a "gambling business" sufficient to meet that requirement in the Wire Act.⁵⁸ Because an individual bettor placing wagers with an offshore service most likely does not meet the definition of a "business enterprise," the Travel Act could not be used to prohibit individuals from placing bets with offshore services.

Although the Travel Act, like the Wire Act, was primarily drafted to help local authorities fight organized crime when their organizations and

52. See *United States v. Smith*, 209 F. Supp. 907 (D. Ill. 1962). See also *Menedez v. United States*, 393 F.2d 312 (5th Cir. 1968) (upholding a defendant's conviction for using long distance telephone calls to aid, promote, and manage a lottery in violation of Florida law).

53. *United States v. Smith*, 209 F. Supp. at 916.

54. 18 U.S.C. § 1952 (a)-(b).

55. See *supra* text accompanying notes 38-49.

56. 18 U.S.C. § 1952 (B)(1).

57. *United States v. Donaway*, 447 F.2d 940 (9th Cir. 1971) (holding that evidence that a defendant placed a bet for another person was insufficient to prove that the defendant was engaged in a "business enterprise" within the language of the statute); See also *United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983) (requiring evidence of a continuous enterprise and at least one act in interstate commerce in furtherance of that enterprise).

58. See *United States v. Barborian*, 528 F. supp. 324, 328-29 (D.R.I. 1981).

activities extend beyond state and local boundaries,⁵⁹ the Travel Act is broad enough to include offshore gambling operations in its definition of "business enterprise."⁶⁰ A company whose entire business revolves around accepting wagers from mostly U.S. citizens calling from the United States falls within the requirement for a "business enterprise" that carries on a continuous course of criminal conduct.⁶¹

The Travel Act seems to prohibit offshore services from using telephone communications to accept wagers from citizens of the United States. Because an individual bettor does not seem to meet the requirement for a "business enterprise," the Travel Act cannot be used to prosecute individuals who place wagers with these offshore services as long as they are not themselves acting on behalf of a criminal enterprise. As a result, both the Wire Act and the Travel Act, as they are currently written, can only be used to attempt to prosecute offshore services.

IV. PROBLEMS OF ENFORCEMENT

While the Wire Act and the Travel Act seem to offer tools with which the U.S. government could attack the problem of U.S. citizens sidestepping anti-gambling legislation at home by placing wagers abroad, there are questions regarding the enforceability of those laws against individuals outside the United States. The biggest issue surrounding the enforceability of these Acts concerns the ability of United States courts to maintain jurisdiction over individuals located outside the United States.

A. *Questions of Jurisdiction*

Although the U.S. government could use either the Wire Act or the Travel Act to attempt to prosecute offshore betting operations that direct their services at U.S. citizens, no court would be able to proceed with the case

59. *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974). *See also* *U.S. v. Altobella*, 442 F.2d 310 (7th Cir. 1971).

60. The court in *Spinelli v. United States* held that the statute is sufficiently broad to sustain the conviction of a petty hoodlum as long as it is established that a defendant is engaged in a proscribed gambling activity as a business enterprise. *Spinelli v. U.S.* 382 F.2d 871 (8th Cir. 1967).

61. *See United States v. Donaway* 447 F.2d 940 (9th Cir. 1971).

unless they have personal jurisdiction⁶² over the defendant.⁶³ In order for jurisdiction to be appropriate, a defendant must have sufficient minimum contacts with the forum state such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁶⁴ Courts have adopted a two-prong test for determining when a court's exercise of jurisdiction over a defendant is appropriate. First, jurisdiction may be appropriate in cases where the defendant "purposefully directed his activities at residents of the forum,"⁶⁵ and thus manifestly "availed himself of the privilege of conducting business there."⁶⁶ This portion of the test provides that a court might still be able to acquire jurisdiction over a defendant even though the defendant never set foot in the forum state.⁶⁷ Examples of what might be considered sufficient minimum contacts with the forum state include "designing the product for the market in the forum State, advertising in the forum State, and establishing channels for providing regular advice to customers in the forum state."⁶⁸

The second portion of the test requires that "the defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."⁶⁹ A court will examine the nature and scope of a defendant's contacts with the forum state to determine if the defendant "should reasonably anticipate being haled into

62. A court would exercise general jurisdiction, as opposed to specific jurisdiction, over an offshore gambling service because the suit would not be "arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984). See *Calder v. Jones*, 465 U.S. 783, 786 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

63. For a discussion of the unique problem courts face in exercising jurisdiction over foreign defendants, see Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983). Lilly argues for the adoption of an "aggregated contacts" standard that would allow a court to exercise jurisdiction over an alien defendant when that alien had accumulated sufficient minimum contacts with the United States as a whole. A defendant's failure to maintain minimum contacts with any one forum would not bar the exercise of jurisdiction by a court if the defendant had accumulated the required amount of contacts with the United States, and if the exercise of jurisdiction over that defendant was reasonable. See also *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdiction Standard*, 95 HARV. L. REV. 470 (1981); Brian B. Frasch, *National Contacts as a Basis For in Personam Jurisdiction over Aliens in Federal Question Suits*, 70 CALIF. L. REV. 686 (1982).

64. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

65. *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985). See also *Hanson v. Denkla*, 357 U.S. 235, 253 (1958); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

66. *Burger King v. Rudzewicz*, 471 U.S. at 476.

67. The physical presence of the defendant in the forum state was once a "prerequisite to its rendition of a judgment personally binding him." *Id.* (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)).

68. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

69. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 313 (1980) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1946)).

court there.”⁷⁰ If a court finds that from the nature and amount of contacts a defendant has with the forum state that it would not surprise the defendant to “be haled into court there,”⁷¹ then the court may properly exercise jurisdiction over the defendant.

Offshore services will argue that they cannot be subjected to the jurisdiction of U.S. courts because they are not physically located within the United States and because they may not have sufficient minimum contacts with the United States to make the exercise of jurisdiction reasonable. In support of this argument, they may look to the decisions of various courts which have not permitted the exercise of jurisdiction over an alien defendant in circumstances similar to those present in the case of offshore betting services. For instance, one court has ruled that telephone calls between an alien defendant and a forum state, standing alone, are “insufficient to satisfy the requirements of due process.”⁷² In that case a Kansas corporation was sued by an Arkansas corporation in the United States District Court for the Eastern District of Arkansas. The Kansas company did not maintain an office or any agents in Kansas, nor did it send any representative to Arkansas to complete the business deal which was the basis for the suit. The court upheld a lower court’s ruling that a company does not subject itself to the jurisdiction of a court in a different forum if the only contacts it has with the forum are through telephone calls. Similarly, a court held that a defendant who conducted business through an “800” toll-free telephone number was not subject to the jurisdiction of the court.⁷³ The court found that toll-free telephone calls creating three invoices for the sale of plastic bags combined with a single written communication between the defendant and the plaintiff in a different forum did not represent “sufficient transaction” necessary to support the court’s exercise of jurisdiction.⁷⁴ Offshore services will likely point to these court rulings as support for their argument that they are not subject to the jurisdiction of U.S. courts.

Likewise, offshore services will contend that the advertisement they place in U.S. magazines and on national radio shows do not rise to the level of directed activities at the United States⁷⁵ which “availed [themselves] of the

70. *World Wide Volkswagen*, 444 U.S. at 297. See *Kulko v. California Superior Court*, 436 U.S. 84, 97-98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977). When a company purposefully avails itself of the privileges and benefits of the forum state, it places itself on notice that it may be subject to potential suits there and cannot take steps to “alleviate the risk of burdensome litigation.” *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297.

71. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297.

72. *T.J. Raney & Sons, Inc. v. Security Savings & Loan*, 749 F.2d 523, 525 (8th Cir. 1984).

73. *Standard Enter., Inc. v. Bag-It, Inc.*, 673 F. Supp. 1216, 1220 (S.D.N.Y. 1987).

74. *Id.* at 1220.

75. See *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985).

privilege of conducting business there.”⁷⁶ Courts have reached differing conclusions as to whether placing advertisements in publications that reach the forum permit a court of that forum to exercise jurisdiction against the nonresident defendant. In *U.S. Securities and Exchange Commission v. Carrillo*, the court found that the advertisements of an alien defendant could support a court’s exercise of jurisdiction.⁷⁷ In that case, a Costa Rican corporation placed advertisements regarding the sale of unregistered U.S. securities in two airlines’ in-flight magazines. The court found that the advertisements were enough to allow for a court’s exercise of jurisdiction because the corporation purposefully availed itself of the privilege of doing business in the forum.⁷⁸ The court reasoned that the articles were reasonably calculated to reach readers in the American forum because they were in English and because the corporation knew that the magazines would be carried into the country aboard U.S. airlines.⁷⁹

A court would likely conclude that it would be proper to exercise jurisdiction over an offshore betting service, even if the service is located completely outside of the United States. Following the two-prong jurisdiction analysis developed by the courts, a court would need to determine whether an offshore betting service “purposefully directed his activities at members of the forum.”⁸⁰ One means by which services direct their business activities to the United States is by advertising on national radio programs, in national sports magazines, and in newspapers, as well as in smaller, regional magazines which target specific areas of the country.⁸¹ By placing the advertisements, offshore services are attempting to directly solicit business customers, and therefore business, from the United States. In addition to advertising in magazines and newspapers and on the radio, many offshore services maintain their own web pages which provide toll-free telephone numbers for their services, information regarding the rules and procedures for opening and maintaining an account, up to the minute betting lines on games, and even statements claiming that these services are completely legal.⁸² The act of

76. *Id.* at 475.

77. *U.S. Securities and Exch. Comm. v. Carrillo*, 115 F.3d 1540 (11th Cir. 1997).

78. *Id.* at 1545.

79. *Id.*

80. *Burger King v. Rudzewicz*, 471 U.S. at 472.

81. “The ads for friendly sounding sports books like Galaxy Sports, EZBet, and Sports Offshore describe user-friendly services and, more importantly claim that such betting is perfectly legal.” Dan McGraw, *Super Sunday, Super Bets: Offshore Sports-Betting Services Boom, One state fights back*, U.S. NEWS & WORLD REP., Jan. 26, 1998, at 54. Entire World Wide Web sites have been created which do nothing more than advertise for offshore betting services. See *Welcome to Bettors World* (visited Nov. 3, 1998) <<http://www.bettorsworld.com>>.

82. See generally *Global Sports Connection*, (visited Nov. 3, 1998) <<http://200.9.63.212>>, *World Wide Tele-Sports*, (visited Nov. 3, 1998) <<http://www.betwwts.com>> (“To ensure complete legality, all transactions and wagers shall be considered originating from and governed

sending hundreds of advertisements to the United States in various mediums would seem to satisfy the first prong of the jurisdictional analysis—the purposeful direction of activities towards the United States.⁸³

Another manner in which offshore services direct their activities towards the United States is through the specific tailoring of their service for customers in the United States.⁸⁴ Many services advertise the fact that they remain open until the last sports games on the West Coast or Hawaii begin so that American bettors will have the opportunity to wager on every game played in the United States on a given day. Indeed, many services only provide betting lines on sporting events in the United States. This is really no surprise considering that people placing wagers with these services are almost exclusively Americans who are unable to legally place the wagers at home.⁸⁵ Additionally, services claim that all their telephone operators speak clear and understandable English so that Americans will be assured that they can accurately place their wagers.⁸⁶ By specifically setting up their services to cater to American customers, the only customers they have, betting services “indicate an intent or purpose to serve the market of the forum state,”⁸⁷ in this case, the United States. This purposeful direction of activities towards the United States satisfies the first prong of jurisdiction analysis.

In addition to directly designing their services for the United States gambling market, betting services also maintain direct contacts with the United States when they send customers' winnings from the Caribbean back to the United States in the form of checks via the United States Postal Service and various overnight mail services. Many services also frequently mail and e-mail customers announcing various promotions and other customer service information. These mailings represent further contacts between overseas services and the United States.

The receipt of frequent telephone calls from the United States likewise represents an activity conducted with a resident of the United States. It cannot be said that just because the offshore services are not the ones placing the calls, that they are then not directing their services to the United States. The nature of telephone gambling is that customers call the service when they wish to place a wager. A court would likely find an argument that these services are only receiving calls and not placing them an unpersuasive attempt to avoid

by the laws of Costa Rica.”). See also *Caribbean Sports Book*, (visited Nov. 3, 1998) <<http://www.caribsports.com>> (indicating the legality of non-U.S. gambling operations).

83. *Burger King v. Rudzewicz*, 471 U.S. at 472.

84. See *supra* note 68 and accompanying text.

85. The main reason that Americans are the only ones placing wagers with these services is that gambling on sports is legal in most Western countries. Great Britain, for instance, has legal sports books spread throughout most cities.

86. See, e.g., *World Wide Tele-Sports*, *supra* note 82.

87. *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

the exercise of jurisdiction.

Taken as a whole, the advertisements in print and on the radio, the web sites which advertise offshore services, the direct tailoring of their product to the United States market, the acts of sending checks and other mailings to customers all over the United States, and the receipt of frequent telephone calls represents the purposeful availment by an overseas service to the benefits of conducting business in the forum of the United States.⁸⁸

The second prong of the jurisdictional test asks whether the nature and scope of the defendant's contacts with the forum are such that it "would not be surprised to be haled into court there."⁸⁹ A court would likely rule that because of the steps taken by offshore services to tailor their services to the needs of U.S. residents, they would not be surprised if they were haled into a U.S. court. A court would also likely be persuaded that these services are subject to U.S. jurisdiction because more than ninety percent of their customers come from the United States.⁹⁰ Indeed, offshore services are quite aware that the law regarding their ability to accept wagers from U.S. citizens is unclear. The fact that they have had to move to the Caribbean to open a telephone sports betting service that accepts virtually all of its business from the United States indicates that they are running a risk that this activity may not be legal. Therefore, a court's exercise of jurisdiction over an offshore service would not be a "surprise," it would be "reasonable,"⁹¹ and it would not offend "traditional notions of fair play and substantial justice."⁹²

B. Attempts to Enforce the Wire Act Against Offshore Services

While it seems that a U.S. court could exercise jurisdiction over offshore gambling services which conduct their business through telephone calls with customers in the United States and who advertise in national magazines and on national radio shows,⁹³ the government has avoided this issue altogether by selectively prosecuting cases in which jurisdiction will clearly be permissible. The case of *United States v. Blair*⁹⁴ represents the only example of a person being successfully prosecuted for violating the Wire Act by accepting bets placed by American citizens on sporting events. The defendant in that case was charged with, and plead guilty to violations of the Wire Act for accepting

88. *Burger King v. Rudzewicz*, 471 U.S. at 472.

89. See *supra* notes 70-72 and accompanying text.

90. See Steven Crist, *All Bets Are Off: The U.S. Is on the Verge of an Explosion in Internet Sports Betting That Could Change the Face of Gambling in this Country Forever. But Is It Legal? And Even If It Isn't, Can It Be Stopped?*, SPORTS ILLUSTRATED, Jan. 26, 1998, at 82.

91. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

92. *Id.*

93. See *supra* notes 80-88 and accompanying text.

94. *United States v. Blair*, 54 F.3d 639 (10th Cir. 1995).

wagers on college and professional basketball games from Oklahoma residents while he was living in the Dominican Republic. Whether the federal district court had proper jurisdiction in this case was not at issue because the defendant was an American citizen, and U.S. courts have traditionally exercised jurisdiction over U.S. citizens residing abroad.

The March 1998 arrest of twenty-one individuals who worked for offshore gambling operations offers an example of how federal prosecutors have avoided the more serious questions regarding the enforceability of the Wire Act against foreign services. Six different offshore services, four of which exclusively accepted wagers over the telephone, had employees who were charged.⁹⁵ The highly-publicized indictments serve the useful purpose of bringing the issues surrounding offshore sports gambling services into a more prominent light,⁹⁶ although it is questionable whether they will have any significant impact beyond this. Importantly, all twenty-one individuals who were indicted were American citizens so, similar to the *Blair* case, the court in which these cases were brought will not be saddled with the question of whether they have personal jurisdiction over the defendants. In addition, it seems as though all of the services which were involved in the arrests had at least a portion of their business in the United States.⁹⁷ Again, prosecutors have avoided the question of whether a court would have jurisdiction over a service that lies completely outside of the United States by carefully selecting services which carried on a portion of their business in the United States. Another interesting aspect of this case is that the individuals were not charged with violating the Wire Act, but instead were charged with conspiracy to

95. John Borland, *Sting Nets More Web Gambling Operators*, CMP TECHWEB, Mar. 26, 1998, available in 1998 WL 9294748.

96. The indictments gave federal prosecutors the opportunity to make some clear and forewarning statements surrounding their plans to combat offshore gambling. Mary Jo White, U.S. attorney for the southern district of New York, stated that "[w]e will continue to monitor and vigorously prosecute offshore sports betting operations that engage in this blatantly illegal activity." *Id.* Attorney General Janet Reno, in referring to offshore betting services, proclaimed, "You can't hide online and you can't hide offshore." John Borland, *Arrest Shake Net Gamers*, CMP TECHWEB, Mar. 6, 1998, available in 1998 WL 9294246. These statements are in sharp contrast to those made by John Russell, a Justice Department Spokesman regarding offshore services: "We have no jurisdiction. The offense has not been made on U.S. soil." See Pulley, *supra* note 4.

97. The FBI has evidence that some of the defendants were working in the United States as well as in various Caribbean countries. Envelopes with return addresses of Costa Rica, Curacao, and the Dominican Republic actually had postmarks from Florida, Texas, and Nevada and carried U.S. stamps. Similarly, the telephone numbers which were used by these services were actually issued to U.S. companies. Finally, checks written by defendants acting on behalf of their gambling services, were drawn on U.S. banks. Nelson Rose, *Internet Operator Arrested*, ANDREWS GAMING INDUSTRY LITIG. REP., Apr. 1998.

violate the Wire Act.⁹⁸ As a result, “[p]rosecutors do not have to prove the defendants transmitted any bet by wire to another country[,]” as is required by the Wire Act.⁹⁹ Instead, they only must prove that more than one person agreed to transmit a wager over telephone lines, and that at least one of them took some overt act in furtherance of the conspiracy.¹⁰⁰ By prosecuting the defendants only for conspiracy to violate the Wire Act, the government once again sidestepped the larger question of whether individuals operating offshore telephone gambling services could be convicted under the Wire Act. The minimal criminal requirements for a conspiracy conviction in this case combined with the relative certainty that a court would exercise jurisdiction over these defendants who carried on a portion of their business within the United States make the likelihood of convictions in this case quite high.¹⁰¹ As a result, we have no clear judicial statement regarding the Wire Act and its effectiveness in dealing with this rapidly expanding industry.

98. Conspiracy charges almost always coincide with charges for the substantive offense to serve as a form of “piling on” to give prosecutors greater leverage in plea bargain negotiations. *See generally Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959) (discussing developments with respect to criminal conspiracy).

99. Rose, *supra* note 97.

100. The four elements necessary for a conspiracy conviction are (1) an agreement between at least two parties; (2) to achieve an illegal goal; (3) with knowledge of the conspiracy and with actual participation in the conspiracy; and (4) at least one conspirator committed an overt act in furtherance of the conspiracy. 18 U.S.C. § 371 (1994); *United States v. Park*, 68 F.3d 860, 866 (5th Cir. 1995) (holding that the government must prove: an agreement to obstruct justice, knowing and voluntary participation by the defendant, and at least one overt act committed in furtherance of the agreement). For a conspiracy to take place, the object of the conspiracy must be the violation of a specific federal statute. *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091 (4th Cir. 1993) (holding that “offense” for the purposes of § 371 includes violation of executive orders where Congress has provided criminal sanctions for such violations). Interestingly, however, there is no requirement that the conspirators intend or know that the conspiracy will violate a federal statute. *See United States v. Cyprian*, 23 F.3d 1189, 1201-02 (7th Cir. 1994) (holding that prosecutors need only prove that the defendant knew he was interfering with the Internal Revenue Service’s ability to collect taxes, and not that he knew he was violating the law). *See also United States v. Blackmon*, 839 F.2d 900, 908 (2d Cir. 1988) (holding that conviction for conspiracy to commit wire fraud does not require foreseeability of interstate nature of wire communication). The fact that the conspirators need not know that their activities will violate a federal statute greatly enhances the government’s ability to prosecute offshore gambling services for a conspiracy to violate the Wire Act because the defendants will be prevented from asserting the defense that they did not know that accepting wagers from American citizens was a violation of the Wire Act.

101. The conspiracy charges should be easy to prove because there is little doubt that defendants working for the service were in agreement to take wagers from American citizens, with knowledge of the agreement to take wagers, and that at least one party committed an overt act in furtherance of the conspiracy. Any act such as registering a new client, accepting a telephone call from a customer placing a wager, or sending a customer’s winnings back to the United States will fit the overt act requirement for a conspiracy charge.

C. *Conflicts of Law*

Although it seems as though the United States could apply the Wire Act to offshore services that accept wagers from U.S. citizens, and in most cases a U.S. court could exercise jurisdiction over such a service, a more interesting question might be whether it would be fair for the U.S. to arrest and prosecute individuals who are engaged in conduct that is fully licensed by another country which is their home country. Many Caribbean nations have begun to license betting services¹⁰² and to recognize the economic benefits that come from playing host to these rapidly expanding companies.¹⁰³ Because many of these countries have taken a very aggressive approach to attracting gambling services, it is unlikely that they will sit idly by and watch the United States attempt to prosecute these revenue building, job creating services out of business.¹⁰⁴

The Restatement (Third) of the Foreign Relations Law of the United States describes situations in which a state may properly prescribe laws applying "to the activities, relations, or status of persons, or the interests of persons in things."¹⁰⁵ Section 402 of the Restatement permits a state to maintain jurisdiction to prescribe laws regarding "conduct outside its territory that has or is intended to have substantial effect within its territory."¹⁰⁶ Stated

102. See *supra* note 1. Like Antigua, Grenada has begun to license services and offers a number of benefits to companies that move to Grenada from other nations. One betting service, Sports International, recently moved from Antigua to Grenada when the Grenadian government offered them the right to sell master licenses to services moving to Grenada. Mike Fish, *Gamblers Virtual Paradise: Should It Be outlawed? Regulated? Or Left Alone?*, ATLANTA J. CONST., Dec. 28, 1997, at E9.

103. See *supra* notes 23-26 and accompanying text.

104. Referring to the arrest of 21 individuals involved in telephone and on-line gambling, Gyneth McAllister, a gaming consultant to the free trade zone of Antigua, has said that "[i]f any of the Antiguan companies' employees are convicted, then the government may protest, or re-evaluate its extradition agreements with the [United States] . . . [because] it could be that the U.S. is operating outside their legal bound." John Borland, *Offshore Gambling Havens Standing Firm*, CMP TECHWEB, Apr. 1, 1998, available in 1998, WL 9294875.

105. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a)(1987). For a summary discussion of the Restatement and its effect on extraterritorial jurisdiction, see Kathleen Hixson, *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT'L L.J. 127 (1988).

106. *Id.* § 402(1)(c). This notion has been limited over the years by an old canon of statutory construction adopted by the U.S. Supreme Court which held that federal law should not be applied extraterritorially unless a statute expressed a clear intention to regulate activities occurring outside of the United States. See *New York Cent. R.R. v. Chisholm*, 268 U.S. 29, 31 (1925) ("Legislation is presumptively territorial and confined to limits over which the law-making powers has jurisdiction.") (quoting *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918)); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) ("Legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."). Subsequent court decisions have eroded reliance on a strict territorial presumption. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (applying the "effects doctrine"

another way, the United States would be able to exercise jurisdiction over an alien defendant under the "effects doctrine" of jurisdiction if it was reasonably foreseeable that the activity in question would produce effects in the United States.¹⁰⁷ The exercise of jurisdiction over conduct which takes place outside a state's territory is subject to the restriction of section 403 of the Restatement. "Even when one of the bases for jurisdiction under § 403 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."¹⁰⁸ The Restatement then lists a number of factors that must be weighed to determine if the exercise of jurisdiction over a party or activity of another state might be unreasonable. Included in these factors are:

[t]he connections, such as nationality, residence, or economic activity; between the regulating state and the person principally responsible for the activity to be regulated; the character of the activity to be regulated; the importance of regulation to the regulating state; the extent to which other states regulate such activities; the degree to which the desirability of such regulation is generally accepted; and the likelihood of conflict with regulation by another state.¹⁰⁹

If after considering these factors it seems reasonable that two separate

of extraterritorial jurisdiction permitting the application of the Sherman Anti-Trust Act to a Canadian company participating in an international aluminum cartel).

107. See *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."). Courts have endeavored to extend this principle articulated by Justice Holmes to cases involving foreign defendants. See, e.g., *Chua Han Mow v. United States*, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (applying the *Strassheim* principle to conduct in Malaysia involving drugs intended for distribution in the United States). For an analysis of the extraterritorial application of U.S. federal criminal legislation, see Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992).

108. See *supra* note 105 § 403(1).

109. *Id.* § 403(2)(b)(c). The Restatement provides some additional factors which must be considered in evaluating conflicts of jurisdictional problems:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; . . . (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

Id.

states might be able to properly exercise jurisdiction over a person or thing, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction," and the state with clearly the greater interest shall be the one to maintain jurisdiction.¹¹⁰

The operation of a gambling service which almost exclusively accepts wagers from residents of the United States satisfies the "effects doctrine" of jurisdiction discussed in the Restatement. It is indeed reasonably foreseeable that accepting wagers on sporting events from U.S. citizens will produce "effects" in the United States. The effects are illustrated in the one to five billion dollars that Americans wager through these overseas services¹¹¹ that might otherwise be spent within the U.S. economy. Effects can also be seen in the societal problems which always accompany gambling such as bankruptcy, increased levels of theft and other related crimes, suicide, and underage gambling. The "effects doctrine" of extraterritorial jurisdiction is satisfied in this case, permitting the United States to prescribe laws concerning an activity that greatly impacts the United States.

After determining that the United States has jurisdiction to prescribe laws regarding telephone gambling services who accept most of their business from residents of the United States, the reasonableness of the exercise of jurisdiction must be analyzed. First, there are strong connections between the regulating state, the United States, and the person principally responsible for the activity to be regulated, the owners and other employees of the offshore gambling services.¹¹² Most of the services are either owned, or at least partially financed by American citizens. This close connection argues in favor of permitting the United States to regulate these services since to do otherwise, would be to allow American citizens to circumvent federal laws to their financial advantage simply by moving their unlawful operations outside of the country.

Second, the fact that the activity in question in this instance is gambling, also supports a conclusion that the exercise of jurisdiction in this case would be reasonable. Throughout history, gambling has always been a highly regulated activity, both in this country and abroad. It seems only reasonable to permit the United States to prohibit overseas companies from doing what their American counterparts cannot: accept wagers on sporting events from American citizens. The fact that these services are designed specifically to

110. *See id.* § 403(3). Many commentators have come to criticize the Restatement's reasonableness test arguing that U.S. courts will often overlook and minimize the interests of another state in regulating an activity while overestimating the United States' interest in doing the same. *See* Born, *supra* note 107, at 94-99; Harold G. Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 1, 24 (1984).

111. *See supra* note 17 and accompanying text.

112. This is a necessary requirement under Restatement § 403(2)(b). *See supra* note 4.

cater to American customers¹¹³ further supports the conclusion that the United States should be allowed to exercise jurisdiction over them even though the services are acting within the laws of their own country. The nature of telephone gambling services is such that the location of the service is not as important as the location of the individuals who are placing the bets. The many social concerns which accompany gambling will not be felt in Antigua or other countries that host these services because their residents are not the ones who are gambling. Indeed, although countries like Antigua permit and license telephone gambling services, they do not permit their own residents to use the services.¹¹⁴ It is the United States where the problems associated with gambling such as the commission of crimes to support gambling habits, gambling by minors, gambling induced bankruptcy, and the use of these services to launder criminal proceeds¹¹⁵ will become apparent because it is Americans who almost exclusively wager with these services. Because the effects of telephone gambling will primarily be felt in the United States, the exercise of jurisdiction by United States courts over this foreign-based industry should be permitted.

Although the United States should be permitted to exercise jurisdiction over individuals who operate offshore gambling services, there may be some problems in obtaining custody of these individuals. One manner in which the United States could acquire custody of a criminal defendant would be through extradition.¹¹⁶ Typically, a nation seeking the extradition of a person residing in another country will formally request that the nation in question arrest the defendant and then permit them to transfer him back to the country seeking extradition so that he may be tried. Normally, however, a country will only agree to an extradition of a person residing within their country if the crime for which the defendant is charged with is also a crime in its own country.¹¹⁷

113. See *supra* notes 81-83 and accompanying text.

114. Gyneth McAllister, the supervisor of all gambling on Antigua notes that "[t]he average Antiguan on the street hasn't a clue what goes on inside these offices, and isn't supposed to. You can't walk in off the street and place a bet." Indeed, there is only one casino on the island nation of Antigua and, it is not permitted to take wagers on sports. Fish, *supra* note 7. For a detailed comparison of various forms of gaming regulation around the world see GAMING AND PUBLIC POLICY: INTERNATIONAL PERSPECTIVES (William R. Eadington & Judy A. Cornelius eds., 1991).

115. See *supra* notes 30-32 and accompanying text.

116. Extradition is defined as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands surrender." *Terlinder v. Ames*, 184 U.S. 270, 289 (1991). Bilateral treaties are the general vehicles used to extradite common criminals.

117. See generally M. Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 388 (3d. ed. 1996) (asserting the notion that a country will not extradite a person unless their alleged crime would also be a crime in their country is referred to as double criminality).

Because telephone gambling is not a crime in the countries that host telephone betting services, a country could refuse to extradite an individual charged with violating the Wire Act or any other U.S. statute which purports to prohibit gambling on sporting events. This is especially true if a country felt strongly about protecting one of their most important economic industries.

Likewise, the United States may have difficulty apprehending defendants under the doctrine of comity. "International comity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law."¹¹⁸ A nation may agree to give up custody of an individual under the doctrine of comity as a demonstration of good faith or as a matter of international etiquette. As with extradition, a nation may not easily agree to hand over individuals operating offshore gambling services when these businesses are not only legal in their country, but are fully licensed by the government.

V. SOLUTIONS

There are perhaps as many possible solutions to the problem of U.S. residents using offshore telephone gambling services to circumvent anti-gambling legislation as there are arguments why those solutions should not be used. This Part will examine a few of the possible solutions, detailing both arguments for and against their implementation. In addition, this Note proposes that the Wire Act should be sufficient to initiate prosecutions against offshore gambling services, and that the United States should take a much more aggressive approach to prosecuting cases under the Wire Act. Other potential solutions that will be discussed are to amend the Wire Act so that individual bettors may be prosecuted for placing wagers with offshore gambling services, and the legalization of telephone gambling in the United States.

A. *Aggressive Prosecution of Gambling Services Under the Wire Act*

Despite statements to the contrary,¹¹⁹ the Wire Act should provide a means by which the U.S. government can prosecute offshore gambling

118. *United States v. Nippon Paper Indus.*, 109 F.3d 1, 8 (1st Cir. 1997). See, e.g., Jay Hall, *International Comity and U.S. Federal Common Law*, 84 AM. SOC'Y INT'L L. PROC. 326 (1990).

119. See Kenneth A. Feeling & Ronald E. Wiggins, *Despite Rough Talk From Prosecutors and Despite Indictments of Those Charged with Internet Gambling, No Court Has Held That U.S. Law Prohibits Such Betting*, NAT. J., Mar. 30, 1998, at B7. Justice Department spokesman John Russell, in referring to offshore telephone and Internet gambling services remarked, "We have no jurisdiction. The offense has not been made on U.S. soil." *Id.*

services. Although the Wire Act does not permit the prosecution of individual bettors who are deemed not be involved in the business of betting,¹²⁰ individuals working for offshore services are subject to criminal liability under the statute because they are accepting wagers over telephone wires that originate in the United States.

The main concern with the application of the Wire Act to overseas services is the issue of whether a court can exercise jurisdiction over individuals employed by gambling services that do not maintain any part of their business in the United States. The answer to that question seems to be yes because these services maintain sufficient contacts with the United States to warrant the exercise of jurisdiction.¹²¹ The advertisements they place in U.S. magazines and on national radio programs, the checks and correspondence they send to their customers in the United States, and the manner in which they design and cater their services almost exclusively toward U.S. customers, taken cumulatively, represent sufficient minimum contacts with the United States to make the exercise of jurisdiction acceptable.

In addition, jurisdiction over many gambling services operators would likely be permissible because most of the services are owned and controlled by American citizens. A court would likely conclude that American operators of gambling services "should reasonably anticipate being haled into court"¹²² in the United States when their businesses are designed purely to accept wagers from American citizens. American citizens conducting gambling services are obviously aware that accepting wagers on sporting events is illegal in the United States. The fact that many services go to great pains to insist that the betting transaction is taking place in the Caribbean, and that no part of their operations lie within the United States only supports the conclusion that these services operate in the Caribbean in order to conduct business with American customers that would be illegal if it was located with the United States. The United States must not allow individuals to take advantage of advances in communications technology to intentionally violate federal and state laws simply by moving offshore. To do so would make every federal and state law prohibiting betting on sports obsolete, because although someone cannot now wager on sporting events with companies located in the United States, they can very easily do so by calling offshore services. An aggressive approach to prosecuting offshore betting services under the Wire Act may only be tempered by the U.S. government's ability to obtain custody over a potential criminal defendant. As noted earlier, it is unlikely that a Caribbean country which benefits greatly from hosting these services will be eager to relinquish an individual to the United States so that he or she can be

120. *United States v. Barborian*, 528 F. Supp. 324 (D.R.I. 1981).

121. *See supra* notes 62-92 and accompanying text.

122. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

prosecuted under the Wire Act.¹²³ In contrast, however, a Caribbean island nation whose primary industry is tourism, and more importantly hosting American tourists, would also not want to do anything to offend the United States government for fear of economic or trade retaliation. Seen in this light, perhaps a country such as Antigua may be reluctantly willing to surrender an individual maintaining an overseas gambling operation over to the United States for prosecution under the auspices of international comity.¹²⁴ Any discussion about how the United States may obtain defendants for the purpose of holding them for trial is guided by unclear precedent considering that many defendants residing outside of the United States who have been indicted for crimes in the United States generally turn themselves over to U.S. authorities without protest.¹²⁵

B. *Amend the Wire Act to Prohibit Individuals from Placing Wagers*

One of the chief criticisms of the Wire Act and its application to offshore betting services has been its limited scope. Because the Wire Act only applies to individuals who are "engaged in the business of betting or wagering,"¹²⁶ and because courts have held that Congress did not intend for casual bettors to be included in the definition of persons engaged in the business of betting,¹²⁷ the only available means for controlling this burgeoning industry is to prosecute individuals who work for and operate offshore services, as these individuals are the only ones who are technically "in the business of betting or wagering." One proposal that would alleviate the problem would be to amend the Wire Act so that individual bettors using the telephone to transmit bets could be prosecuted the same as those who are working for gambling services, and thus are engaged in the business of betting. The Internet Gambling Prohibition Act of 1997 proposed to amend the

123. The extradition agreement signed between the United States and the governments of the countries comprising the Organization of Eastern Caribbean States (Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines) defines an extraditable offense as one that is punishable under the laws in both Contracting States by deprivation of liberty for a period of more than one year or by a more severe penalty." Extradition Treaty, Oct. 10, 1996, S. Treaty Doc. No. 105-19, art. 2, *available in* 1996 WL 913075. As conducting a telephone gambling business is not a crime in countries such as Antigua, the United States may not be able to obtain custody over defendants through formal extradition procedures. Neither is it likely that a defendant would consent to surrender under the treaty which would allow the requested state to surrender the individual over to the United States. *Id.* art. 15.

124. See Bassiouni, *supra* note 117.

125. Just one week after the March 1998 arrest of 14 individuals charged with conspiracy to violate the Wire Act, 11 had either been arrested or had voluntarily turned themselves over to U.S. authorities.

126. 18 U.S.C. § 1084 (a).

127. *United States v. Barborian* 528 F. Supp. 324, 328-29 (D.R.I. 1981).

Wire Act so that it would become applicable to individual bettors.¹²⁸ While this amendment deals specifically with Internet gambling operations and not simply telephone services, this alteration should be applied to telephone services as well. Allowing the United States to prosecute individuals as well as those engaged in the business of betting would provide prosecutors more flexibility in attempting to control this exploding industry. Similarly, by simply prosecuting individuals for betting with these services, the government need not face some of the difficult issues relating to obtaining jurisdiction and custody of defendants who are living outside of the United States.

The main argument against amending the Wire Act to permit the prosecution of individuals who place bets with gambling services is one based on the practicality of enforcing such a law. While perhaps serving as a mild deterrent to those who wish to bet offshore, it is doubtful that this change in the law would reap significant benefits because it would be nearly unenforceable. Prosecuting gambling cases in the United States is not as glamorous as it was when the government cracked down on organized crime's control of gambling in the 1960s. Similarly, the federal government and the states, alike, provide little funding for gambling prosecutions. As a result, it would be unwise to spend this money attempting to prosecute individual bettors who may only wager a few hundred dollars a week. A much more cost-efficient approach would be to prosecute the services who accept wagers under the existing statute, instead of amending the law to attempt to stop individuals from placing bets.

C. Legalize Telephone Gambling

One final solution to the problem of Americans placing bets overseas would be to legalize telephone gambling in the United States. Many argue that it is hypocritical for the federal government and the states to ban this form of gambling when they so actively promote other forms of gambling such as lotteries and river boat casinos. Permitting Americans to place wagers with U.S. gambling services and casinos would have the natural benefit of allowing the government to regulate this activity. As it is today, the United States has no means through which it can ensure the legitimacy of these services. Also,

128. The Bill proposed to amend the Act by adding the following paragraph:

Whoever other than a person described in paragraph (1) knowingly uses a communication facility for the transmission or receipt in interstate or foreign commerce of bets or wagers, information assisting in the placing of bets or wagers, or a communication that entitles the transmitter or receiver to the opportunity to receive money or credit as a result of bets or wagers, shall be fined not more than \$2,500 imprisoned not more than six months, or both.

Internet Gambling Prohibition Act, S. 474, 105th Cong., 1st Sess. (1997). In addition to this change, the Bill would also amend the Wire Act to specifically cover services who accepts bets via the Internet.

by legalizing this activity, the U.S. government could enjoy a new source of revenue from the taxes it would collect from these services.

The arguments against legalizing telephone gambling mostly deal with concerns over how the increased accessibility of gambling may affect gamblers and non-gamblers alike. Considering the social problems that traditionally follow gambling,¹²⁹ it would seem unwise to permit sports betting services to open up on street corners throughout the country. There is some evidence that America's gambling fever may be subsiding somewhat,¹³⁰ and the legalization of sports gambling would go against this positive trend. Moreover, by legalizing the use of sports gambling services, the United States would likely be seen as having thrown their hands in the air as a sign of defeat, when the government has not yet made a conscientious effort to enforce the Wire Act against these services.

VI. CONCLUSION

Offshore telephone gambling services have taken advantage of advances in communication technology to provide a service to U.S. citizens that is not otherwise legal in the United States. Attracted by the sandy beaches and warm climates, as many as one-hundred telephone gambling services have sprung up in the Caribbean and Central America. Many nations provide a number of benefits including corporate and personal tax breaks, reduced lease payments on prime real estate, and guaranteed banking services free from U.S. regulators. All of these factors combined with the outbreak of gambling fever in the United States have served to make these businesses very profitable.

Although the Federal Interstate Wire Act prohibits the transmission of information assisting in the placing of bets or wagers in interstate or foreign commerce, the United States has been slow to utilize this statute to prosecute offshore services whose customers are almost exclusively U.S. citizens. The primary question surrounding the enforceability of the statute against offshore services centers around the issue of whether U.S. courts can exercise jurisdiction over an activity that occurs completely outside of the United States. A court would likely maintain jurisdiction because gambling services maintain numerous "contacts" with the United States and it is foreseeable that, as a result of conducting continuous business with U.S. citizens, the operators

129. See *supra* notes 27-29.

130. See *Rose, supra* note 14.

of services might be “haled into court” in the United States. Offshore gambling is a societal menace that must be reckoned with and the Wire Act stands as the best alternative for dealing with the problem.

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