

Department of Justice and the Wire Act

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ON FEBRUARY 16, 2012, Gaming Law Review and Economics held a roundtable discussion on the Department of Justice's (DOJ) recent pronouncement on, and new policy in regards to, the Wire Act.

Sue Schneider (SS): *Right before Christmas, a change of policy came out from the Department of Justice. Barry, could you provide a brief overview of the Wire Act, its history, and what it has meant so far, as well as of how the Department of Justice has made use of it and interpreted it in the past?*

Barry Boss (BB): The Wire Act is in the Criminal Code, at 18 USC Section 1084. Certain types of betting and wagering, on "a sporting event or a contest," are illegal.

It has been used, however, by the Department of Justice, to prosecute individuals and entities that were involved in gaming beyond sporting events or contests. There had been very limited law in the area: one case in the Fifth Circuit, which held that a prosecution for something outside of a sporting event was not covered by the Wire Act, and a district court case in Utah, which had held that there was no such limitation in the Wire Act, but that it could be used more broadly.

In the online poker area, which is the area with which I am most familiar, the DOJ had constantly threatened people with prosecution under the Wire Act. And, in fact, there have been at least three or four pleas that were taken, including some major ones, for individuals involved in online poker who

pled guilty to Wire Act violations. And there were at least half-a-dozen seizure warrants that we know about in which the Department of Justice seized funds on a basis of a claimed violation of the Wire Act, arising from online poker.

That was the backdrop for the Office of Legal Counsel's memorandum, which came out in December of last year. There had been that split in the circuits: one circuit court had held that the Wire Act did not apply outside sporting events, and at least one district court that had said that the Wire Act did apply more broadly.

The recent memorandum opinion for the Assistant Attorney General read the statute, I think, in really the only logical way you could read it, which is that the Wire Act only applies to sporting events—to sports gambling—and does not go beyond that.

I. Nelson Rose (INR): I think it is important to remember that the Wire Act was passed in 1961, as part of Bobby Kennedy's war on organized crime. It was designed to cut the "wire," which was a telegraph wire that bookies used so that they could get the results before the bettors. So you have a statute designed to help the states with their public policy of the time, which was complete prohibition, designed to go after horse racing and telegraph wires; using that against something like Internet poker is like trying to do brain surgery with stone tools—it might work, but it is very messy.

SS: *True, the Internet was not even a gleam in anybody's eye in 1961. Barry brought up a couple of pleas that were very lucrative for the federal government. One was about \$300 million, which the government ended up getting from one of the founders of Party Poker, as well as, I think, \$102 million or thereabouts that they got from Party Poker corporate at that time. Those were, in some ways, predicated on Wire Act violations. So*

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what happened with those pleas, given that the DOJ has essentially said that the law was applied incorrectly?

Paul Hugel (PH): First of all, at least for the \$300 million that Anurag Diskhit paid as part of his plea, it was not just partially predicated on the Wire Act—that was the only charge, conspiracy (or aiding or abetting) to violate the Wire Act. The Wire Act was the only substantive charge; there was nothing else he was charged with.

However, it was a final judgment. The money was paid. I believe he still may be on probation, but I suspect he does not really have a basis for filing an appeal.

INR: When people are convicted under a crime and have served their time, and then the legislature subsequently changes the law, or the prosecutor announces that they are not going to prosecute certain alleged violations, that does not undo the prior pleas, verdicts, and punishments. To analogize: if a prosecutor indicates that there will not be prosecutions in the future for recreational or medical marijuana use, that does not invalidate prior prosecutions under the law.

PH: It is in some ways odd. I mean, it is frequently an issue. If the Supreme Court invalidates a statute—declares it unconstitutional—that presents a more straightforward question about how it applies to people who have already been convicted under the statute, correct? But this is not that case. There is no court saying anything. This is simply the executive branch making an internal decision about how it interprets an act of Congress. They are not judges, they are not legislators. It is simply a decision by the Executive about the interpretation they will use internally going forward. I think it would be a tough one to litigate an appeal on that.

SS: *In terms of the process, I have heard other gaming attorneys point out that this could easily be overturned by the Court. Dan, I am wondering, from your perspective, in terms of what Paul was saying, now that the DOJ has put forth an opinion that is almost 180 degrees from its past opinion, how does that sort out?*

Dan W. Goldfine (DWG): To answer your question directly, I think you have identified the issue, and

Paul has identified it, correctly: this is an opinion from the Office of Legal Counsel, which is the most political arm of the Department of Justice, and it is disagreeing with line prosecutors in the Department of Justice.

I think it impacts anything that exists today that would have been filed in contravention of this policy—at least while this administration is in place, and probably up through any subsequent administration, up to a point in time when a future political arm or a future Office of Legal Counsel goes back on this opinion or a court rules otherwise. Clearly, the Office of Legal Counsel can get it wrong; we only have to go as far back as *Hamden* to recognize that the Office of Legal Counsel gets it wrong according to the courts. Likewise, you only have to go back to last summer to see that this Office of Legal Counsel got it wrong with regards to its own president.

There are a lot of problems with the analysis by the Office of Legal Counsel. While I agree that the better weight of the analysis favors the limitation to sporting events, the analysis skips the purpose language in the legislative history of the Wire Act. The purpose language is pretty clear that it is broad. It says, quote, “The purpose of the bill is to assist various states and the District of Columbia in enforcement of their laws pertaining to gambling, bookmaking and like offenses and to the 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.” The Office of Legal Counsel’s opinion limits this language to “bookmaking” when the purpose language suggests broader meaning, through words like “gambling” and “like offenses.”

I think both Wire Act analysis in the *Lombardo* decision in Utah and, frankly, the Fifth Circuit’s analysis as well as an analysis by a state court in New York are also probably incomplete and flawed in their own ways, which highlights why this is a problematic criminal statute in the first place.

The Office of Legal Counsel’s opinion also highlights why the Department of Justice, at least in the last two years or three years, has focused on using other criminal statutes to address what they believe to be a criminal problem in the context of online gambling.

SS: *Can someone talk about how the DOJ could have reversed itself in such a dramatic fashion?*

And whether any of the line prosecutors will try to deviate from this new position?

DWG: I spent nine years previously at the Department of Justice, and I would note that this opinion is effectively binding on line prosecutors within the Department of Justice. I think it would be a fool's errand for any one of the line prosecutors in this administration to attempt to get an indictment approved. The U.S. Attorney for the District in which a case was filed would have to approve it, but—like the Office of Legal Counsel—each U.S. Attorney is political, too. It would be a fool's errand to get it approved in the face of this and, frankly, I think, that if the indictment survived the internal machinations, it would be dismissed right away in the face of the Office of Legal Counsel's memorandum.

PH: The *Lombardo* prosecution, I think, was scheduled to go to trial about three weeks ago, and while I do not know if they have pulled the plug on it, I do know that they have asked for an adjournment to figure out what to do, in light of this change. The *Lombardo* prosecution in Utah was predicated heavily on Wire Act violations.

From looking at all of the press that the DOJ's new pronouncement has been getting, the spin that is being put on it is that this was a political decision, result-oriented. But when I read this opinion, it does not strike me as that. It strikes me as an opinion by an intelligent lawyer trying to reach the right result, by trying to reason to "What is the best way to interpret this statute?"

I agree with Dan that if you look at this opinion and the one from the *MasterCard* case and the district court in Utah in the *Lombardo* case, none of them are perfect. But I think this one was the best-reasoned, and it is probably, to me, the most persuasive. It therefore did not strike me as result-oriented, the way a lot of decisions do. I mean, the Office of Legal Counsel is a stepping stone for, I think, Supreme Court Justice—Chief Justice Rehnquist, Justice Scalia were people who ran this office at one point. So certainly, politics can creep into it. And, after all, the waterboarding memos came out of that office, and they were clearly political, too. Nonetheless, this did not strike me as a politically motivated opinion; it struck me as good legal reasoning.

DWG: Can I ask a question of Paul? I would be really interested in his—or anybody's—insight into

the following: why do you think the Office of Legal Counsel omitted the "purpose of the bill" legislative history from the analysis, which to me, is the most difficult piece of legislative history that is out there? It seems an odd omission if this opinion was purely an attempt to better understand or interpret a statute.

PH: I cannot tell you what was in her head. It is just that in reading, it did not strike me as someone trying to push an agenda, or reach a predetermined conclusion they wanted to reach. It struck me as someone trying to look at the evidence, the documents available, and trying to come up with a reasonable way to interpret a statute that, frankly, is really poorly drafted.

If the administration wanted to change DOJ's approach to this, it seemed to me that it could have been very easy. Eric Holder could simply tell the line assistants, "Do not bring these cases any more." The DOJ could have simply said, "We decided this is not how we are going to interpret the statute; we do not want to bring cases based on the Wire Act." And since Eric Holder would take instructions on this from the President, it would have been an easy and appropriate way to effectuate a new administration policy.

But, you know, it just seems an odd way to make a policy change, where there would be no reason to have a legal opinion. They would not need a legal opinion to back a policy change up.

INR: Paul, but what about the timing, since this was supposedly made in September, but then released on the Friday before Christmas, two days before Christmas, where there is no news coverage of anything? So that it was a Friday news night dump, and nobody really saw it until days, weeks, later.

PH: I am not—I am not quite sure what the policy is in the Office of Legal Counsel for publishing these opinions. I am fairly sure that they do not have to publish them, and I do not think that they do regularly publish them. Their Web site has some vague statement that they publish ones that they deem internally to be sufficiently important or affecting the public.

I am not sure that they had to publish it at all, and I do not have any idea of why they decided to, or what was behind the timing of doing so. I agree that it does look like it was published at a time

when it would get as little coverage as possible. But, obviously, it has in fact gotten a lot of coverage from people who care about this.

BB: Do not forget that it was just a matter of Holder making an announcement, “We are not going to prosecute these cases.” There were businesses that wanted to move forward with some degree of confidence. They wanted more than just this Attorney General saying that, “Well, we are going to use our discretion not to prosecute these cases.” Rather, they wanted assurance that what they were doing was legal. And, although, of course, you know, this is not binding, and some Legal Counsel in the future could change the opinion, it does have a degree of permanence, because it interprets the statute, which, I think, provides people with confidence going forward that they can operate under the assumption that the Wire Act does not reach beyond sporting events. I think that is what the businesses were looking for.

I am not sure there was another way to do it. I do think it was embarrassing to the Department of Justice, because it is contradicting years of prosecutions by the criminal division for alleged violations of the Wire Act which did not involve sporting events—it makes sense that they would want to sort of deep-six it, to the extent that they could, and not give it a lot of publicity and not embarrass themselves. But, at the same time, it was something that needed, I think, to be in the public, so that businesses could rely on it moving forward.

PH: I understand. I think that what brought this issue to the attention of the Office of Legal Counsel was the request by New York and Illinois, to get some comfort from the criminal division about whether what they planned to do with their lotteries would be a problem under the Wire Act. I do not think anyone was sitting down, saying, “Ah, this is the perfect excuse we need to overturn this.” It just seemed that the questions from New York and Illinois were legitimate questions, based on current events, so I think the DOJ gave it to the Legal Counsel for an opinion.

INR: Do not forget, there was also the letter from Jon Kyl and Harry Reid, that said, “Hey, look, the D.C. Lottery says it is going to be doing internet lottery, poker and blackjack and we want you to clarify that it is still your position that the Wire Act covers all forms of gambling.” And then all that would be

illegal, unless, of course, Congress changed it so that Harry Reid’s privately owned casinos or Jon Kyl’s Indian casinos ran the games.

So this did answer that question as well, which is, “Well, in fact, intrastate and not sports betting, the Wire Act does not cover it.”

SS: *Where does this leave the lotteries? Is it really clear that they can put their lottery products online? And if their state allows them to do something more than that, will they now have the leeway to do so? Can they do that beyond state borders? How does that all sort out?*

INR: My position is that this completely opens the door to everything except sports betting, and the only reason sports betting is still covered is because of a separate statute, the Professional and Amateur Sports Protection Act (PASPA). Of the other federal statutes, only the Wire Act and the federal anti-lottery statutes covered state legal gambling, and the lottery statutes have an express exemption for state lotteries going across state lines.

So now that the Wire Act is limited to bets on sports events and races, I think the states can do just about anything, certainly lotteries, but including instant lottery tickets, which means ... well, you put a scratcher on a video screen and it is a lot like a slot machine. And then poker and casinos.

And I have to say, I do not think there is any chance they are going to reverse it. We did have a Fifth Circuit opinion saying this is the law, which is pretty good guidance for everyone, and I do not think the Department of Justice very often changes its position on something that they do not consider that important.

SS: *In the past, every time a state or territory, whether it was U.S. Virgin Islands or Nevada or one of the Dakotas, North or South Dakota, when they came up with an attempt to try to legalize this in the past, they were immediately struck down by the DOJ, even for intrastate types of things.*

INR: That is right.

SS: *So does that mean, if a state like Iowa decides that they want to legalize and regulate interstate poker, they could do that there and take play from other states?*

INR: Yes, as long as it is legal under the laws of the other states. And, I think, even internationally. As long as, say, Iowa has a statute that expressly says, “Yes, we will allow, say, companies licensed by New Jersey”—any state, I suppose, but let us say New Jersey—“and England, we can form one big Internet poker pool,” I do not see any federal law that would say, “No, Iowa cannot do that.”

PH: Yes, certainly intrastate, I think that would not be problematic. Interstate, the only issue would be what the law is in the player’s jurisdiction.

INR: Right.

PH: Correct.

SS: *There is an international precedent for that at this point with Denmark now, saying—because they have such a small population—that they are going to allow their licensees to pool their liquidity with global liquidity. It seems like the door might be open for that to happen here at this point.*

PH: On the other hand, New York has a statute that criminalizes promoting unlawful gambling. It is an open question, I think, that if you are based outside of New York, and you are doing things that promote players in New York to come to your out-of-state Web site, whether that would violate the New York statute. At least, an argument could be made that it would, so, I do not know that a state or a foreign country could unilaterally say, “Well, we say it is legal, and we can do it and it is not a problem then for our operators.” I think they are running a risk if they are doing it in a way that is not in conformity with the laws of the players’ jurisdictions.

SS: *Since the Wire Act has, at least at this point, has been taken away, taken out of the DOJ’s toolbox, are there other statutes or tools that they might now use as alternatives—other than the Unlawful Internet Gaming Enforcement Act?*

DWG: The answer to that question is yes, although I agree with Professor Rose that if there is no predicate state law violation, then there is probably not a federal law violation, if our assumption is right that the Wire Act goes away. If neither of those predicates exist, there probably is no other federal law. On the other hand, if you are, in fact, doing this in

a state, or touching a state, where it is against the law, there are a number of federal laws that can be used, from RICO to bank fraud, to wire fraud, to the Travel Act—even to the Hobbs Act—that could be used. Entrepreneurial prosecutors could put together and charge a case, and a case would survive a motion to dismiss. Frankly, that is what has occurred in the last two or so years. The federal cases have not involved Wire Act violations.

PH: Just last week, Judge Kaplan in the Southern District in New York issued a ruling in a case involving two Black Friday defendants. It was Elie and, I think, Campos. Basically, it was talking about exactly that issue. There were no Wire Act counts in those indictments, but the judge was saying, “These are, in theory, viable prosecutions under . . .” I believe it was Unlawful Internet Gambling Act, and also the prohibition of illegal gambling business, that is Section 1955, Title 18, which, based on violations of New York law, provided the necessary predicate for both of those.

INR: I think it is important to remind readers that it still has to be legal under state law. I think that probably a state can do pretty much anything, but it still has to be legal. Recently, I received an email from a guy who asked, “I am in Utah; can I set up sports betting on the Internet?” And I wrote back, and I said, “You are in Utah; you will not be able to ever set up sports betting.” In Utah, after all, you cannot even bet on a sports event.

I think the most interesting kind of political/legal side note on this was made on Black Friday, April 15th—the indictments do not mention the Wire Act. Which means that even back then, the Department of Justice saw this coming.

My theory is they did not want to indict anyone who would actually fight it. They wanted to avoid indicting anyone who was doing Internet poker under the Wire Act and then get a judge’s decision on that indictment, which would be reported in the press as “Judge declares Internet poker legal.” So they have been moving away from using the Wire Act for illegal Internet gambling for a few years now.

PH: Even the Daniel Tsvetkov case that preceded the Black Friday cases, I think, which led into them, which was from, I think, early 2010, was the same thing: no Wire Act counts in the indictment.

BB: An interesting thing, though, is that while DOJ was not willing to risk losing a motion to dismiss on the Wire Act, they did not have any problem, during that same time period, taking pleas under the Wire Act.

INR: I find that it is troublesome, because, as you know, I have said that this is a war of intimidation, which means that the DOJ kept scaring players, payment processors, and operators out of the American market, using the Wire Act, primarily, even though they may have known it did not in fact apply, and they were never taking to trial anyone who was just offering poker. Because they also knew they were going to lose if they did that, and so instead they were simply scaring people by making threatening statements. Go to the FBI official Web site. It says, “It is illegal to bet on the Internet,” and then they cite the Wire Act—which does not cover players anyway.

I think it is troublesome when the Department of Justice is waging a war of intimidation while knowing that it does not really have the weapons to do so. Instead, it is stretching the laws a little bit to get the result it wants.

SS: *When they say the Wire Act applies to sporting events, what about things that did not exist or were not contemplated in 1961, like Betfair, or betting exchanges, or market-related products related to sporting events—where do things like that fit in?*

INR: The Wire Act still has very broad language, plus there is also the Professional and Amateur Sports Protection Act, which is even broader. In regards to a state that is not grandfathered in, that is not one of the—by my count—eight states that have some form of sports betting, if you are not one of those eight, or you try to expand beyond what you did fifteen or twenty years ago, it is illegal. I do not think that this opens the door for being too creative about sports events.

SS: *What do you think will happen with the New Jersey challenge?*

INR: I would go on record by saying that I think the challenge will be successful. It is legally irrational to say that eight states—actually, twelve, because you should throw in the states that have legal jai alai—twelve states can have bets on sports events

but the other 38 cannot. It is so irrational, it is like the Congress saying, “Oh, I am sorry. You did not have sound when you opened up your movie theater, so some theaters can have sound and talkies and your state cannot—your theaters cannot have sound with your movies.” It is also the only time I know when the federal government has overruled the states and said they cannot change their public policy toward gambling. That has never happened.

DWG: I will go on record saying that I am not as confident as Professor Rose that the Act will be held unconstitutional. I think you can come up with a rational basis for discriminating between particular states.

INR: One of the interesting twists is that John Roberts was the lawyer for the American Gaming Association in the Greater New Orleans Broadcasting case, and he was the one who raised the successful argument that it was legally irrational to say that Indian tribal casinos can advertise over television and radio, but privately owned casinos cannot. So we actually have a Chief Justice who not only understands this legally irrational argument, but also understands something about gambling. It is important because this decision says the states can pretty much do anything they like, as long as it is legal. And if PASPA is declared unconstitutional, I think we are immediately going to see states looking at sports betting. Indeed, even before it is declared unconstitutional, we are going to see states looking at intrastate Internet sports betting.

I acted as a consultant for the Delaware State Lottery, when they were setting up their legal sports books, for which they were grandfathered in. And I told them that I think they can now have intrastate betting. Anyone in the State of Delaware should be able to bet on the forms of sports betting that are allowed in Delaware—which, unfortunately for them, is parlay bets.

SS: *A former DOJ prosecutor had mentioned to me that he was hearing that this is actually going to rally some of the prohibition forces to try to perhaps look at some congressional fixes somewhere along the line. Does anybody see that kind of thing happening and, if so, what? What might this elicit, because it was such a dramatic change of policy?*

DWG: I see some potential for something coming out of the House, but it would be dead on arrival in the Senate.

INR: In fact, there has been some increase in interest by the “antis.” Frank Wolf, Republican from Virginia, who is anti-gambling, actually testified at the hearings back, I think, in November. And after the DOJ announcement, there was movement by the antis. There is also movement now by various pro-gambling forces. For example, NASPL, the North American Association of State and Provincial Lotteries, got involved for the first time and said, “Hey, now, we do not need federal legislation. The states can do this.”

But, you know, as Dan said, nothing is going to pass this Congress anyway. Perhaps something could get through in the lame duck session, but nothing has passed and there has been no new substantive law. The only new substantive law passed by this Congress which I could find was a little tweaking of the patent laws. Since the Republicans took over the House in January of last year, literally no new substantive law has passed.

I think that this is a major development. And, because the speed of change of the Internet is like dog years, we are going to see things happen really fast. In 1962, there were no legal state lotteries in this country. Now, only a half-a-dozen states do not have state lotteries, but that took half a century. It is not going to take another four or five decades for almost every state to have greatly expanded Internet gambling.

In fact, half the states already have Internet betting on horse races. And I think we are going to find two or three or four this year legalize Internet betting—certainly, the state lotteries are jumping into it. And then, within the next couple years, we are going to find almost all of them jumping in.

SS: *It seems ironic that Illinois was one that pushed this, for example, but yet they have a prohibition law on the books. I am presuming that they would have to repeal that in some way.*

INR: The only statute expressly says that the state lottery can sell lottery tickets online, over the Internet, unless the Department of Justice objects. So, it was an act of the state legislature. I think, though, that you cannot stretch that to Internet poker. That is what is going to slow things down, when you

need to get a political decision and an act of the legislature, and legislation always takes longer than it should.

PH: What will be interesting for me to see is what comes out of this. I think we will see things changing fairly rapidly, but we don’t know yet whether what develops is going to be tightly state-controlled gaming, like state lotteries, or whether it is going to expand to state licensees that are going to be able to expand their offerings, based on this.

INR: Well, why would it not be state licensees?

PH: I think it is within the state’s powers to determine how they would like to see this play out. I do not, however, know the politics from state to state.

SS: *That is the battle. I think it is between the lotteries and, in those states that have gambling control boards and private licensees, that is where there is going to be a lot of tension.*

PH: Right. For example, New York’s gambling statutes say that all gambling is illegal, except that which is specifically permitted by the statute. So, would New York ever pass a statute allowing a licensee to take bets across state wires?

DWG: I agree that it will be interesting, and I think we will see a variety of different things on the state level. What surprised me a little bit is that, since the memorandum came out from the Office of Legal Counsel, it appears that D.C. has backed down on what it was planning, and the Governor of Connecticut has backed down, at least in his statements with respect to online poker, online gaming. I would also add that I am not wise enough to know the impact of what had been earlier phrased as the “antis”—which I presume to be some sort or subset of the Tea Party conservatives that have populated the House of Representatives—at the state level. I do know that those are powerful coalitions in Arizona and, therefore, I suspect that they are powerful within other states as well.

So it may not be as fast as we think it is going to be. And I think it may be narrower than we suspect, and I also suspect that states with powerful existing interests—whether it is Native American, or private commercial gambling or powerful state lotteries—will move slowly and carefully.

INR: I am working with the D.C. lottery on a different project, so I have been following it closely, and their response was really politics. I do not think that it represented any great policy decision, such that they said, “Oh, we made a mistake,” or that somehow the Department of Justice opinion was important to shaping their reaction.

But the political context of this are that we are continuing to be in the Great Recession, so the states need money. If the big money is local, that is who gets the licenses. So I think New Jersey will legalize Internet casinos this year, and all the licenses will go to Atlantic City companies.

Where we do not know what is going to happen is with states like California, where the rumor is that Jerry Brown wants to have the state lottery do it, because the state will make more money that way. But you have got very powerful Indian gaming tribes and card clubs, and if they want to, they can block that in the legislature. As a consequence, they are certainly going to get at least one of the licenses each.

The conservatives are interesting, because the fiscal conservatives like gambling, since it is a painless tax. It is the social conservatives that do not like it, but even that is changing, as we can see by the votes to continue the casinos in Iowa every year. But I do agree that legislation always takes longer than it

should, because you have got to work out who is going to get the licenses.

BB: I would just say that when you get down to a discussion that involves the vagaries of politics, it is very hard to make solid predictions about what is going to happen. However, taking a step back, it seems to me that the DOJ’s change of position on the Wire Act is a game changer. Up to now, there has been a stopping point for any jurisdiction that was considering anything like this. You did not even get to the political debate, because the federal government would insert themselves and say, “Well, you cannot do that; you would be violating the Wire Act.” Even if the federal government did not literally insert itself, everybody was worried about the big, bad federal government coming in and alleging there was a Wire Act violation and shutting everything down.

With DOJ now stepping to the side, there will be a lot of discussions, and there are a lot of competing interests, such as the gaming industry and the tribes and the conservatives, but we are now at a point where at least there can *be* that discussion, with the potential outcome being that there could be intrastate gaming. And so I think that that, in and of itself, is a really significant turn of events that should be highlighted.