

States Challenge Federal Internet Gambling Ban



Michelle Minton

Senior fellow at the Competitive Enterprise Institute specializing in consumer and regulatory policy*

Visit cei.org

This January, the Department of Justice (DOJ) issued an opinion that threatens legal online gambling in the U.S. The tenuous rationale on which the opinion is based has raised some eyebrows, but the most concerning aspect is that the DOJ revisited the Internet betting issue at the behest and in service of a single casino owner, one who just so happens to be a major donor to the president.

After decades of rampant illegal online gambling, the DOJ issued an opinion that opened the door for states to regulate the activity within their borders. Since then, the legal online gambling industry in the U.S. has flourished. This newly legal market now supports millions of jobs, contributes billions of dollars to our nation's economy, and has knee-capped the illegal market. But not everyone was happy with this development.

Republican Donor Asks Congress to Ban Online Gambling

Sheldon Adelson, the owner of the Las Vegas Sands Corp. and a Republican megadonor, vowed in 2013 to spend "whatever it takes" to stop online gambling. He has since spent millions campaigning for a federal ban on Internet gambling with the aid of an army of lobbyists, many of whom are former members of Congress or DOJ officials.

These legislative efforts repeatedly failed and, as they failed, the states rapidly expanded legal gambling opportunities. Today, five states allow casino-style games online, many allow online lottery ticket sales, and most have legalized daily fantasy sports betting online. More importantly, just about every state that hasn't already



legalized some form of gambling online is currently considering legalization to do so in the future.

Bypassing Congress

Undeterred by their failure in Congress, Adelson and his lobbyists found a new opportunity with the election of Donald Trump. First, they sought the support of Attorney General Jeff Sessions who, in his Senate confirmation hearings, vowed to revisit the DOJ's 2011 memo. But Sessions was ultimately forced to recuse himself from the Internet gambling issue due to the fact that his personal lawyer, Charles Cooper, also worked as a lobbyist for Sheldon Adelson's anti-online gambling efforts.

Sessions's recusal did not deter Cooper and others from lobbying the Department of Justice, as records obtained from a Freedom of Information Act request reveal. In April 2017, Las Vegas Sands lobbyist Darryl Nirenberg send a letter to high-ranking DOJ officials about revisiting their 2011 opinion and included with it a legal rationale, written by Charles Cooper, to do so.

A little over a month after the letter was sent, these DOJ officials requested that the Office of Legal Counsel (OLC) reconsider the 2011 opinion's conclusion that the Wire Act was limited to sports gambling. OLC finished its revised opinion on November

2, 2018—five days before Jeff Sessions "resigned" his post as Attorney General.

Though Matthew Whitaker took over as acting Attorney General almost immediately after Session's departure, the Department did not release the new opinion until January 14th—the night before the confirmation hearing for his nominated replacement, William Barr.

Did Adelson Get DOJ to Ban Online Gambling?

The arguments used by DOJ in its latest memo track those made by Cooper in the memo sent to the Department, even citing the same case law as examples. Though Whitaker denies that outside parties had any influence over DOJ's opinion, he did not address the many individuals within the administration that have links to Adelson and his lobbyists, and may have influenced DOJ decisions.

A Cloud of Confusion

A major question about the new DOJ opinion is why the Department felt the need to revisit the issue. The first DOJ Wire Act memo was a response to questions from state authorities: a clarification of the how federal law applied to their proposed online lotteries. The new memo seems to have been prompted only by the demands of Adelson's lobbyists and, instead of providing clarity, has created even more confusion about the law. Not only does the law, under the new interpretation, ban online gambling, but it is now also unclear whether or not it bans in-person lottery ticketing systems (if the devices are Internet enabled), interstate lottery games like Power Ball and Mega Millions, or even online trading of options, securities, stocks, and bonds.

Confusion may have been the purpose of the new opinion since it was uncertainty that had, for so long, dissuaded state authorities from regulating online gambling prior to 2011. But, unlike the pre-2011 era, state lawmakers cannot now sit back and wait for the federal government to decide the fate of online betting. States and residents have come to depend on the

Continued on page 49

So this is our new philosophy, this is what we are launching here at ICE. Two verticals, sports betting and lottery, new platforms for both, same philosophy, a holistic approach of end-to-end, cross channel, cross product, and cross vertical. But let's look at each vertical alone for a moment. We have the lottery with a new central engine that has a very flexible, open architecture, third-party friendly, and much shorter time-to-market and lower cost of ownership. And with a sports betting omni-channel platform that is strong on both digital and retail, we give the operators the ability to support both channels without cannibalizing one or the other, but rather working complementarily in order to keep the player engaged.

And how about other channels such as self-service terminals and cashless transactions.

C. Sfatos: Self-serving terminals and machines offer a chance for a larger footprint. However, they're not expected to replace the retailer but rather to offer a different kind of experience so that the player doesn't get bored with the same thing again and again. It was a different time when people had one draw per week and would go to the store, fill out a slip, wait for a week and look up the results. Now we live in a time when everything happens quickly. The consumer expects speed and convenience. They do not want to spend more or become addicted to anything; that's why we have all the safeguards and all the analytics that tell us about player behavior. Responsible gaming features support the long-term sustainability of healthy player-ship, happy players, and therefore the business itself. By providing a simple and easy playing option, self-service terminals contribute to the quality of the in-store shopping experience.

Self-service machines offer efficiencies, unmediated options, and the alternative preferred by many consumers who prefer to avoid check-out lines. Self-service betting terminals provide people who are not so familiar with betting with an option that is familiar to them because it resembles the way lottery is packaged and displayed. Sports betting is not like a draw game, it's not an RNG that produces a result. It plays more like an actual game, but the playing activity displays the choices in ways that make it easy to select a betting option much like you would select a lottery ticket, so it makes it attractive to somebody who

doesn't really know a lot about sports or how to bet on sports.

How will INTRALOT position its clients to succeed in the competitive gaming environment of the coming years?

C. Sfatos: Our vision at INTRALOT is to be ahead of developments in modernizing lotteries in the digital era and shaping the future of gaming. This summarizes our very broad vision and the way we operate with our clients. We are a technology company and an international company and these two elements are the essence of who we are. We are in the gaming industry for longer than 25 years, and we have developed a niche expertise for the government lotteries and sports betting in the regulated markets.

Unlike our competitors, we have not diversified into the casino technology business and remain very focused in creating and launching the next generation products that will serve the digital transformation needs of our clients. We have a lot of know-how in offering services and managing operations, as we run the gaming operations in some jurisdictions, but primarily our focus is on partnering with operators, anticipating broad consumer trends and the changing tastes and preferences of the players, and developing technologies that meet the needs of the gaming operator, the market-place, and the modern consumer. We are strong at providing options for the retail network and integrating the retail and digital worlds. As a technology company, we are focusing on the human capital because we depend on the knowledge of the people and their skills to create software and integrate new ideas. That is where my personal challenge lies: to offer inspiration to our people and to create the structures that will keep them excited about the future of the industry and their role in that future; to communicate our company's vision clearly, to receive our stakeholders' feedback and to identify constructive ideas for continuous improvement and innovation. ■

industry for jobs, economic stability, and tax revenue.

Indeed, a lawsuit has already been filed against DOJ in federal court by the New Hampshire Lottery Commission. And pressure from the judge overseeing the case has, reportedly, already forced the DOJ to push compliance with the new opinion from April to June.

Fortunately, this period of limbo will likely not last very long, as most legal scholars agree the new opinion is so poorly constructed it will not withstand challenges in court. Thus, it may only be a matter of months before the clarity achieved by the DOJ's 2011 opinion is reestablished and the power to regulate intrastate gambling is rightfully restored to the states. Still, the opinion will no doubt have the chilling effect Adelson hoped for with states stalling proposals to legalize or expand online gambling and notoriously skittish payment processors refusing to service licensed operators in states where online betting is already legal. And, no matter how short-lived the logjam created by the DOJ's opinion is, it should be gravely concerning to all of us that a single special interest appears to have manipulated an office of the federal government into bending the law to suit his personal interests. ■

.....
*Michelle Minton has authored numerous studies, including topics like the effectiveness and unintended consequences of sin taxes and history of gambling regulation. Her analyses have been published and cited by nationally respected news outlets such as the New York Times, the Wall Street Journal and USA Today as well as peer-reviewed journals. She regularly appears in news media to discuss the unintended effects of laws and rules designed to save adults from their own choices which not only conflicts with the principle of individual liberty, but often the goals of public health.