

U.S. Appeals Court Rejects Trump-Era Wire Act Memo

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U.S. Appeals Court limits Wire Act to sports betting

Ruling okays interstate lotteries, online gaming

Slim chance Biden administration will appeal ruling

In a potentially historic opinion, a federal appeals court on Wednesday rejected an appeal by the U.S. Department of Justice (DOJ) that posed a threat to the future expansion of the gambling industry.

Two judges from the First U.S. Circuit Court of Appeals in Boston affirmed a June 3, 2019 decision by a New Hampshire federal district judge who ruled the U.S. Wire Act of 1961 applies only to interstate sports betting and does not prohibit internet gaming or online lotteries.

In a **49-page opinion**, the judges cited an ancient parable in which Dionysius, a Greek tyrant, allowed a flatterer named Damocles to enjoy the luxuries of the king's court before he noticed a sword hanging from the ceiling above his head.

"New Hampshire and its vendors should not have to operate under a dangling sword while DOJ purports to deliberate without end the purely legal question it had already apparently answered," U.S. Circuit Judges Sandra Lee Lynch and William J. Kayatta, Jr. wrote in their opinion.

The only surprise about the decision was how long it took.

Lynch, Kyatta and U.S. Circuit Judge Juan R. Torruella did not hide their skepticism of the appeal as they grilled Justice Department attorney Jeff Sandberg during **oral arguments** on June 18.

Torruella died on October 26 at the age of 87, and did not participate in Wednesday's 2-0 ruling.

It is fitting the decision was released on Wednesday morning with less than two hours left in the Trump presidency before President Biden was sworn into office at noon.

After all, it was the Office of Legal Counsel (OLC) of Trump's Justice Department which stunned the gaming industry on January 14, 2019 by publishing a new opinion to reverse an earlier legal memo by President Obama's OLC on December 23, 2011.

The **2011 opinion** concluded the Wire Act applies exclusively to sports betting online, triggering the advent of legal and regulated internet gambling, including online lotteries, in the United States.

The OLC memo written in November 2018 raised eyebrows, given Trump's relationship with his top financial donor, Sheldon Adelson, who had vowed to spend "whatever it takes" to abolish internet gambling.

The Trump OLC memo sent the U.S. gaming industry into a **tailspin of uncertainty** before it hastily regrouped to come up with an effective response.

A month later, the New Hampshire Lottery Commission and its online lottery provider, NeoPollard Interactive, sued the Justice Department and sought to nullify the 2018 OLC opinion.

During oral arguments on April 11, 2019 in the federal courthouse in Concord, New Hampshire, U.S. District Judge Paul Barbadoro **predicted** the case would eventually reach the U.S. Supreme Court.

Although his decision to overturn the Trump administration's opinion on the Wire Act was affirmed on Wednesday,

Barbadoro's prediction about the Supreme Court appears unlikely to come true.

President Biden was vice president when the 2011 opinion was issued, and a decision by his Justice Department to appeal Wednesday's decision simply would not make sense.

In a perfunctory response on Wednesday, a Justice Department spokesperson said: "The department is reviewing the decision and determining next steps."

Matthew McGill, the Gibson Dunn attorney who represented NeoPollard Interactive in the case, praised Wednesday's decision.

"We are very pleased with the 1st Circuit's decision, which restores the Wire Act to its intended scope and makes clear that state-run lotteries are not criminal enterprises," said McGill, who helped famed attorney Ted Olson win the milestone sports-betting **decision** by the U.S. Supreme Court on May 14, 2018.

Behnam Dayanim, a gaming attorney in Washington, D.C. firm of Paul Hastings, said the federal appeals court did more than just affirm Barbadoro's opinion in 2019.

"Rather than confining its analysis to the narrow question of whether lotteries are encompassed by the Wire Act, it embraced the district court's broader conclusion that the statute only encompasses sports betting," Dayanim said.

"That provides the iGaming industry with protection from prosecution under the statute as well."

Dayanim said online gambling trade association iDEA Growth, which participated in New Hampshire's lawsuit as a friend of the court, deserves credit for the comprehensive ruling.

"Uncertainty surrounding the ambit of the Wire Act has been a cloud over the internet gaming industry since 2018," Jeff Ifrah, founder of iDEA Growth and Ifrah Law, said in a news release.

"Today's decision will hopefully put to rest the question of whether federal law prohibits states from licensing internet gaming within their borders and compacting with each other to allow such gaming on an interstate basis."

James Trusty, a member of Ifrah Law who was in charge of the Justice Department's organized crime and gang section from 2011 to 2018, said Wednesday's ruling "guts" the Trump administration's "wrongheaded" interpretation of the Wire Act.

"I would be shocked if the Justice Department even bothered with petitioning the Supreme Court to review this ruling, and stunned if the [Supreme] Court decided to take it," Trusty said.

"The ruling is well-reasoned and without conflict in any other [federal] circuit, which typically forecloses the Supreme Court from choosing to accept the case."

Bill Miller, president and CEO of the American Gaming Association, said Wednesday's ruling "provides important certainty for those who wish to innovate and invest in mobile gaming products."

"Across the country, state and local economies rely on valuable tax revenue from gaming operators, which remains critical as our nation recovers from the economic impact of the pandemic," Miller said.

Las Vegas gaming attorney Kate Lowenhar-Fisher said Wednesday's ruling ends the looming menace of the Wire Act on the industry's future.

"The Biden administration won't pursue a case whose objective is to stifle the expansion of a pandemic-friendly business," said Lowenhar-Fisher, who works for the Dickinson-Wright firm.

"The case is dead. Good riddance!"

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