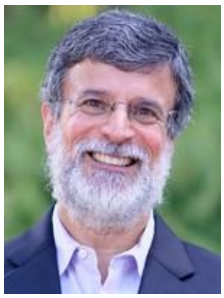
2 Gambling Issues That May Change After Sports Bet Ruling

By **David Jacoby** (June 1, 2018)



David Jacoby

It may not have been on anyone's mind when Murphy v. National Collegiate Athletic Association[1] was called for argument in the U.S. Supreme Courtlast Dec. 4, but that was one day short of the 84th anniversary of the repeal of Prohibition.[2] Will the Murphy decision, opening the door to much broader legal gambling in the United States, be as important a societal turning point as the repeal of Prohibition?

There are differences, of course — most notably, that Murphy was a court decision, not the legislative action of two-thirds of the states — but there are striking parallels, too. The efforts to outlaw drinking and to outlaw gambling both had strong moral components. Proponents also argued the ban would protect the vulnerable from alcoholism and its consequences in one instance, or compulsive gambling and its consequences in the other.

Back then, some of the major policy arguments advanced for ending Prohibition included the boost it would give to the economy during the Great Depression, the increase in government tax revenue it would produce and the blow it would strike against what was not yet called organized crime.[3] Now, some of the major policy consequences being posited from Murphy's striking down of the Professional and Amateur Sports Protection Act are that it will give the legitimate economy a huge boost by shifting what's estimated at $150 billion annually in now-illicit sports gambling to the legal side of the ledger, that it will be a bonanza for state governments' revenue as they levy gambling taxes and run sports-related lotteries and that organized crime will be robbed of funds as a result.

Unlike the nation's one-off experiment with Prohibition, however, Murphy is just the latest reverse flip in America's roller-coaster treatment of gambling. This particular twist is likely to impact directly the fortunes of two groups somewhat improbably linked by their relationship to gambling: Native American tribes and the tiny Caribbean nation of Antigua and Barbuda.

Colonies, Indian Tribes and Gambling

Professor I. Nelson Rose, the eminence gris of gambling legal studies, identifies three long cycles in American law's treatment of gambling: the first, from colonial times to after the American Revolution; the second, from after the Civil War to the end of the 19th century; and the third, beginning during the Great Depression.

In colonial times, lotteries were a popular way to finance such improvements as colleges — including Princeton, the alma mater of Justice Samuel Alito, who wrote the majority opinion in Murphy. After the Civil War, many Southern states used lotteries to fund rebuilding. It was the losses throughout the country from a shady state-licensed lottery in Louisiana — its nickname "the Serpent" will convey a sense of how it was regarded — that led Congress in the 1870s to ban the use of the U.S. mail to transmit lottery materials.[4]

It took another 80 years, and the televised Kefauver Senate hearings on organized crime in the 1950s, to lay the groundwork for more federal legislation. It followed the pattern of the existing statute, applying only to the extent interstate or foreign commerce was implicated. The 1961 Travel Act barred travelling in interstate or foreign commerce, or using the mail or

any facility of interstate or foreign commerce, with the intent to distribute the proceeds of any unlawful activity (specifically including gambling) in violation of state or federal law. Also in 1961, the Interstate Wire Act barred using a "wire communication facility" (telegraphs, telephones) to transmit wagers or information to assist in betting on any sporting event or contest.[5] In 1970, the Illegal Gambling Business Act banned conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business (meaning one that violates the law of the state where it is located) that involves five or more people in its operation and is in substantially continuous operation for more than 30 days or grosses more than $2,000 on any single day.

Matters grew still more complicated in 1987 when the Supreme Court struck down an obscure bit of federal legislation, Public Law 280 of 1953.[6] That statute had given six states, including California, jurisdiction over tribal lands for purposes of applying their criminal statutes. The decision distinguished between criminal/prohibitory laws and civil/regulatory laws. After weighing California's failure to prohibit all gambling and its sanctioning of a state-run lottery, the Supreme Court concluded the gambling and bingo being conducted by the defendant tribes was only regulated but not banned by California law — and hence, couldn't be prohibited on tribal lands. In response, Congress passed the Indian Gaming Regulatory Act the following year.

IGRA was the foundation stone for the vast and complex business of tribal gaming that now exists across the country. Briefly, the most sophisticated (and lucrative) gambling — including sports gambling — is allowed if it is (1) approved by a tribal ordinance, (2) permitted within the state where the tribal land is located; and (3) conducted under a compact negotiated between the tribe and the state. As originally enacted, IGRA had created a negotiation process after which, if no agreement had been reached, a tribe could sue a state in federal court, but the Supreme Court struck this down as a violation of state sovereignty under the Eleventh Amendment in 1996.[7] The U.S. Department of the Interior adopted regulations to fill the gap, but the Fifth Circuit found these unconstitutional in 2007.[8]

By the time Congress enacted PASPA in 1992, the scene was very different from what it had been in 1961. Gambling had been legal in Nevada since 1931, but since then many other states had loosened their anti-gambling laws to permit state-run lotteries and to allow limited gambling such as "Las Vegas nights" to benefit charities. Delaware, Montana and Oregon even had begun to offer state-sponsored betting on sports.

One certain consequence of Murphy will be a tug of war over who gets to exploit what parts of sports gambling. Some Indian nations already have argued that gambling compacts into which they entered with various states give them the exclusive right to conduct gambling on sports.[9] If past negotiations are any guide, however, many states and tribal operators will wind up reaching an accommodation on pragmatic financial bases. It also seems likely that the Supreme Court eventually again will be asked to resolve the constitutionality of the Interior Department's regulatory stand-in for the IGRA compact negotiation process.

The Forgotten Case of Antigua and Barbuda

The rise of the internet made it easy for gamblers to wager using off-shore sites, leading Congress to enact the Unlawful Internet Gambling Enforcement Act in 2006. That statute prohibits placing, receiving or knowingly transmitting a bet by use of the internet if the bet is unlawful under any federal or state law applicable in the state (or tribal lands) where the bet is initiated, received or otherwise made — except for interstate horse racing.[10]

The tiny Caribbean nation of Antigua and Barbuda, with only about 90,000 people and a geographic area less than half that of New York City, had seen and successfully taken the opportunity to become a hub for online gambling. That business became the country's second biggest employer, providing over 4,000 jobs. But all that came to an abrupt end on "Black Friday," April 15, 2011, when the United States government unsealed indictments of 11 individuals and seized the assets of various online gambling service providers.

Antigua's response was to file a complaint under the General Agreement on Trade in Services, to which both it and the United States are signatories. It claimed that its right to supply gambling and betting services to the United States had been violated by various federal and state laws, costing Antigua $1 billion a year. In November 2004, a World Trade Organization panel sustained Antigua's claims that the Wire Act, the Travel Act and IGBA, along with certain Louisiana, Massachusetts, South Dakota and Utah statutes, violated U.S. commitments under GATS. An American defense that its laws were saved by a treaty exception for laws protecting public morals was rejected in light of how much gambling U.S. law permitted (shades of Cabazon!).

The WTO Appellate Body ultimately reversed the findings as to the four states' laws, concluding that no prima facie case had been made. But it did find a problem with the Interstate Horseracing Act, because it let states allow intrastate online betting on horses but was silent on international betting on the same races. In essence, it held that the U.S. could permit all online gambling, or ban all online gambling, but that it couldn't pick and choose depending on whether the situs of the gambling operation was domestic or foreign.

In response, the United States did nothing. As a result, in 2007, Antigua sought and obtained the right to suspend its own compliance with intellectual property-related aspects of GATS with respect to the United States to the extent of $21 million a year. So far, it has not done so. Reports indicate that there have been some desultory negotiations between the two countries, but nothing has been resolved.

If, as seems likely, many U.S. states will now amend their laws to permit sports gambling, it will become even harder to justify not allowing foreign countries to provide gambling services to Americans. As a law journal article suggested a few years ago, other countries may be encouraged to follow Antigua's example and challenge American restrictions.[11]

Readers with any top-of-the-head awareness of Antigua and Barbuda may have it because Hurricane Irma hit the island of Barbuda so hard last year that it had to be completely evacuated. As of earlier this spring, roughly two-thirds of its people still hadn't been able to return home.[12] Particularly in view of that, perhaps this is one gambling marker that it's time for Uncle Sam to honor.

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[1] 584 U.S. ____, 138 S. Ct. 1461 (May 14, 2018).

[2] Daniel Okrent, Last Call: The Rise and Fall of Prohibition (2010), at p. 354.

[3] Id., at pp. 331-333, 337, 349-351.

[4] 17 Stat. 80, amending Revised Statutes § 3894. See Ex parte Jackson, 96 U.S. 727 (1878). The current version is at 18 U.S.C. § 1302.

[5] Departing from how the statute generally had been understood, although consistent with its wording, a Sept. 20, 2011 opinion of the Justice Department's Office of Legal Counsel concluded the statute applied only if gambling on a sporting event or contest is involved. www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf.

[6] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

[7] Seminole Indian Tribe of Florida v. Florida, 517 U.S. 44 (1996).

[8] Texas v. United States, 497 F.3d 491 (5th Cir 2007), cert denied sub nom. Kickapoo Traditional Tribe of Texas v. Texas, 555 U.S. 811 (2008).

[9] See Kevin Draper, Tim Arango and Alan Blinder,"Indian Tribes Dig In To Gain Their Share of Sports Betting," The New York Times, May 22, 2018.

[10] See 31 U.S.C. § 5362(10)(D).

[11] Hollander, "The House Always Wins: The World Trade Organization, Online Gambling and State Sovereignty," 12 Rutgers J.L. and Public Policy 179 (2015).

[12] See https://www.globalgiving.org/pfil/29887/Q1_BRCTDonorReport.compressed.pdf at p. 2.