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## You Say Intrastate, I Say Interstate: Why We Should Call the Whole Thing Off

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## **YOU SAY INTRASTATE, I SAY INTERSTATE: WHY WE SHOULD CALL THE WHOLE THING OFF**

*Andrew Wiktor\**

*As society evolves, so do criminals. In the early twentieth century, America embraced the automobile, passed the Volstead Act, and created a national highway program. These developments inadvertently paved the way for interstate criminal enterprise. Infamous gangsters such as Al Capone were able to operate large-scale racketeering syndicates without fear of being prosecuted for two primary reasons: (1) states lacked jurisdiction, resources, or both to go after such criminals, and (2) there was no federal criminal statute to fill the gap left by the states.*

*But as criminals evolve, so does society. In 1961, Congress, at the urging of Attorney General Robert F. Kennedy, passed the Travel Act. This statute makes it a federal crime to use interstate facilities to promote certain offenses that would otherwise have amounted to only state-level crimes. The Travel Act enumerates several crimes falling within its scope, including, but not limited to, gambling, prostitution, arson, bribery, and extortion.*

*While the statute's legislative history makes it clear that the Act targeted gangsters like Capone who were using interstate facilities to conduct interstate crimes, the Ninth Circuit has held that the federal government can exercise its jurisdiction whenever a facility of interstate commerce is used, even when that facility is used to facilitate wholly intrastate conduct. Interstate facilities include automated teller machines (ATMs), banks, cars, and cellphones, making the enumerated crimes in the Travel Act nearly always chargeable by the federal government under this holding.*

*Given the potential breadth of the Ninth Circuit's holding, this Note considers whether the Travel Act's jurisdictional interstate requirement can be satisfied by the intrastate use of interstate facilities. Ultimately, this Note concludes that while reading the Act's scope to include wholly intrastate activity may initially appear disconcerting, such an expansive interpretation should be encouraged.*

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## INTRODUCTION

Alphonse Gabriel “Al” Capone smirked in a federal courtroom in Chicago, Illinois on October 17, 1931, after a jury found him guilty of tax evasion.<sup>1</sup> Although “[n]o one interviewed him” that day, it was evident Capone was happy.<sup>2</sup> America’s most recognizable gangster was not gleeful because he had evaded the Internal Revenue Service (IRS) for years before being caught; instead, he was gleeful because he evaded a different, more serious charge: racketeering.<sup>3</sup>

In fact, Capone was *never* charged with crimes such as murder, facilitating prostitution, or gambling—the very offenses that led to his infamy. Furthermore, for the better part of American history, crime bosses—like Capone, Lucky Luciano, and George “Machine Gun Kelly” Barnes—were able to run multistate racketeering syndicates safe from the prying eyes of the federal government since these crimes were only chargeable as state offenses. And even though state law enforcement agencies were legally permitted to go after these notorious gangsters, they often did not because such prosecutions were either outside of their jurisdictions or beyond their investigatory capabilities. Thus, when Assistant United States Attorney Jacob I. Grossman went after Capone, he indicted the country’s most well-known crime boss with a less-than-glamorous federal offense: income tax evasion.<sup>4</sup>

Capone’s income tax prosecution has been deemed “pretextual”—since the government could not charge him for his most heinous behavior, it settled for a lesser charge in hope of doing some justice.<sup>5</sup> When prosecutors settle for charging suspects with lesser crimes, however, it can be unsettling for the general citizenry.<sup>6</sup> Moreover, such prosecutions frequently expose larger

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1. Meyer Berger, *Capone Convicted of Dodging Taxes; May Get 17 Years*, N.Y. TIMES, Oct. 18, 1931, at 1 (“As soon as the verdict was entered, [Capone] got out of his seat and virtually ran from the room. He rushed on lumbering feet across the dim corridor, stepped into the elevator and as soon as it touched the rotunda floor he ran out to the street to a waiting automobile.”).

2. *Id.*

3. Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583 (2005) (“[Capone’s] crimes were not easily proved in court. So federal prosecutors charged Capone not with running illegal breweries or selling whiskey or even slaughtering rival mobsters, but with failure to pay his income taxes.”).

4. At the time, a recent U.S. Supreme Court case had made it possible for the government to hold criminals accountable for not paying taxes on the profits they derived from illegal activities. *See United States v. Sullivan*, 274 U.S. 259, 263 (1927). *See also generally* Boris I. Bittker, *Taking Income from Unlawful Activities*, 25 CASE W. RES. L. REV. 130 (1974) (discussing the evolution of taxing illegal gains).

5. Richman & Stuntz, *supra* note 3, at 584.

6. *See id.* at 588 (describing that although Capone’s prosecution did not spark ire from the public, more recent pretextual prosecutions—those of Bill Clinton and Martha Stewart, for example—have stirred up criticism).

systemic problems in the justice system,<sup>7</sup> often indicating gaps in title 18 of the United States Code.<sup>8</sup>

Capone was sentenced to eleven years in prison one week after his conviction, a decision he was no longer smiling about and one he attempted to vacate six years later.<sup>9</sup> Still, his initial elation and the elation of other such gangsters—men who quite literally got away with murder—prompted then-Attorney General Robert F. Kennedy to propose criminal legislation, three decades later, geared at wiping the grins off the faces of gangsters such as Capone. On June 29, 1961, President John F. Kennedy passed the Travel Act.<sup>10</sup>

While Attorney General Kennedy's purpose for proposing the Travel Act was narrowly geared toward crime bosses who operated illegal enterprises in State A from the jurisdictionally safe confines of State B,<sup>11</sup> the Act has been interpreted more broadly than that.<sup>12</sup> This is largely due to the potentially wide-reaching clause in the first line of the statute, which covers anyone who "travels in interstate or foreign commerce or uses the mail *or any facility in interstate or foreign commerce.*"<sup>13</sup> In fact, some courts have liberally interpreted the "facility in interstate or foreign commerce" language, upholding Travel Act charges based on the *intrastate* use of the mails,<sup>14</sup> automated teller machines (ATMs),<sup>15</sup> and telephones.<sup>16</sup> While there is little to no doubt that these facilities ought to be deemed facilities in interstate or foreign commerce, it is far more questionable whether the mere use of such

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7. Ken LaMance, *The Dark Horses of Criminal Prosecution*, LEGAL MATCH (Apr. 7, 2010), <https://lawblog.legalmatch.com/tag/pretextual-charges> [<https://perma.cc/NLE9-AMN9>].

8. Congress can close "gap[s] in the authority of federal investigatory agencies" by using its Commerce Clause power. *Perrin v. United States*, 444 U.S. 37, 42 (1979) (noting that in addition to the gaps that the Travel Act, codified at 18 U.S.C. § 1952, intended to fill, Congress also sought to provide the federal government with the ability to aid in the prosecution of two other crimes traditionally prosecuted on the state level: kidnapping and the interstate transportation of stolen automobiles).

9. *See generally* *United States v. Capone*, 93 F.2d 840 (7th Cir. 1937).

10. Pub. L. No. 87-228, 75 Stat. 498 (1961) (codified as amended at 18 U.S.C. § 1952 (2012)).

11. *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before the S. Comm. on the Judiciary*, 87th Cong. 3 (1961) [hereinafter *Hearings*] (statement of Robert F. Kennedy, Att'y Gen. of the United States) ("Only the Federal Government can curtail the flow of funds which permit the kingpins to live far from the scene, preventing the local officials, burdened by the gambling activity, from punishing him.").

12. J. R. Kemper, Annotation, *Validity, Construction, and Effect of 18 U.S.C.A. § 1952, Making It a Federal Offense to Use Interstate or Foreign Travel or Transportation in Aid of Racketeering Enterprises*, 1 A.L.R. Fed. 838 § 2[a] (1969) ("[T]he word 'facility' should not be limited in its scope to travel or transportation facilities, but should be broadly construed to also include communication and other facilities of all kinds.").

13. 18 U.S.C. § 1952(a) (2012) (emphasis added).

14. *See, e.g.*, *United States v. Riccardelli*, 794 F.2d 829, 834 (2d Cir. 1986).

15. *See, e.g.*, *United States v. Baker*, 82 F.3d 273, 275 (8th Cir. 1996).

16. *See, e.g.*, *United States v. Nader*, 542 F.3d 713, 716 (9th Cir. 2008).

a facility satisfies the jurisdictional hook of the Travel Act.<sup>17</sup> This is especially true given twenty-first-century technology, where, for example, Americans collectively check their cellphones eight billion times a day.<sup>18</sup> This Note is primarily concerned with whether using a cellphone in an entirely *intrastate* manner is enough to give the federal government jurisdiction under the Travel Act.

Interestingly, only one circuit court has addressed this issue in the context of the Travel Act, and it held that such use *does* create a sufficient jurisdictional hook.<sup>19</sup> While this Note is concerned with whether the wholly intrastate use of a facility with interstate capabilities should satisfy the Travel Act's jurisdictional requirement, its scope will rely in part on a similarly worded statute—the federal murder-for-hire statute<sup>20</sup>—where the case law is more developed in an effort to compare these two federal laws. In both contexts the ramifications are real, especially in a society where most people can affect interstate commerce with the click of a button (or, more accurately, the touch of a screen or command of a voice).

Part I of this Note explores the background of the Travel Act. It commences with the Act's roots in the Commerce Clause and analyzes the text of the statute. This Part then turns to the legislative history of the Travel Act and concludes with the U.S. Supreme Court's interpretation of the Act in two cases from the 1970s.

Part II discusses the ways in which courts have analyzed the interstate element specifically required by the Travel Act. This Part also breaks down the case law surrounding the intrastate use of interstate facilities in the context of the murder-for-hire statute,<sup>21</sup> which, as noted, may help to delineate the scope of the Travel Act's interstate nexus requirement. This Part concludes by examining what the murder-for-hire statute means for Travel Act jurisprudence.

Finally, in Part III, this Note examines possible reasons why more courts have not decided whether the intrastate use of an interstate facility can satisfy the Travel Act. It concludes that if more courts decide this issue, they should find that the intrastate use of an interstate facility *does* satisfy the Travel Act. Though at first blush this may appear to be the federal government

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17. *See, e.g.*, *United States v. Anderson*, 368 F. Supp. 1253, 1257 (D. Md. 1973) (“The law is unclear on what constitutes sufficient contact with interstate commerce to establish jurisdiction under the Travel Act.”).

18. Lisa Eadicicco, *Americans Check Their Phones 8 Billion Times a Day*, TIME (Dec. 15, 2015), <http://time.com/4147614/smartphone-usage-us-2015/> [<https://perma.cc/6US6-DG9A>].

19. *Nader*, 542 F.3d at 722.

20. 18 U.S.C. § 1958 (2012).

21. *Id.* Circuits once disagreed whether wholly intrastate use of an interstate facility satisfies the jurisdictional requirement of the murder-for-hire statute. *Compare* *United States v. Marek*, 238 F.3d 310, 313 (5th Cir. 2001) (en banc) (holding that the intrastate use of a facility of interstate commerce gives federal courts jurisdiction in the context of murder for hire), *with* *United States v. Weathers*, 169 F.3d 336, 342 (6th Cir. 1999) (finding that the intrastate use of a cellphone only satisfies § 1958 if an interstate facility is utilized to complete the communication). These decisions are particularly illuminating because of the similar “interstate facility” language in both the murder-for-hire and Travel Act statutes.

overstepping its reach, this Note, without outright contesting that notion, explains why this is not a terribly worrisome outcome. It contends that the potential for harm is minimal, and it provides two reasons why the benefits outweigh the harm: (1) the Travel Act is an important, versatile statute that permits a wide range of fair prosecutions, and (2) a more liberal interpretation of the Travel Act's jurisdictional reach will help prevent, for example, nefarious health-care providers from running illegal kickback schemes that state law enforcement agencies are ill-equipped to prosecute. Thus, this Note ultimately defends the Ninth Circuit's decision in *United States v. Nader*<sup>22</sup> and shows why a broad reading of the Travel Act is not problematic.

### I. THE TRAVEL ACT

The Travel Act was enacted with a narrow purpose<sup>23</sup> but broad language.<sup>24</sup> What makes this discrepancy even harder to reconcile is that in the years following its inception, the Travel Act was one of federal prosecutors' most used tools.<sup>25</sup> This Part explores this discrepancy by detailing where Congress derived its authority when enacting the Travel Act,<sup>26</sup> what role prepositions in the text of the statute may (or may not) play,<sup>27</sup> who was involved in the statute's legislative history,<sup>28</sup> and how the Court has interpreted the Act.<sup>29</sup> By proceeding in this order, this Part attempts to emulate how judges grapple with challenging statutory questions.<sup>30</sup> First, courts make sure there was constitutional authority for Congress to act.<sup>31</sup> Next, if such authority is present, they look for ambiguity in the language of the text.<sup>32</sup> Third, if the language is not clear, they turn to other sources such as legislative history.<sup>33</sup> In following this order, this Part systematically traces how courts have approached the Travel Act.

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22. 542 F.3d 713 (9th Cir. 2008).

23. *See infra* Part I.C.

24. *See infra* Part I.B.

25. *See* Barry Breen, *The Travel Act (18 U.S.C. § 1952): Prosecution of Interstate Acts in Aid of Racketeering*, 24 AM. CRIM. L. REV. 125, 125 (1986) ("Though only a few paragraphs in length, it is nevertheless a mainstay of federal prosecutors."); Michael Kendall, *The Use of State Statutes in Federal Corruption Prosecutions*, 40 BOS. B.J. 10, 10 (1996) ("The statutes that federal prosecutors most commonly use to prosecute state and local corruption are: the Hobbs Act, § 666, the Travel Act, RICO, and the mail and wire fraud statutes.").

26. *See infra* Part I.A.

27. *See infra* Part I.B.

28. *See infra* Part I.C.

29. *See infra* Part I.D.

30. *See* *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (breaking down the order in which courts interpret statutes).

31. It is not uncommon, however, for courts to forgo this step altogether. As noted in Part I.A, there is no debate that Congress had authority to enact the Travel Act under the Commerce Clause. Thus, many of the cases mentioned do not even address this threshold issue.

32. *See, e.g.*, *Perrin v. United States*, 444 U.S. 37, 42–45 (1979).

33. *See, e.g., id.* at 45.

*A. Constitutional Hook: The Commerce Clause*

The Commerce Clause gives Congress the right “[t]o regulate Commerce with foreign Nations, and among the several States.”<sup>34</sup> Historically, Congress’s power to legislate under the Commerce Clause has ebbed and flowed. At times, the Court has given federal legislatures broad deference under this clause;<sup>35</sup> other times it has curbed this ability.<sup>36</sup> At the time the Travel Act was codified in 1961, the Court’s jurisprudence recognized that Congress had broad reach under the Commerce Clause.

In *Wickard v. Filburn*,<sup>37</sup> for example, the Court focused on the cumulative effects an individual’s actions may have on the nation; if those effects could affect interstate commerce, Congress was within its right to regulate.<sup>38</sup> In *Wickard*, a farmer exceeded his wheat-acreage allotment under the Agricultural Adjustment Act of 1938, which was designed to “control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.”<sup>39</sup> This federal statute was intended to regulate the national wheat industry,<sup>40</sup> but even though the farmer’s activity was “local in character,”<sup>41</sup> the Court found it was within Congress’s reach under the Commerce Clause.<sup>42</sup>

Congress enjoyed great latitude with respect to the Commerce Clause for over fifty years after *Wickard* was decided. The Court even reaffirmed the Clause’s power and used it to support the civil rights movement in the 1960s,<sup>43</sup> the same decade that the Travel Act was enacted. Thus, it is no surprise that courts have routinely recognized that Congress was well within

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34. U.S. CONST. art. I, § 8, cl. 3.

35. *See, e.g.*, *Hous., E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 360 (1914) (permitting Congress to invoke its Commerce Clause authority to regulate intrastate commerce if it may impact interstate commerce).

36. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (requiring the activity to directly affect interstate commerce in order for Congress to have the power to regulate it).

37. 317 U.S. 111 (1942).

38. *Id.* at 133.

39. *Id.* at 115.

40. *Id.*

41. *Id.* at 119.

42. *Id.* at 125 (“But even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .”).

43. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249–50 (1964).

its power when it used the Commerce Clause as the constitutional hook for the Travel Act,<sup>44</sup> despite several failed challenges.<sup>45</sup>

Even under the Court's current, narrower Commerce Clause jurisprudence, as articulated in *United States v. Lopez*,<sup>46</sup> intrastate activity remains within the reach of Congress.<sup>47</sup> The question, however, is whether Congress intended to do that when it passed the Travel Act or if the statute's language permits such broad application.<sup>48</sup>

### B. *The Text of the Travel Act*

Seeing that Congress was within its authority when it enacted the Travel Act, the next step in any sound statutory interpretation is to examine the text of the statute and try to uncover its plain meaning.<sup>49</sup> While one scholar has remarked that the Travel Act "is a comparatively short criminal provision,"<sup>50</sup> this does not necessarily mean such analysis will be straightforward. Whatever the Travel Act may lack in length, it makes up for in ambiguity. To be sure, though, part of the Act is clear. The statute makes certain that

44. *United States v. Baker*, 82 F.3d 273, 275 (8th Cir. 1996) (defending Congress's power to "regulate and protect the instrumentalities of interstate commerce" (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995))); *United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989) (finding that Congress has the power to regulate the intrastate use of the mails within the context of the Travel Act); *United States v. Wechsler*, 392 F.2d 344, 352–53 (4th Cir. 1968) (explaining that Congress acted well within its power to regulate interstate activities when enacting the Travel Act); *United States v. De Sapio*, 299 F. Supp. 436, 448 (S.D.N.Y. 1969) ("There is no doubt that Congress has the power to regulate intrastate transactions when it is necessary for the protection of interstate commerce."). In fact, in Attorney General Kennedy's testimony before the House of Representatives, which was later presented to the Senate, he noted that "[i]t would be an exercise by the Congress of its plenary power over interstate communications to aid the States in coping with organized gambling, by denying the use of interstate communication facilities for such activities." *Hearings*, *supra* note 11, at 6.

45. See Kemper, *supra* note 12, at 14 ("[I]t has been charged that [the Travel Act] is beyond the powers of Congress under the commerce clause, and amounts to a usurpation of powers reserved to the states by the Tenth Amendment; that its language is vague, ambiguous, and uncertain and thus its enforcement constitutes a denial of due process of law in violation of the Fifth Amendment; that it makes arbitrary and unreasonable discriminations, also in violation of the Fifth Amendment; that its application to interstate communications abridges the freedom of speech guaranties of the First Amendment; and that it unconstitutionally restricts travel, fails to adequately apprise a person of conduct which he must avoid, compels a person to give testimony against himself, and imposes cruel and unusual punishment. Each and all of these contentions have been rejected by the courts and it appears to be well settled [sic] that § 1952 is a valid and lawful exercise by Congress of its broad powers over interstate commerce." (footnotes omitted)).

46. 514 U.S. 549 (1995).

47. *Id.* at 558 ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, *even though the threat may come only from intrastate activities.*" (emphasis added)).

48. *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) ("We note at the outset that this is a question of congressional intent, not congressional power. Nader and Lake correctly do not contest that Congress has the *power* to regulate intrastate telephone calls."); see also *Barry*, 888 F.2d at 1095.

49. *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006).

50. Breen, *supra* note 25, at 125.

the specific “illegal activity” enumerated in 18 U.S.C. § 1952(b)—crimes that would otherwise be state violations—can be charged federally if the commission of the act involves interstate commerce.<sup>51</sup> Broadly, the statute targets illegal gambling, prostitution, extortion, bribery, and arson,<sup>52</sup> but it can also reach other illegal activity, too.

The ambiguity—and, thus, the initial focal point of this Note—lies within the first nineteen words of the Act: “Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce . . .”<sup>53</sup> Jurists have disagreed about this language in at least two significant ways.

In *Holy Trinity Church v. United States*,<sup>54</sup> Justice David J. Brewer noted that “[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>55</sup> While this is certainly true, it is also “elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed.”<sup>56</sup> Thus, it is important to begin any statutory analysis with the letters of the law. In the Travel Act, interestingly, the words that have caused the most confusion have been prepositions.

### 1. Prepositional Problems: The Debate Between “In” and “Of”

The Eighty-Seventh Congress, which, to be sure, served *after* the Seventy-Third Congress,<sup>57</sup> used the preposition “in”—not the preposition “of”—to

51. The pertinent text of the statute reads as follows:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to . . .

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform [an enumerated act].

(b) As used in this section (i) “unlawful activity” means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 1952(a)–(b) (2012).

52. *Id.* § 1952(b).

53. *Id.* § 1952(a).

54. 143 U.S. 457 (1892).

55. *Id.* at 459.

56. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

57. The Seventy-Third Congress enacted the Securities Act of 1933, codified at 15 U.S.C. § 77a, and the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78a. Both of these acts are founded upon “interstate commerce” language, but one uses the preposition “in,” *see* 15 U.S.C. § 77a (2012), and the other uses the preposition “of,” *see* 15 U.S.C. § 78a (2012). Courts have tried to analogize the use of the prepositions “in” and “of” in the securities context to argue that there is also a meaningful difference for Travel Act purposes. Sometimes this has been successful; other times it has not.

precede the words “interstate commerce.”<sup>58</sup> The legislative history of the Travel Act does not indicate that legislatures fretted much over this decision; in fact, there is no indication that this was even a conscious decision. Nonetheless, it has been the subject of litigation as some have argued such a distinction is the difference between the Travel Act reaching wholly intrastate activity and it not.

Defendants charged with Travel Act violations predicated upon wholly intrastate use of an interstate facility have contended that the use of the word “in” demonstrates that the facility must have actually been used *in* an interstate manner. The argument continues: had Congress used the preposition “of” to precede “interstate commerce,” the Travel Act would be far broader and would reach *any* use of a facility with interstate capabilities, whether used for an interstate purpose or not.

Some courts have mentioned this argument,<sup>59</sup> some have heeded it,<sup>60</sup> and others have rejected it.<sup>61</sup> Despite how courts come out on the issue, the arguments presented usually involve case law from securities litigation. The Securities Act of 1933 uses the preposition “in”<sup>62</sup> whereas the Securities Exchange Act of 1934 uses the preposition “of.”<sup>63</sup> In securities litigation, “in” is construed more narrowly than “of,” which requires some interstate activity.<sup>64</sup> As noted above, in the context of the Travel Act this distinction has been given credence by some courts<sup>65</sup> but has also been rejected by others.<sup>66</sup>

In *United States v. Barry*,<sup>67</sup> for example, the court was trying to determine whether intrastate use of the mails was punishable under the Travel Act.<sup>68</sup>

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58. 18 U.S.C. § 1952(a).

59. *See, e.g., United States v. Varbaro*, 597 F. Supp. 1173, 1175 (S.D.N.Y. 1984), *invalidated by United States v. Riccardelli*, 794 F.2d 829 (2d Cir. 1986). In *Varbaro*, the court acknowledged that “[i]n the realm of securities regulation this difference in prepositions has been used to distinguish between statutes requiring actual interstate activity (‘in’) and mere intrastate use of an instrumentality of commerce which otherwise runs interstate (‘of’).” *Id.* The court also noted that the word “of” was used in the House report on the Travel Act, which demonstrates that “this discrepancy cautions against excessive reliance on a single preposition.” *Id.* Thus, the *Varbaro* court found “[t]he statutory language appears to wrestle itself to a draw,” and it rested its decision on the stated purpose of the act. *Id.* at 1176. Its decision, however, was later overruled by the Second Circuit. *United States v. Riccardelli*, 794 F.2d 829 (2d Cir. 1986).

60. *See United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989) (noting the distinction between the prepositions “in” and “of,” and holding that the Travel Act’s use of “in,” consistent with the statute’s legislative history, should be read to require interstate use).

61. *See United States v. Nader*, 542 F.3d 713, 719–20 (9th Cir. 2008).

62. 15 U.S.C. § 77e (2012).

63. 15 U.S.C. § 78o (2012).

64. *See Rosen v. Albern Color Research, Inc.*, 218 F. Supp. 473, 475–76 (E.D. Pa. 1963) (explaining that the Securities Act of 1933, which uses the preposition “in,” requires an actual interstate communication); *cf. Myzel v. Fields*, 386 F.2d 718, 727–28 (8th Cir. 1967) (explaining that the Securities Exchange Act of 1934, which uses the preposition “of,” can be satisfied with the intrastate use of a facility).

65. *See, e.g., Barry*, 888 F.2d at 1095.

66. *See, e.g., Nader*, 542 F.3d at 719–20.

67. 888 F.2d 1092 (6th Cir. 1989).

68. *Id.* at 1092; *see also infra* Part II.A.1.

The court relied on the Interstate Incitement of Riot Act<sup>69</sup> and the aforementioned securities laws, and it was persuaded that the choice in preposition mattered.<sup>70</sup>

Conversely, the Ninth Circuit was not persuaded by the prepositional distinction as it appeared in the context of securities laws.<sup>71</sup> There, the court explained that the Securities Act of 1933 and the Securities Exchange Act of 1934 were “unrelated statutes not at issue.”<sup>72</sup> While it found the application of the securities acts unpersuasive, the court did give credence to the prepositional distinction in the federal murder-for-hire statute,<sup>73</sup> which was “closely related to the Travel Act.”<sup>74</sup> There, the court acknowledged that the murder-for-hire statute, as originally enacted, contained a discrepancy between § 1958(a), which used the preposition “in,” and its definitional section, § 1958(b), which used the preposition “of.”<sup>75</sup> The *Nader* court explained that Congress rectified this asymmetry when it passed an amendment in 2004. In this amendment, Congress purported to clarify the definitional portion of the statute (§ 1958(b)); interestingly, though, it did so by changing the substantive section (§ 1958(a)).<sup>76</sup> From this, the Ninth Circuit gleaned that the prepositions “in” and “of” were always intended to be interchangeable, as Congress clarified the definition by altering the substance.<sup>77</sup> Since the murder-for-hire statute was “closely related” to the Travel Act, the court ultimately held that the prepositions were similarly interchangeable under the Travel Act.<sup>78</sup>

Adding to the uncertainty surrounding the importance (or lack thereof) of the “in” versus “of” distinction are two murder-for-hire cases that preceded the 2004 amendment.<sup>79</sup> The Sixth Circuit, for example, struggled to rectify the use of “in” in § 1958(a) with the use of “of” in § 1958(b).<sup>80</sup> In *United States v. Weathers*,<sup>81</sup> however, there was enough of an interstate hook to allow the court to skirt the issue, but the court expounded on the lack of clarity regarding the differing prepositions and urged Congress to clarify its intent.<sup>82</sup> Two years later, when the Fifth Circuit sat en banc to determine the

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69. 18 U.S.C. § 2101 (2012).

70. *Barry*, 888 F.2d at 1095 (“[A] statute that speaks in terms of an instrumentality *in* interstate commerce rather than an instrumentality *of* interstate commerce is intended to apply to interstate activities only.”).

71. *See Nader*, 542 F.3d at 719.

72. *Id.*

73. 18 U.S.C. § 1958 (2012).

74. *Nader*, 542 F.3d at 719.

75. *Id.* at 720.

76. *Id.*

77. *Id.*

78. For a more detailed discussion on this case and its import, see *infra* Part II.A.3.

79. *See United States v. Marek*, 238 F.3d 310, 320 (5th Cir. 2001) (en banc); *United States v. Weathers*, 169 F.3d 336, 342 (6th Cir. 1999).

80. *Weathers*, 169 F.3d at 342.

81. 169 F.3d 336 (6th Cir. 1999).

82. *Id.* at 342–43.

jurisdictional scope of the murder-for-hire statute, it waved off the “in” versus “of” distinction as insignificant.<sup>83</sup>

The sum of the case law surrounding this prepositional difference is that there is no consensus as to how much, if any, significance ought to be attributed to Congress’s use of the word “in” in the Travel Act.<sup>84</sup>

## 2. A Second Language Debate: Is It a Modified Noun or a Modified Verb?

A second linguistic debate centers on whether the prepositional phrase “in interstate or foreign commerce” modifies the noun “facility” or the verb “uses.” The implications of the answer cannot be overstated. If the prepositional phrase modifies the noun “facility,” this means that the facility merely needs to be one that *can be used* in interstate commerce. Such a reading is far-reaching, and it would certainly cover wholly intrastate activity. This means whenever one drives an automobile, withdraws money from an ATM, dials a phone, or uses a computer, they risk violating the Travel Act.<sup>85</sup> Conversely, if the phrase modifies the verb “uses,” this would require that the facility *must actually be used* in an interstate manner that affects interstate commerce. Such a reading, therefore, is far narrower, and it would not cover wholly intrastate activity. This, though, is not much of a debate, as “[n]o court has held that the phrase ‘in interstate or foreign commerce’ modifies [the verb] ‘uses.’”<sup>86</sup>

In *Nader*, the Ninth Circuit examined cases where other circuits had upheld Travel Act violations where the alleged “interstate” activity was performed entirely within one state.<sup>87</sup> From this, the court extrapolated that the noun “facility” necessarily was being modified by the prepositional phrase “in interstate or foreign commerce.”<sup>88</sup> The court cleverly explained that it would have been impossible for other circuits, such as the Second, Fifth, and Eighth, to have concluded that wholly intrastate activity was within the reach of the Travel Act had the prepositional phrase modified the verb,

83. *Marek*, 238 F.3d at 320.

84. Notably, these are not the only contexts in which the “in” versus “of” distinction has been addressed. For example, 18 U.S.C. § 844(e), which prevents people from using a telephone to threaten or injure members or damage or destroy property of religious synagogues, uses the preposition “of,” which only requires the use of an instrument of interstate commerce. *See United States v. Corum*, 362 F.3d 489, 493 (8th Cir. 2004). This was compared to § 844(i), which has the preposition “in” and does require an actual interstate use. *Id.*

85. This, of course, presumes one is using one of these facilities to further an “illegal activity” enumerated in the Travel Act. *See* 18 U.S.C. § 1952(a)–(b) (2012).

86. *United States v. Nader*, 542 F.3d 713, 718 (9th Cir. 2008).

87. *See id.*

88. *Id.* (“While these cases involve facilities other than the telephone, their holdings require a grammatical construction of the Travel Act that forecloses *Nader* and *Lake*’s interpretation. That the cases arise under different circumstances does not render them any less applicable here, since the phrase ‘in interstate or foreign commerce’ modifies the same word no matter the facts of the case.”).

which would have necessitated *interstate* use of the facility.<sup>89</sup> It seems there is little debate that “in interstate or foreign commerce” modifies the noun.

### C. Legislative History

Once there is ambiguity in the text of a statute, courts often turn to the legislative history to glean insight from the process that put the law into effect. How and why a law came about is often indicative of its appropriate interpretation. This section first looks at the purpose of the Travel Act. It then analyzes statements by two key proponents of the Act. Finally, it examines how courts have used the legislative history of the Travel Act when analyzing cases.

#### 1. The Purpose of the Travel Act

As previously noted, Al Capone was indicted, convicted, and sentenced for income tax evasion, not racketeering.<sup>90</sup> Although the public speculated about Capone’s involvement in, for example, the St. Valentine’s Day Massacre,<sup>91</sup> and it was largely taken as fact that Capone was a full-time gangster who derived millions of dollars from his various illegal enterprises,<sup>92</sup> the government never charged him with the crimes for which he was best known. Law enforcement often did not have the requisite evidence because of how careful Capone was,<sup>93</sup> but this was not the only restraint: at the time, there was no federal statute geared at stopping racketeering, so prosecuting mobsters who operated dangerous criminal syndicates was left entirely to the states.

Though arguably the most well-known, Capone was not the only gangster in the first half of the twentieth century getting away with murder.<sup>94</sup> Thus, cross state gangsters were a problem of national proportions. Congress finally intervened in the early 1960s with legislation that provided the federal government with its first tool to help state law enforcement crack down on gangsters who ran multistate criminal enterprises.<sup>95</sup> Although the legislative

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89. *See id.*

90. *See supra* notes 1–10 and accompanying text.

91. Elizabeth Nix, *History Stories: 8 Things You Should Know About Al Capone*, HISTORY (May 5, 2015), <http://www.history.com/news/history-lists/8-things-you-should-know-about-al-capone> [<https://perma.cc/9FQ6-8QBV>]. The St. Valentine’s Day Massacre, which took place on February 14, 1929, and involved the execution of seven men with ties to one of Capone’s rival gangs, remains unsolved. *Id.*

92. *Id.*

93. Josh Clark, *Why Was Tax Evasion the Only Thing Pinned on Al Capone?*, HOW STUFF WORKS, <https://history.howstuffworks.com/history-vs-myth/capone-tax-evasion1.htm> [<https://perma.cc/KMW6-Z2LX>] (last visited Nov. 15, 2018).

94. *See generally Mafia in the United States*, HISTORY (Oct. 22, 2009), <http://www.history.com/topics/mafia-in-the-united-states> [<https://perma.cc/3ZBJ-W9RW>] (listing leaders of organized crime groups).

95. *Rewis v. United States*, 401 U.S. 808, 811 (1971) (“Legislative history of the Act is limited, but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another.”).

history is limited,<sup>96</sup> it reveals Congress's main target: well-known gangsters operating criminal syndicates across state lines.<sup>97</sup>

## 2. Statements Made by Key Proponents of the Travel Act

Attorney General Robert F. Kennedy wanted to rid the country of organized crime.<sup>98</sup> In fact, a year before his congressional testimony pushing for criminal legislation that would make it far more challenging to be a gangster in America, Kennedy espoused his concern in *The Enemy Within*, a book he authored detailing the pitfalls of relying solely on local law enforcement to stop organized crime.<sup>99</sup> As the attorney general, Kennedy put his ideas into action.

On May 17, 1961, Kennedy testified before Subcommittee Number 5 of the House Committee on the Judiciary, and, a few weeks later, he presented that testimony to the Senate Committee on the Judiciary.<sup>100</sup> Kennedy's testimony cited different reports<sup>101</sup> that indicated organized crime was a rampant problem.<sup>102</sup> Specifically, Kennedy made it clear that his proposed legislation was concerned with interstate gambling.<sup>103</sup> He did not mention any gangsters by name—likely because he was creating a public record and did not want to jeopardize any ongoing investigations—but he did recount specific activities and noted that they were being carried out by “[s]ome notorious individuals, whose names you would immediately recognize.”<sup>104</sup>

Kennedy explained that although most people at the time thought of gambling as local in nature—for example, placing a sports bet with the neighborhood bookie—it was actually often a nationwide enterprise.<sup>105</sup> Bookies, he explained, would “reinsure” one another to balance their books; to do so, they would rely on a large network of sophisticated bookmakers

96. Breen, *supra* note 25, at 126 (noting the Act's “sparse legislative history”).

97. Annotation, *Interstate Travel as Element of Offense Established by Travel Act (18 U.S.C.A. § 1952)*, 69 A.L.R. Fed. 251 § 2 (1984) (“[The Travel Act] was intended to strike a blow at the interrelated network of criminals whose influence and activities extended over state and national borders. The statute was designed to assist local law enforcement officials whose work was often impeded by the interstate nature of syndicate-controlled criminal activity.”); see Kemper, *supra* note 12, at 13 (“[T]he principal thrust of the statute was directed against ‘syndicate’ members who reap rich profits from various forms of racketeering but remain immune from local prosecution by living outside the state of actual operation of such illegal ‘business enterprises.’”).

98. See Martin R. Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 BROOK. L. REV. 37, 37 (1961).

99. ROBERT F. KENNEDY, *THE ENEMY WITHIN* 263 (1960) (calling for a “national crime commission” to aggregate data on “leading gangsters”).

100. *Hearings*, *supra* note 11, at 1 (statement of Robert F. Kennedy, Att’y Gen. of the United States).

101. *Id.* at 2 (referring to the Kefauver investigation, New York State Commission on Investigation, and General Investigating Committee to the House of Representatives of the Fifty-Seventh Legislature of Texas).

102. See, e.g., *id.* (explaining “the rape of the city of Beaumont by organized crime”).

103. *Id.* (“The main target of our bill is interstate travel to promote gambling.”).

104. *Id.* at 3.

105. *Id.* at 2–3.

who would buy risk from one another.<sup>106</sup> This occurred across state lines.<sup>107</sup> Additionally, Kennedy discussed how taking bets on horseracing in America, which at the time took place at “20 major racetracks throughout the country,”<sup>108</sup> required various forms of interstate communication.<sup>109</sup> It was evident, and acknowledged by Kennedy himself, that as attorney general he wanted to prevent crime bosses from running illegal enterprises in State A from the safe confines of State B.<sup>110</sup> The proposed legislation, Kennedy argued, would “curtail [crime syndicates’] use of interstate communications” and “inflict a telling blow to their operations.”<sup>111</sup> And it seems to have done that and more.<sup>112</sup> Though the Travel Act was “acknowledged by RFK as his most controversial legislative proposal,” it was also “the signature achievement of his attorney generalship.”<sup>113</sup>

While the Travel Act was passed relatively quickly, it underwent several changes while it was still a bill.<sup>114</sup> One of the changes involved the scope of the law. Senator Kenneth Keating of New York and other members of the Senate Judiciary Committee were concerned that the bill was too *narrow* in scope, and they wanted to extend its reach.<sup>115</sup> Accordingly, this contingent wrote a report to the Senate asking for broader, more encompassing language.<sup>116</sup> While the exact language they proposed was not used verbatim, the idea of extending the reach was applied.

Part of the reason Senator Keating wanted the Act to be worded broadly was his fear that criminals would find a way around the law.<sup>117</sup> He had even previously tried to introduce far-reaching legislation that would have

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106. By Kennedy’s estimates, gambling involved over 70,000 people and was more than a \$7 billion industry. *Id.* at 5.

107. *Id.* at 3.

108. *Id.* at 5.

109. *Id.* at 5–6 (mentioning that bookies communicated the winners of races “by telegraph ticker tape, by telephone, or even by radio or television broadcast” to prevent bettors from placing bets on a horse that already won without a bookie in another state realizing the race had concluded).

110. *Id.* at 4 (“[O]ur information reveals numerous instances where the prime mover in a gambling or other illegal enterprise operates by remote control from the safety of another State—sometimes half a continent away.”); see also Pollner, *supra* note 98, at 39.

111. *Hearings, supra* note at 11, at 11.

112. See Adam Harris Kurland, *The Travel Act at Fifty: Reflections on the Robert F. Kennedy Justice Department and Modern Federal Criminal Law Enforcement at Middle Age*, 63 CATH. U. L. REV. 1, 28 (2013).

113. *Id.* at 48.

114. For a more detailed discussion of the ins and outs of the statute’s language evolution, see generally Pollner, *supra* note 98.

115. Part of this concern was that sports gambling was influenced greatly by organized crime, and Senator Keating wanted to make sure the Travel Act was crafted in a manner such that it would be able to address this concern. See *United States v. Perrin*, 444 U.S. 37, 46 (1979).

116. 107 CONG. REC. 13,943 (1961) (statement of Sen. Keating).

117. *Hearings, supra* note 11, at 259 (statement of Sen. Keating) (“[A]ll these gamblers will do if this statute is passed is send the proceeds through the mail . . . .”); see also *United States v. Barry*, 888 F.2d 1092, 1093 (6th Cir. 1989); *United States v. Riccardelli*, 794 F.2d 829, 833 (2d Cir. 1986).

criminalized conspiracies to engage in organized crime.<sup>118</sup> Ultimately, a broader version than was originally proposed was passed by the Senate and the House, but it is worth noting that Senator Keating warned that “there is still some danger that the bill will not be as inclusive as is necessary to be completely effective.”<sup>119</sup>

### 3. Treatment of Legislative History by the Courts

Early into the Travel Act’s existence, a district court evaluated the legislative history of the Act. In *United States v. De Sapio*,<sup>120</sup> the court focused on the national concern that Attorney General Kennedy addressed in his letter to Congress and noted the “far-flung criminal activities” that Kennedy sought to weed out.<sup>121</sup> Moreover, the court quoted language from the report of the House Committee: “The interstate tentacles of this octopus known as ‘organized crime’ or ‘the syndicate’ can only be cut by making it a Federal offense to use the facilities of interstate commerce in the carrying on of these nefarious activities.”<sup>122</sup> The court concluded that the activity that Congress intended to criminalize had to itself be interstate.<sup>123</sup>

The Second Circuit, however, curtailed the *De Sapio* opinion twenty-five years later. In *United States v. Riccardelli*,<sup>124</sup> the court reached the issue of whether intrastate use of the U.S. mails satisfies the Travel Act.<sup>125</sup> The court found that “any use of the United States mails” was enough to invoke federal jurisdiction under the Travel Act.<sup>126</sup> In so holding, the court stressed Senator Keating’s concern that the original Travel Act language was not far-reaching enough,<sup>127</sup> and it noted how the mails were singled out in the final language that was adopted by Congress.<sup>128</sup>

While the Sixth Circuit in *Barry* was “reluctant to disagree with the distinguished panel of a sister circuit” (i.e., the Second Circuit in *Riccardelli*),<sup>129</sup> it nevertheless reached the opposite conclusion regarding whether any use of the mails could satisfy the jurisdictional requirement of the Travel Act.<sup>130</sup> The *Barry* court also relied on the legislative history, and

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118. *Hearings*, *supra* note 11, at 95 (statement of Sen. Keating). The language in this proposed piece of legislation clearly would have criminalized the mere act of depositing something in the mail, even if it were never shipped. Since the language of that bill was notably broader than the language of the Travel Act, at least one court has interpreted this as a concession on Senator Keating’s part to make the Travel Act narrower than his conspiracy bill. *Barry*, 888 F.2d at 1094.

119. 107 CONG. REC. 13,943 (1961) (statement of Sen. Keating).

120. 299 F. Supp. 436 (S.D.N.Y. 1969).

121. *Id.* at 448.

122. *Id.* (quoting H. REP. NO. 87-966, at 3 (1961)).

123. *Id.*

124. 794 F.2d 829 (2d Cir. 1986).

125. *See id.* at 830. For a more detailed discussion on how courts have treated the intrastate use of the mails under the Travel Act, see *infra* Part II.A.1.

126. *Riccardelli*, 794 F.2d at 830.

127. *Id.* at 832.

128. *Id.* at 833.

129. *United States v. Barry*, 888 F.2d 1092, 1096 (6th Cir. 1989).

130. *Id.* at 1095.

it, too, noted that Congress expanded the Travel Act's reach while it traversed the judiciary committees.<sup>131</sup> Still, it explained that "Congress never stated or indicated an intention to include purely intrastate activities within its ambit."<sup>132</sup> The court went further, noting that Congress would have used a disjunctive "or" before the words "including the mail" if it intended to also reach the intrastate use of the mails.<sup>133</sup> And, in parsing Senator Keating's concern, the court noted that he was merely concerned that the original language of the Travel Act would have been limited to physical travel; thus, his concern was to include the mails to prevent gangsters from finding a clever way around the federal criminal statute.<sup>134</sup>

Though the two aforementioned competing readings of the legislative history are certainly interesting, the Ninth Circuit in *Nader* was unpersuaded by either.<sup>135</sup> In *Nader*, the court relied primarily on the text of the statute. While the court acknowledged that "[t]he primary legislative purpose of the Travel Act was to target organized crime,"<sup>136</sup> it also pointed out that organized crime was not at issue in the case before it as the Travel Act is "worded broadly."<sup>137</sup> Because of this discrepancy, the Ninth Circuit did not appear to accord the legislative history much weight.

Since the Travel Act was enacted, the U.S. Supreme Court has discussed the reach of statute in depth twice, both in the 1970s.

#### 4. The Supreme Court Case Law on the Travel Act

In *Rewis v. United States*,<sup>138</sup> the petitioners were convicted for violating the Travel Act because of a lottery they ran in their home state of Florida.<sup>139</sup> Although the lottery operated wholly within Florida and "there [wa]s no evidence that [petitioners] at any time crossed state lines in connection with the operation of their lottery," it was run a few miles from the state border, and it attracted patronage from Georgia residents.<sup>140</sup> The Fifth Circuit found for the government and held that the petitioners were responsible for their customers' interstate travel.<sup>141</sup>

The Supreme Court reversed the conviction, noting that holding petitioners responsible for the interstate travel of other citizens would make for "an expansive Travel Act [that] would alter sensitive federal-state relationships."<sup>142</sup> The Court concluded that both the language of the text and

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131. *Id.* at 1096.

132. *Id.*

133. *Id.* at 1094. Impliedly, here the Sixth Circuit seems to adopt the position that not only must the use of the mails be interstate in nature, but so must the use of any interstate facility.

134. *See id.*

135. *See generally* *United States v. Nader*, 542 F.3d 713 (9th Cir. 2008).

136. *Id.* at 720.

137. *Id.* at 721.

138. 401 U.S. 808 (1971).

139. *Id.* at 810.

140. *Id.*

141. *Id.* at 810–11.

142. *Id.* at 812.

its legislative history did not support such a broad interpretation of the Act.<sup>143</sup> While some commentators have remarked that the *Rewis* Court indicated that the Travel Act should be interpreted narrowly,<sup>144</sup> others have recognized the *Rewis* holding could be viewed more broadly.<sup>145</sup>

Less than a decade after *Rewis*, the Court heard another case that questioned the Travel Act's scope: *Perrin v. United States*.<sup>146</sup> This case, however, did not deal with the interstate element. Instead, the issue was whether Congress intended to use the generic meaning of "bribery" in the Travel Act—a meaning that would be more expansive because it would include commercial (i.e., private) bribery—or the common-law version, which would limit "bribery" to acts that concerned public officials.<sup>147</sup> The government, of course, argued for the broader, generic meaning, and the defendant, naturally, argued for the narrower common-law meaning.<sup>148</sup>

This time, the Court found for the government—it was persuaded that Congress, though silent on the issue, intended the more generic reading that had largely been accepted across the nation when the Travel Act was codified.<sup>149</sup> In contrast to *Rewis*, commentators have contended that the *Perrin* Court "opted for a more expansive interpretation of the Travel Act."<sup>150</sup> Others, though, read *Perrin* as merely holding that Congress did not intend to limit Travel Act prosecutions to bribery involving public officials.<sup>151</sup>

These two Court cases are somewhat at odds with one another in how they interpret the breadth of the Travel Act, though this discrepancy is hardly irreconcilable. While the *Rewis* Court was certainly concerned with the federalism tension accentuated by the Travel Act, it seemed more worried about convicting defendants who had not purposefully enticed out-of-state patrons to partake in their lottery. And though the *Perrin* Court applied the generic definition of bribery and certainly did not want to hamper the Travel Act's utility for federal prosecutors, it seemed more focused about ruling on one enumerated crime than expounding on the breadth of the entire Act. Thus, both cases are likely best read as being confined to their specific facts,<sup>152</sup> and they ought not be taken as a clear indication of how narrowly or broadly the statute needs to be read, much less about when the interstate hook is satisfied. There is disagreement about the scope of the Travel Act no matter whether the text, legislative history, or Court precedent is being

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143. *Id.*

144. Steven G. Shapiro, *Travel Act*, 24 AM. CRIM. L. REV. 735, 736 (1987).

145. Breen, *supra* note 25, at 147.

146. 444 U.S. 37 (1979).

147. *See id.* at 41–45.

148. *See id.* at 42.

149. *See id.* at 48–49.

150. Shapiro, *supra* note 144, at 736 (arguing further that "*Perrin* thus dismissed the argument expressed in *Rewis* that federalism concerns require a narrow interpretation of the Travel Act.>").

151. *See* Breen, *supra* note 25, at 140–41.

152. In fact, the *Perrin* Court seemed to indicate this should be the case with the *Rewis* opinion. *See Perrin*, 444 U.S. at 50.

analyzed. Therefore, it is important to go further and look to how lower courts have grappled with the Act to understand the arguments regarding its jurisdictional scope.

## II. THE TRAVEL ACT CASE LAW: A CLOSER LOOK AT THE INTRASTATE ARGUMENTS

While interstate activity such as physically traveling across state lines satisfies the Travel Act's jurisdictional hook without issue,<sup>153</sup> courts are less clear on how much the interstate activity actually needs to help further the crime.<sup>154</sup> Though travel subsequent to the commission of the crime is insufficient to trigger the Travel Act across jurisdictions,<sup>155</sup> it is less clear when crimes such as bribery are concluded. At the epicenter of this Note, however, is whether an activity is, in fact, interstate.<sup>156</sup> One court has remarked that “[t]he law is unclear on what constitutes sufficient contact with interstate commerce to establish jurisdiction under the Travel Act,”<sup>157</sup> and this is illustrated by the divergent conclusions courts have reached when determining whether an activity is interstate.

### A. When “Intrastate” Does and Does Not Mean “Interstate”

This section examines how courts have decided whether the intrastate use of certain facilities with interstate capabilities permits the federal government to charge a defendant under the Travel Act.

#### 1. The Mails

One would be hard-pressed to argue that the United States Postal Service is not an interstate facility, considering that mail can be sent across state lines. But does a letter sent and received wholly within one state to further an illegal

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153. See generally, e.g., *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975) (finding the appellant's trip from Arkansas to Chicago was critical to the success of a scheme to bribe the Illinois Secretary of State, rendering federal jurisdiction based on the Travel Act appropriate); *United States v. Michael*, 456 F. Supp. 335 (D.N.J. 1978) (upholding an indictment under the Travel Act because the defendant had to travel to another state in order to bribe a bank official).

154. See generally, e.g., *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977) (holding that interstate travel must be significant to the commission of the crime, and it cannot be incidental or minimal); *United States v. Eisner*, 533 F.2d 987 (6th Cir. 1976) (applying a narrow approach for determining when interstate activity satisfies the jurisdictional hook); *United States v. LeFaivre*, 507 F.2d 1288 (4th Cir. 1974) (recognizing that interstate travel that is essential or significant to the carrying on of the illegal activity is within the reach of the Travel Act).

155. See generally, e.g., *United States v. Botticello*, 422 F.2d 832 (2d Cir. 1970) (finding that extortion followed by travel was beyond the reach of the Travel Act).

156. Although how much the interstate activity must help facilitate the illegal activity is an interesting and important component of the Travel Act, it is not the focal point of this Note. To decide whether the interstate activity aided in the commission of the crime or was too tenuous to serve as a jurisdictional hook presumes the conduct itself was interstate. For a collection of cases that evaluate nuanced fact patterns to determine whether activity is within the reach of the Travel Act, see generally Annotation, *supra* note 97.

157. *United States v. Anderson*, 368 F. Supp. 1253, 1257 (D. Md. 1973).

activity enumerated in the Travel Act make the sender susceptible to a federal prosecution? And what should courts make of the Travel Act's specific reference to "the mail"?<sup>158</sup> These questions have led to a minor split in authority at the circuit level.

The Sixth Circuit does not believe that sending a piece of mail wholly within one state is enough to trigger the Travel Act. In *Barry*, the court acknowledged that "the text of the [Travel] Act extends its coverage far beyond that indicated by its title"<sup>159</sup> but determined that the Act was not meant to cover "purely intrastate activities."<sup>160</sup> In reaching this conclusion, the court analyzed the language of a different bill proposed by Senator Keating that would have criminalized the act of depositing a letter in the mail.<sup>161</sup> Because that bill, which failed to become law, used the word "or" to describe acts covered by the bill that were not necessarily interstate in nature, the court stated that, under the proposed bill, wholly intrastate activity would have been covered. Here, however, Senator Keating did not include the disjunctive "or" in his proposed language, which in part led the court to conclude that wholly intrastate activity was not to be covered by the Travel Act.<sup>162</sup>

The *Barry* court was also concerned with federalism issues, and it cited Attorney General Kennedy's insistence that the Travel Act was meant to aid local law enforcement, not usurp its power.<sup>163</sup> Moreover, to read the statute in accord with its legislative history, the court gave credence to the "in" versus "of" distinction<sup>164</sup> and found the use of mails was only intended to cover interstate activities.<sup>165</sup> Finally, in bolstering its conclusion, the court noted that the rule of lenity also compelled it to hold that intrastate use of the mails is not covered by the Travel Act.<sup>166</sup>

Conversely, though, the Second Circuit believes any use of the mail— intrastate or interstate—satisfies the Travel Act's jurisdictional requirement. In *Riccardelli*, the court upheld bribery convictions where the defendant approved inspection certificates that were later sent via the mail from Manhattan to Brooklyn, wholly within the state of New York.<sup>167</sup> The court's analysis was grounded in large part in the U.S. Constitution, which granted the federal government the right to control the mail.<sup>168</sup> Thus, the court called

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158. 18 U.S.C. § 1952 (2012) (covering anyone who "travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce").

159. *United States v. Barry*, 888 F.2d 1092, 1092 (6th Cir. 1989). The full title of the Travel Act is "Interstate and foreign travel or transportation in aid of racketeering enterprises." 18 U.S.C. § 1952.

160. *Barry*, 888 F.2d at 1092–93.

161. *Id.* at 1094. Keating's proposed bill used the following language: "deliver for shipment or transport in interstate commerce any article, or deposit in the mail or deliver by mail any letter [or] package . . ." *Hearings, supra* note 11, at 95 (statement of Sen. Keating).

162. *Barry*, 888 F.2d at 1094.

163. *Id.*

164. *See supra* notes 67–69 and accompanying text.

165. *See Barry*, 888 F.2d at 1095.

166. *Id.* at 1096.

167. *United States v. Riccardelli*, 794 F.2d 829, 830 n.4 (2d Cir. 1986).

168. *Id.* at 831.

the defendant's use of the term "intrastate mails" an "oxymoronic juxtaposition."<sup>169</sup>

Moreover, the *Riccardelli* court highlighted that the phrase "including the mail" was specifically referenced because it was to receive special treatment; since the mails are inherently federal, using them invokes federal jurisdiction regardless of the intrastate destination of the material being mailed.<sup>170</sup> The court also noted that, despite roughly seven hundred pages of legislative history, there is no indication that Congress required the use of the mail to be interstate in nature.<sup>171</sup> In direct contrast to the Sixth Circuit, the Second Circuit found that wholly intrastate use of the mail does satisfy the Travel Act's interstate requirement.<sup>172</sup>

## 2. Banks and ATMs

Some courts have also permitted federal prosecutors to establish the jurisdictional hook when banks and ATMs are used to distribute proceeds of the illegal activity. For example, in *United States v. Wechsler*,<sup>173</sup> partners in a real estate group were convicted of bribery based on the deposit of a check in a bank, which the court found was a facility in interstate or foreign commerce.<sup>174</sup> Similarly, the Eighth Circuit, in *United States v. Baker*,<sup>175</sup> held that forcing another to use an ATM fell "squarely within the literal language of the Travel Act."<sup>176</sup>

In *United States v. Isaacs*,<sup>177</sup> however, the Seventh Circuit disagreed with the *Wechsler* court. Though the *Isaacs* court ultimately affirmed a conviction of a former state governor and his director of revenue, it expressly disagreed that a Travel Act violation could stand simply because a federal bank was used to deposit a bribe.<sup>178</sup>

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169. *Id.*

170. *Id.* This argument separates the mails from other interstate facilities. Although not explicitly stated in the opinion, this impliedly assumes that all other activity that uses an interstate facility other than the mails must be interstate in nature to satisfy the Travel Act. If it was purely intrastate, under the *Riccardelli* logic it would not be enough to sustain the Travel Act's jurisdictional requirement.

171. *Id.* at 832.

172. *Id.* at 834.

173. 392 F.2d 344 (4th Cir. 1968).

174. *Id.* at 347; *see also* *United States v. LeFaivre*, 507 F.2d 1288, 1290 (4th Cir. 1974) (holding that the use of the banks is sufficient when the predicate offense is gambling).

175. 82 F.3d 273 (8th Cir. 1996).

176. *Id.* at 276.

177. 493 F.2d 1124 (7th Cir. 1974).

178. *Id.* at 1149 ("We are unable to agree with [the *Wechsler* court's] view of § 1952, however, not only because it assumes that the use of a single check crossing state lines may trigger § 1952, but also because it suggests that the check need not actually travel interstate. We cannot agree that the incidental use of a federally regulated banking facility furnishes the jurisdictional element of a § 1952 offense.").

## 3. Telephones

Tina Nader and Marilyn Lake ran two prostitution businesses, disguised as massage studios, in Montana from the mid-1990s to the early 2000s.<sup>179</sup> Together, these businesses had roughly five thousand customers from both Montana and at least five other states.<sup>180</sup> Nader and Lake used telephone calls to procure at least some of their patrons,<sup>181</sup> but “there [wa]s no evidence of any calls that crossed state lines.”<sup>182</sup> The issue before the court, therefore, was whether wholly intrastate phone calls can violate the Travel Act.<sup>183</sup>

The court, in deciding this question of first impression, held that such calls could—and did—violate the Travel Act.<sup>184</sup> The court addressed whether the prepositional phrase “in interstate or foreign commerce” modifies the noun “facility” or the verb “uses.”<sup>185</sup> Since Congress included the word “in” next to “facility” and not “uses,” the court found that the word was intended to modify the noun.<sup>186</sup> This, then, indicates that the facility has to be one in interstate commerce; its use, however, does not. The court bolstered its finding by looking to other circuits: the court noted that of all of its sister circuits that had interpreted the Travel Act, none of them found that the preposition “in” modified the verb “uses.”<sup>187</sup> Further, the court looked to other circuits that had interpreted the murder-for-hire statute, which has “nearly identical language.”<sup>188</sup>

While the court was comfortable supporting its position by comparing the Travel Act to another criminal statute, it was unwilling to give any weight to the “in” versus “of” distinction used in securities litigation because the Securities Act of 1933 and the Securities Exchange Act of 1934 were “unrelated” and “not at issue.”<sup>189</sup> In fact, the court noted that, in the context of the murder-for-hire statute, three circuits had determined that the “in” versus “of” distinction was innocuous.<sup>190</sup> Thus, the court found that “intrastate telephone calls involve the use of a facility ‘in’ interstate commerce.”<sup>191</sup>

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179. *United States v. Nader*, 542 F.3d 713, 716 (9th Cir. 2008).

180. *Id.*

181. *Id.*

182. *Id.* at 715–16.

183. *Id.* at 716.

184. *Id.*

185. *Id.* at 717.

186. *Id.* at 717–18.

187. *Id.* at 718. Here, the court cited the mail and ATM cases discussed above, noting that other circuits had found the intrastate use of these facilities was sufficient for a Travel Act violation. The Ninth Circuit reasoned that the only way those courts could have reached those conclusions was if the word “in” modified “facility” and noted that “[w]hile these cases involve facilities other than the telephone, their holdings require a grammatical construction of the Travel Act that forecloses Nader and Lake’s interpretation.” *Id.*

188. *Id.* For a deeper discussion on the similarities between the Travel Act and murder-for-hire language, see *infra* Part II.B.

189. *Nader*, 542 F.3d at 719.

190. *Id.* at 720.

191. *Id.*

The court also briefly dismissed some of the defendants' other arguments. First, although the Travel Act was intended to target organized crime, it was "worded broadly" enough to encompass other forms of criminal activity.<sup>192</sup> Second, since the court dispelled any argument that the Travel Act was ambiguous, the rule of lenity—a rule that requires courts to construe vague or unclear criminal statutes in favor of defendants—did not apply.<sup>193</sup> Finally, the court found there was not a federalism concern because the federal government was merely helping states fight crime, not usurping the state government's power to do so.<sup>194</sup>

Interestingly, the *Nader* decision has been cited in nearly seventy cases since it was written in 2008.<sup>195</sup> Of those, *only nine even mention* the Travel Act.<sup>196</sup> In one such case, a Ninth Circuit panel explained that the *Nader* court reached its broad, sweeping decision because of the word "facility," which permitted the Travel Act to reach further than statutes without such language.<sup>197</sup> In *United States v. Wright*,<sup>198</sup> however, the court declined to extend that in the context of another statute that did not have the word "facility" in it.<sup>199</sup> It has been far more common for cases to use *Nader* for its statutory interpretation language rather than its Travel Act holding.<sup>200</sup>

Still, this is not to say *Nader* is an anomaly. A district court from the Fifth Circuit has used the *Nader* opinion for its holding that wholly intrastate use of a telephone can violate the Travel Act.<sup>201</sup> That court, however, noted that "[w]hile the Fifth Circuit has not specifically declared that an intrastate telephone call may implicate federal jurisdiction under [the] Travel Act, it has not conclusively ruled out the possibility."<sup>202</sup> Similarly, a district court in the Fourth Circuit relied on *Nader's* contention that using a telephone

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192. *Id.* at 721.

193. *Id.*

194. *Id.* at 722.

195. A Westlaw search conducted on November 1, 2018, indicated that *Nader* had been cited sixty-seven times in cases. A LexisNexis search conducted the same day indicated the case had been cited sixty-nine times in cases.

196. This figure is based on the sixty-seven Westlaw cases.

197. *United States v. Wright*, 625 F.3d 583, 594 (9th Cir. 2010).

198. 625 F.3d 583 (9th Cir. 2010).

199. *Id.* ("By contrast, section 2252A(a)(1) [of a child pornography statute] does not include the word 'facility.' Thus, the phrase 'in interstate or foreign commerce' modifies the actus reus proscribed in the statute—mailing, transporting or shipping child pornography. Unlike the Travel Act, section 2252A(a)(1)'s jurisdictional element is focused not on the *means* the defendant uses to mail, transport, or ship child pornography, and *its* connection to interstate commerce. Rather, it requires that the defendant mail, transport, or ship child pornography interstate.").

200. *See, e.g.*, *United States v. Shill*, 740 F.3d 1347, 1354–55 (9th Cir. 2014) (citing *Nader* for its description of the rule of lenity); *United States v. Gallenardo*, 579 F.3d 1076, 1085 (9th Cir. 2009) (citing *Nader* to illustrate that statutes should be "interpreted harmoniously" with their legislative history and for its description of the rule of lenity); *Gov't of Virgin Islands v. Davis*, 561 F.3d 159, 169 (3d Cir. 2009) (citing *Nader* for the proposition that similar statutes should be interpreted harmoniously).

201. *See United States v. Procell*, No. 13-031-JJB, 2013 WL 5701495, at \*2 (M.D. La. Oct. 17, 2013).

202. *Id.* This opinion, however, has not been cited by any court as of November 1, 2018, according to Westlaw.

within one state can support the interstate hook required by the Travel Act to uphold an indictment.<sup>203</sup> But these are the only two cases that have relied on *Nader* for its main holding. When the Second Circuit cited *Nader* in *United States v. Halloran*<sup>204</sup> to prove the Travel Act's jurisdictional element was satisfied, it did so as a belt-and-suspenders move, not out of necessity; there, the defendant had made *interstate* calls, so it appears the court was merely demonstrating the Travel Act's potentially far reach.<sup>205</sup>

Decades before *Nader* and mere years after the Travel Act was passed, Judge Charles Miller Metzner of the Southern District of New York held, in *De Sapio*, that telephone calls must actually be interstate to violate the Travel Act.<sup>206</sup> To reach this conclusion, the court relied on the very securities laws that *Nader* deemed inapposite.<sup>207</sup> Moreover, no other circuit has decided one way or the other whether wholly intrastate phone calls satisfy the Travel Act. Circuits have, however, reached the issue with regard to the federal murder-for-hire statute.

*B. Evaluating "Interstate Facility" by Analogy: Statutory Interpretation of the Murder-for-Hire Statute*

Under 18 U.S.C. § 1958, it is a federal crime to "travel[] in or cause[] another (including the intended victim) to travel in interstate or foreign commerce, or use[] or cause[] another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed."<sup>208</sup> This is often referred to as the federal murder-for-hire statute, and its "interstate facility" language closely mirrors the language in the Travel Act.<sup>209</sup> While, as discussed above, only one circuit court has determined whether the interstate element of the Travel Act is satisfied by wholly intrastate use of an interstate facility, more circuits have ruled on this same matter as it pertains to the murder-for-hire statute. At the turn of the twenty-first century, there appeared to be a circuit split as to whether a wholly intrastate activity could satisfy 18 U.S.C. § 1958. This, however, was resolved by a 2004 amendment to that statute, and subsequent cases have held, under the new language, that intrastate activity can satisfy the statute.

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203. *United States v. Crawford*, No. MJG-15-0322, 2016 WL 4662334, at \*4 (D. Md. Sept. 7, 2016). No court has cited this case as of November 1, 2018, according to Westlaw.

204. 821 F.3d 321 (2d Cir. 2016).

205. *Id.* at 342.

206. *United States v. De Sapio*, 299 F. Supp. 436, 448 (S.D.N.Y. 1969) ("[I]t is apparent that the words 'uses any facility in interstate or foreign commerce' were intended to embrace telephone calls made only in interstate or foreign commerce.").

207. *Id.*

208. 18 U.S.C. § 1958 (2012).

209. The relevant language in the murder-for-hire statute is as follows: "uses or causes another . . . to use the mail or any facility of interstate or foreign commerce." *Id.* The relevant language in the Travel Act is as follows: "uses the mail or any facility in interstate or foreign commerce." 18 U.S.C. § 1952 (2012).

1. *United States v. Weathers*

Jeffrey Eugene Weathers had state charges pending against him, and he wanted the police sergeant who was going to testify against him to be killed.<sup>210</sup> To accomplish this, Weathers enlisted an intermediary to introduce him to a hitman.<sup>211</sup> Unbeknownst to him, though, the person he asked for help—Renee Deckard—was already working with law enforcement officers to help them bolster their charges against Weathers.<sup>212</sup> Deckard agreed to help Weathers, and she surreptitiously recorded a conversation about the murder plot.<sup>213</sup> Deckard also helped arrange a meeting between Weathers and Detective Dan Peterson, who was undercover as a drug dealer and hitman.<sup>214</sup> The first meeting took place at a hotel in Kentucky and was videotaped.<sup>215</sup> A few days later, Weathers, Deckard, and Peterson met again at a hotel in Kentucky, but in the interim Weathers and Peterson spoke independent of Deckard over the phone.<sup>216</sup> At the second meeting, Weathers supplied Peterson with a gun to carry out the murder, and he was promptly arrested.<sup>217</sup>

At Weathers's trial for violating the murder-for-hire statute, Weathers moved for a directed verdict, arguing that the government failed to prove the interstate nexus.<sup>218</sup> His argument was simple: since all of the meetings took place in Kentucky and all of the phone calls were placed within Kentucky, there was no interstate element to give the federal government jurisdiction.<sup>219</sup> The district court noted that if the government was able to show that the search signal used in the cellphone calls between Weathers and Peterson so much as crossed state lines, this would satisfy the interstate requirement.<sup>220</sup> The government called a cell site location expert who worked for Weathers's cellphone provider, and that expert explained that interstate paging signals were, in fact, used to locate Weathers's cellphone.<sup>221</sup> Accordingly, Weathers was found guilty, and he appealed to the circuit court.

The Sixth Circuit harped on a discrepancy in the language of the murder-for-hire statute. At the time, the text of § 1958(a) used the language “facility *in* interstate commerce” whereas § 1958(b)(2), the definition section, defined the phrase “facility *of* interstate commerce.”<sup>222</sup> The court explained that this difference was material: “in” implied that the actual use needed to be interstate whereas “of” implied that the facility merely needed interstate

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210. *United States v. Weathers*, 169 F.3d 336, 338 (6th Cir. 1999).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 339.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 340.

capabilities.<sup>223</sup> While the district court was inclined to chalk this discrepancy up as congressional oversight—especially because two courts in the Southern District of New York had reached opposite conclusions on the issue<sup>224</sup>—the circuit court disagreed. It found that “the key prohibition creating the criminal offense is found in subsection (a) and that it controls over the provision in subsection (b), which, after all, merely defines an otherwise non-existent term.”<sup>225</sup>

In holding that § 1958(a)’s language—“facility *in* interstate commerce”—controls, the court found that there needed to be actual interstate activity and that wholly intrastate actions would not suffice.<sup>226</sup> Here, even though Weathers’s phone calls were placed and received within the state of Kentucky, since the cellphone provider paged his phone from Indiana, the interstate element *was* satisfied.<sup>227</sup> The court, nonetheless, added an important caveat:

We would be remiss, however, if we failed to point out that the intent of Congress, as expressed in the inconsistent provisions in § 1958(a) and (b)(2), is far from clear. Moreover, this lack of clarity has not only made resolution of the instant case unnecessarily difficult, but will pose even thornier questions as communications that appear to be carried on *intra* state are increasingly transmitted by satellite and other obviously “interstate” facilities. We can only express the hope that future amendments to the statute will obviate our current difficulty.<sup>228</sup>

This discrepancy was rectified in a 2004 amendment to the statute. Following this amendment by Congress, both sections now use the preposition “of.”<sup>229</sup>

## 2. *United States v. Marek*

At a Western Union in Houston, Texas, Louise Marek wired \$500 to an undercover FBI agent who was posing as a hitman because she wanted her boyfriend’s lover dead.<sup>230</sup> Western Union unquestionably has the ability to wire money across the United States (and beyond), which renders it a facility of interstate commerce.<sup>231</sup> There was no evidence, however, that Marek’s

223. *Id.* at 341. Interestingly, the *Weathers* court cited the Travel Act, *id.* at 340, as the Sixth Circuit also did in its decision in *United States v. Barry*, 888 F.2d 1092 (6th Cir. 1989), to highlight the distinction between “in” and “of”—and reiterated that under the Travel Act, “of which the current murder-for-hire statute was originally a subset,” the preposition “in” requires actual interstate activity, *Weathers*, 169 F.3d at 341.

224. Compare *United States v. Paredes*, 950 F. Supp. 584, 590 (S.D.N.Y. 1996), with *United States v. Stevens*, 842 F. Supp. 96, 97–98 (S.D.N.Y. 1994).

225. *Weathers*, 169 F.3d at 342.

226. *See id.*

227. *Id.*

228. *Id.* at 342–43.

229. *See* 18 U.S.C. § 1958 (2012). This amendment seems to render *Weathers* moot. Since the “in” language has been replaced with “of,” it appears that any use of an interstate facility now satisfies the murder-for-hire statute in the Sixth Circuit.

230. *United States v. Marek*, 238 F.3d 310, 313 (5th Cir. 2001) (en banc).

231. *Id.* at 314.

wire transfer crossed state lines before it was received in Harlingen, Texas.<sup>232</sup> Thus, the Fifth Circuit was tasked with determining whether wholly intrastate use of a facility of interstate commerce satisfies the jurisdictional requirement of the federal murder-for-hire statute.<sup>233</sup>

A Fifth Circuit panel initially heard Marek's case, and it was asked to decide whether her guilty plea should have been accepted by the district court.<sup>234</sup> Though that panel was divided, it affirmed her conviction and held that intrastate use of an interstate facility is enough to satisfy the murder-for-hire statute.<sup>235</sup> Around the same time, however, a different Fifth Circuit panel, in dicta, suggested the opposite: the facility must actually be used in an *interstate* manner.<sup>236</sup> To "reconcile these differences and announce a consistent position for th[e] Circuit, [the Fifth Circuit] voted to rehear both cases en banc."<sup>237</sup>

To approach the issue, the court started with the language of the statute. In doing so, it declared that the "key question" was whether the term "in interstate or foreign commerce" modified the verb "use" or the noun "facility."<sup>238</sup> By applying the rule of proximity, the court found that the phrase modified the noun "facility," which was the more natural reading.<sup>239</sup>

Next, the court transitioned to the statutory context, where it noted that the Travel Act was amended to clarify that it applied to intrastate mailings.<sup>240</sup> Since Congress used the same language that was used in the murder-for-hire statute, the en banc panel found that "logic dictates that precisely the same wording [in the Travel Act and the murder-for-hire statute] must apply equally to intrastate use of other interstate facilities, such as Western Union."<sup>241</sup>

In wrapping up its decision, the *Marek* court made a few more maneuvers that judges handling Travel Act cases have also made. For example, the court found that the phrases "in" and "of" were used by Congress interchangeably without any significant difference between the two.<sup>242</sup> In so finding, as has

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232. *Id.* at 313.

233. *Id.* at 315.

234. *United States v. Marek*, 198 F.3d 532 (5th Cir. 1999), *affirmed on reh'g*, 238 F.3d 310 (5th Cir. 2001) (en banc). Marek's appeal suggested that the court improperly accepted her plea because she admitted to an act that did not satisfy the legal elements of the murder-for-hire statute (namely the interstate element).

235. *Id.* at 533.

236. *United States v. Cisneros*, 203 F.3d 333, 343 (5th Cir. 2000).

237. *Marek*, 238 F.3d at 313.

238. *Id.* at 316. Indeed, this is the same question that many courts have looked to when deciding how best to interpret the Travel Act.

239. *Id.*

240. *Id.* at 318.

241. *Id.* There was, however, a dissent from the en banc decision. There, five judges argued against such a reading, noting that the postal service was "inherently federal in nature," so it should be treated differently. *Id.* at 327 (Jolly, J., dissenting). Moreover, the dissent expressed concern that *every* murder-for-hire would be federal under the majority's view because it is nearly impossible to commit such a crime without using either a phone or car. *Id.* at 326.

242. *Id.* at 320 (majority opinion). This is in stark contrast to how the Sixth Circuit approached this distinction in *Weathers*. See generally *United States v. Weathers*, 169 F.3d

been done with the Travel Act, the court looked at the legislative history where Congress seem to carelessly switch between the two prepositions.<sup>243</sup> Moreover, the court dismissed the notion that the rule of lenity should apply by explaining that the statute was *not* ambiguous (despite needing roughly ten pages to make that point).<sup>244</sup> Finally, the court dismissed the concern that the statute unconstitutionally usurped a power reserved to the states under the Tenth Amendment.<sup>245</sup>

### 3. Post-Amendment Interpretations of the Murder-for-Hire Statute

After *Marek* and the subsequent 2004 amendment to the murder-for-hire statute that changed the preposition in § 1958(a) from “in” to “of,” two other circuits have also concluded that the statute was meant to cover any use of a facility of interstate commerce regardless of whether that use was, in fact, interstate. And, as discussed above, this amendment appears to have rendered the Sixth Circuit’s opinion in *Weathers* moot.

In *United States v. Perez*,<sup>246</sup> a case of first impression, the Second Circuit had to decide “whether a defendant can be convicted of using a facility in interstate commerce with the intent that a murder-for-hire be committed when the defendant’s use of that facility is wholly *intrastate*.”<sup>247</sup> There, Jose Antonio Perez was accused of helping to facilitate the killing of a rival gang drug dealer.<sup>248</sup> Perez placed wholly intrastate phone calls within the state of Connecticut to lure the victim to a garage where a hitman waited.<sup>249</sup> Perez argued that these intrastate calls were not enough to satisfy the jurisdictional requirement of the murder-for-hire statute.<sup>250</sup>

The court, however, found that the phone company Perez used provided its customers with the ability to make interstate phone calls, which rendered it a facility of interstate commerce.<sup>251</sup> The Second Circuit sided with the Fifth Circuit, in *Marek*,<sup>252</sup> and Seventh Circuit, in *United States v. Richeson*,<sup>253</sup> which had both held that wholly intrastate use of an interstate facility does satisfy the murder-for-hire statute.<sup>254</sup>

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336 (6th Cir. 1999). There, the *Weathers* court based its entire opinion on the nuanced difference between the prepositions “in” and “of.” See *supra* Part II.B.1.

243. *Marek*, 238 F.3d at 322.

244. *Id.*

245. *Id.*

246. 414 F.3d 302 (2d Cir. 2005) (per curiam).

247. *Id.* at 303.

248. *Id.* at 302.

249. *Id.* at 303.

250. *Id.*

251. *Id.*

252. *Id.* at 304.

253. 338 F.3d 653, 654 (7th Cir. 2003).

254. In siding with these two circuits, however, the court noted there was a “circuit split.” *Marek*, 238 F.3d at 304. This, as noted above, seems to be somewhat inaccurate. The only circuit that appeared to hold the opposite of *Marek* was the Sixth Circuit in *Weathers*. See *United States v. Weathers*, 169 F.3d 336 (6th Cir. 1999). That court’s decision, however, appears moot based on the 2004 amendment to 18 U.S.C. § 1958.

The Seventh Circuit came to a similar conclusion in *United States v. Mandel*.<sup>255</sup> Robert Mandel was convicted under 18 U.S.C. § 1958 for trying to have his business partner, Konstantinos Antoniou, murdered.<sup>256</sup> The interstate nexus came from two different interstate facilities: a cellphone and an automobile.<sup>257</sup> Mandel had enlisted one of his employees, Patrick Dwyer, to help conceive and facilitate the plot to kill Antoniou.<sup>258</sup> Dwyer, however, reported this solicitation to law enforcement, and he worked with the FBI to prevent the scheme.<sup>259</sup> For several months, Mandel and Dwyer discussed the plan over the phone and in Mandel's car.<sup>260</sup> There is no evidence in the record, however, that any phone call or drive occurred outside of the Chicago area; instead, it appears that all these discussions took place wholly within the state of Illinois. Still, the court had no problem finding that Mandel violated the murder-for-hire statute.<sup>261</sup>

In so finding, the court noted that it previously settled this issue in *Richeson*.<sup>262</sup> There, even before the 2004 amendment that changed the language in § 1958(a) to “facility of interstate commerce,” the Seventh Circuit held that wholly intrastate activity can satisfy the murder-for-hire statute.<sup>263</sup> Every circuit that has decided whether entirely intrastate use of an interstate facility can satisfy the murder-for-hire statute since the 2004 amendment has held that it does. Should this development, however, influence how the Travel Act is treated?

#### 4. What the Murder-for-Hire Statute May Mean for the Travel Act

While the Travel Act and the murder-for-hire statute have been called “companion statute[s],”<sup>264</sup> they are nevertheless “worded differently.”<sup>265</sup> In fact, after the 2004 amendment to the murder-for-hire statute, there is a stark difference between the two pieces of legislation: the murder-for-hire statute now contains the language “facility of interstate commerce”<sup>266</sup> whereas the Travel Act uses the verbiage “facility in interstate commerce.”<sup>267</sup> While some courts have dismissed this disparity in prepositions as insignificant,<sup>268</sup> other courts have placed great import on the nuance.<sup>269</sup>

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255. 647 F.3d 710 (7th Cir. 2011).

256. *Id.* at 722–23.

257. *Id.* at 712.

258. *Id.*

259. *Id.*

260. *Id.* at 713.

261. *Id.* at 723.

262. *Id.* at 721.

263. *United States v. Richeson*, 338 F.3d 653, 661 (7th Cir. 2003). The court relied heavily on the *Marek* decision to reach this conclusion, with which it “wholly agree[d].” *Id.* at 660.

264. *United States v. Marek*, 238 F.3d 310, 326 (5th Cir. 2001) (Grady, J., dissenting).

265. *United States v. Varbaro*, 597 F. Supp. 1173, 1178 (S.D.N.Y. 1984).

266. 18 U.S.C. § 1958 (2012) (emphasis added).

267. 18 U.S.C. § 1952 (2012) (emphasis added).

268. *See United States v. Nader*, 542 F.3d 713, 716 (9th Cir. 2008).

269. *See United States v. Weathers*, 169 F.3d 336, 341 (6th Cir. 1999).

With the difference in language, it is hard to definitively state that these similar statutes ought to be treated the same way. This is especially true given how concerned the *Weathers* court was with deciding whether the intrastate use of an interstate facility satisfied the statute given the pre-amendment difference in language between § 1958(a) and § 1958(b).<sup>270</sup> To skirt this issue, the *Nader* court argued that, by titling the 2004 murder-for-hire statute amendment a “definitional clarification,” Congress was actually staking out a position about the “in” versus “of” language—specifically, it was taking the stance that these two words are interchangeable.<sup>271</sup>

The *Nader* argument, however, had to go a step further to set up its holding by discussing how related statutes can be interpreted harmoniously.<sup>272</sup> This, then, allowed the court to ignore the securities statutes because they were not closely related to the Travel Act.<sup>273</sup>

This multistep analysis may well be persuasive, but no other court has relied on it. Moreover, there is still the hurdle that the language of the two statutes is not identical. This, then, may be reason enough to reject treating the intrastate use of an interstate facility under the Travel Act the same as it is treated under the murder-for-hire statute. This would not necessarily preclude finding that the intrastate use of an interstate facility suffices; it would just require an alternative analytical basis.

### III. WHY THE TRAVEL ACT SHOULD COVER INTRASTATE USE OF INTERSTATE FACILITIES

Without being able to rely with any degree of certainty on extending a reading of the murder-for-hire statute to apply to the Travel Act, it is unclear whether courts will find that the intrastate use of an interstate facility can satisfy the Travel Act. This Part starts by analyzing potential reasons why more courts have not reached this issue. It then proceeds to explain why courts that do reach this issue should find that wholly intrastate use *does* satisfy the Act. Finally, this Part explains why such a holding is not as problematic as it may initially appear.

#### A. *Why More Courts Have Not Decided This Issue*

The mere notion that any wholly *intrastate* use of an everyday facility of interstate commerce such as an ATM, car, or cellphone could satisfy the *interstate* element of the Travel Act seems, at least at first blush, wholly inappropriate. And, as such, one would expect to find a plethora of case law surrounding this concern. But only one circuit has addressed this issue,<sup>274</sup> and it did so in 2008.<sup>275</sup> Why is this seldom an issue before the courts? While

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270. *Id.* at 342–43.

271. *Nader*, 542 F.3d at 720.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

there is no straightforward answer, there are a few possible explanations—none, however, is truly satisfying.

Perhaps one explanation why more courts have not decided this issue is that the Travel Act is not being used by federal prosecutors as frequently as it once was, which renders this issue less prominent. This, however, is simply not true. In 2017 alone, eighty-seven cases cited the Travel Act.<sup>276</sup> Given the exorbitantly high plea rate,<sup>277</sup> it is likely that these eighty-seven cases are not fully representative of the Act's use.

One such example of federal prosecutors still using the Travel Act is *United States v. Asaro*,<sup>278</sup> where the Eastern District of New York secured a guilty plea from Vincent Asaro, a longtime member of the Bonanno crime family, by charging him under the Travel Act. Notably, that case had two “interstate” facility hooks: a car and a telephone. The federal prosecutors were able to secure a guilty plea<sup>279</sup> even though there was no clear indication that the use of the car or phone ever crossed state lines.<sup>280</sup> Though the *Asaro* case is merely one example, it supports a larger point—the Travel Act is by no means extinct.

In fact, there is even some speculation that the Travel Act is poised to make a comeback of sorts. Some have argued that the Travel Act may become relevant in the realm of health-care fraud and kickback schemes.<sup>281</sup> Others have pointed out that the Travel Act has been used to charge corruption in the wake of two Supreme Court decisions that limited the utility of other federal corruption statutes.<sup>282</sup> It seems, therefore, that the Travel Act is not obsolete, so this does not provide a satisfactory answer to why more circuits have not decided whether the intrastate use of an interstate facility is enough to satisfy the Travel Act.

A second potential explanation for why more circuits have not decided this issue is that the Travel Act only carries a maximum prison term of five years

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276. This figure comes from a Westlaw search conducted on Oct. 8, 2018. While some of these cases merely mention the Travel Act, a majority of them deal squarely with Travel Act charges.

277. See generally LINDSAY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING (2011), <http://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/7S2L-BEWD>].

278. No. 17-CR-00127-ARR, 2017 WL 8315759 (E.D.N.Y. Jan. 4, 2017); see also Press Release, U.S. Dep't of Justice, Long-Time Bonanno Crime Family Member Sentenced to 96 Months' Imprisonment for Arson (Dec. 28, 2017), <https://www.justice.gov/usao-edny/pr/long-time-bonanno-crime-family-member-sentenced-96-months-imprisonment-arson> [<https://perma.cc/U575-U292>].

279. Press Release, U.S. Dep't of Justice, *supra* note 278.

280. The plea minutes only demonstrate that, after a high-speed road-rage incident, Asaro used a phone to set up the arson. The presumption appears to be that this all took place within New York. See Letter from Richard P. Donaghue at 1–2, *United States v. Rullan*, No. 17-127 (E.D.N.Y. Feb. 1, 2018), ECF No. 143.

281. Jonathan S. Feld et al., *The Rise of the Travel Act*, L.J. NEWSLETTERS (Oct. 2017), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/10/01/the-rise-of-the-travel-act/> [<https://perma.cc/W3SJ-XMV8>].

282. Elizabeth H. Capel & Brandon D. Fox, *Gov't Use of Travel Act to Charge Corruption Might Backfire*, LEXOLOGY (Nov. 13, 2017), <https://www.lexology.com/library/detail.aspx?g=413f97a1-b285-4464-b647-71dcd8f974c> [<https://perma.cc/K8LD-E49U>].

(provided there is no act of violence involved),<sup>283</sup> so it is not a headline-grabbing criminal charge. This explanation, however, is predicated on at least three assumptions. First, it rests on the presumption that federal prosecutors base the crimes they charge on whether they would make the news. This is a cynical view, and one that is not supported by any empirical data.<sup>284</sup> Second, it is based on the notion that federal prosecutors would not otherwise use the Travel Act as a main criminal charge. This, too, has no statistical support.<sup>285</sup> Third, it relies on courts having discretion in which cases they decide. While this is certainly true for the Supreme Court,<sup>286</sup> district and circuit courts must hear federal cases within their jurisdiction, with few exceptions.<sup>287</sup>

Thus, this is no explanation for why more circuits have not decided whether the intrastate use of interstate facilities satisfies the Travel Act. The idea that the maximum sentence provisions in the Travel Act have somehow limited the utility of this statute is simply not true. Not only is a five-year maximum sentence nothing to scoff at, but there is also a mechanism in the statute that makes any crime that involved a violent act punishable by up to twenty years in prison.<sup>288</sup>

A third potential explanation for why more courts have not decided this issue is that mandatory minimum sentencing requirements have led to more defendants taking plea deals, which prevents courts from reaching the merits of such cases. This is not a sufficient answer either. First, since 2010, federal prosecutors have charged crimes carrying mandatory minimums less frequently.<sup>289</sup> Though this does not in and of itself dispel this explanation—over 21 percent of charged federal offenses, after all, carry mandatory minimum sentences<sup>290</sup>—a second, more compelling fact does: the Travel Act does not carry a mandatory minimum sentence. While a Travel Act charge can certainly be coupled with offenses that do carry such minimums, when charged alone there is no added pressure that a judge will have to

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283. 18 U.S.C. § 1952(a) (2012). If a crime of violence is involved, however, the Travel Act carries a maximum prison sentence of twenty years. *Id.*

284. While there is no such support for this idea, there is some support that indicates federal prosecutors may “overcharge” defendants, which allows them to gain the upper hand in a criminal prosecution—the more charges that are brought, the more likely the defendant is to plead guilty. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 868 (1995).

285. See *supra* Part III.A.1.

286. See 28 U.S.C. § 1254 (2012).

287. Assuming the litigants have standing, there is a controversy that is not moot, and the federal court has jurisdiction, the case will likely be justiciable. Though there is the political question doctrine, which can prevent a court from hearing an issue, see, for example, *Nixon v. United States*, 506 U.S. 224 (1993), this doctrine is not implicated by the Travel Act.

288. 18 U.S.C. § 1952(a)(1)–(a)(3)(B) (2012).

289. See U.S. SENTENCING COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf) [<https://perma.cc/887J-YCWT>]. These statistics, however, cover President Obama’s presidency; it is possible that these numbers will surge during President Trump’s presidency.

290. *Id.*

sentence a guilty defendant to a lengthy prison term. Therefore, a defendant challenging the breadth of the Travel Act's jurisdiction would have less pressure to accept a plea deal since the Travel Act does not carry on its own a mandatory minimum sentence. Again, this reason falls short in explaining why more courts have not reached this issue.

Finally, perhaps this issue is just not of great concern, so it is not often litigated. This is both the most likely and least satisfying explanation.

It is the most likely explanation because the lack of case law is partial evidence that courts are not faced with this issue often. As noted, this precise issue has only ever been decided by one circuit court, and that was in 2008.<sup>291</sup> That holding, while cited around seventy times, has never been used by a court at the circuit or district level to uphold or strike down a Travel Act charge. It is certainly possible, then, that this issue does not arise frequently enough to warrant great national concern.

This is also the least satisfying explanation. It may also be true that prosecutors, defense attorneys, and courts are all comfortable with allowing the intrastate use of an interstate facility to satisfy the jurisdictional requirement of the Travel Act. This, then, would render this issue moot. But there is some indication that this may be of national interest and that potential defendants may not be so willing to concede federal jurisdiction. After all, as the Internet of Things<sup>292</sup> burgeons, more and more everyday devices may be deemed facilities in interstate commerce.

*B. Why Intrastate Use of an Interstate Facility Should Satisfy  
the Travel Act*

There are at least three reasons courts should allow the Travel Act's jurisdictional hook to be satisfied even when the use of an interstate facility of commerce only occurs *intrastate*.

First, the Travel Act's constitutional hook is the Commerce Clause.<sup>293</sup> At the time the Act was codified, Supreme Court jurisprudence permitted the Commerce Clause to reach intrastate activity.<sup>294</sup> Even today, where the Court is less deferential than it once was, Congress can still regulate the channels and instrumentalities of interstate commerce.<sup>295</sup> Moreover, Congress can also regulate any activity—local or national in nature—if it substantially impacts interstate commerce.<sup>296</sup>

While there is no debate whether Congress had authority to enact the Travel Act, there is some uncertainty surrounding whether Congress *intended* for the Travel Act to extend to wholly intrastate activity.<sup>297</sup> At the time the

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291. See *United States v. Nader*, 542 F.3d 713, 719 (9th Cir. 2008).

292. The Internet of Things describes everyday items that are able to collect data and send those pieces of information to the internet.

293. See *supra* Part I.A.

294. See *supra* notes 34–48 and accompanying text.

295. See *United States v. Lopez*, 514 U.S. 549, 558 (1995).

296. See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

297. See *supra* note 44 and accompanying text.

Travel Act was enacted in 1961, society was certainly different than it is today. While this might appear to be compelling enough to sway a court to limit the reach of the Act, this would ignore the reality of both the time of the statute's codification and of today. Prior to the Travel Act being signed into law, there was already an interstate highway system underway.<sup>298</sup> Congress was well aware of the ease with which people were able to move from state to state; in fact, this was a motivating factor of the Act's passage.<sup>299</sup> Thus, it would be a mischaracterization to contend that society is so different that Congress could not have foreseen cars being considered an instrumentality of interstate commerce.

A slightly better argument is that Congress certainly did not foresee cellphones being as pervasive as they are today, but this argument is only somewhat more compelling. Though it is certainly true that Congress did not envision a world of cellphones—the first cellphone was not used until 1973<sup>300</sup>—it is not as though there were no long-distance calls in the early 1960s. In fact, Attorney General Kennedy even expressed concern about bookmakers using phones to establish a national network of support for each other.<sup>301</sup> So, while the pervasive use of cellphones certainly was not considered by Congress, it considered that cars traveled state to state and phones were capable of placing long-distance calls. All this indicates that while society is different than it was when the Travel Act was enacted, enough similarities exist to demonstrate that it is not too great of a stretch to find that Congress wanted the Act to be far-reaching.

Second, the legislative history further indicates Congress's intent to create a far-reaching statute. While courts have placed a varying degree of weight on the legislative history of the Travel Act<sup>302</sup> and this has led to competing interpretations of the scope of the Act,<sup>303</sup> the legislative history indicates that Congress intended the Act to be broad as it was addressing the national problem of organized crime. And, despite the Act's narrow title,<sup>304</sup> members of Congress expressed a clear desire to make the Act as broad as possible<sup>305</sup> by successfully lobbying to add more expansive language when the Act was being reviewed.<sup>306</sup> Part of Congress's desire to broaden the language was its

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298. See 23 U.S.C. § 101 (2012).

299. See *supra* notes 90–97 and accompanying text.

300. Zachary M. Seward, *The First Mobile Phone Call Was Made 40 Years Ago Today*, ATLANTIC (Apr. 3, 2013), <https://www.theatlantic.com/technology/archive/2013/04/the-first-mobile-phone-call-was-made-40-years-ago-today/274611/> [<https://perma.cc/PBX9-2P2Y>].

301. See *Hearings*, *supra* note 11, at 3.

302. See *supra* notes 120–52 and accompanying text.

303. Compare *United States v. Riccardelli*, 794 F.2d 829 (2d Cir. 1986) (relying on the legislative history to hold that the intrastate use of the mails is enough to invoke federal jurisdiction under the Travel Act), with *United States v. Barry*, 888 F.2d 1092 (6th Cir. 1989) (relying on the legislative history to hold that the use of the mails must be interstate in nature).

304. In *United States v. Smith*, the court, in one of the first cases to discuss the scope of the Travel Act, explained that the statute was intended to be read more broadly than its title indicated. 209 F. Supp. 907, 916 (E.D. Ill. 1962).

305. See *supra* notes 90–119 and accompanying text.

306. In fact, shortly after the Travel Act was passed, the Supreme Court affirmed that Congress intended for the statute to be broad in scope. In *United States v. Nardello*, the Court

fear that criminals would find a way around the reach of the Act.<sup>307</sup> In fact, even though it ended up being broader than it was in its proposed form, there was still fear within Congress that the Act was too narrow.<sup>308</sup>

This is not to say that the Travel Act's scope is infinite. There is certainly an argument to be made that intrastate use of interstate facilities is beyond the scope of the Act.<sup>309</sup> But such a reading would limit a statute that was written with broad language and was intended to be far-reaching. Attorney General Kennedy even pointed out that organized crime may appear to be local in character when it really is not. This is further strengthened by Senator Keating's concern that criminals would figure out a workaround if the Act was written too narrowly.<sup>310</sup> Finally, the language of the Act is unarguably broad, and, though it has been amended several times, the language has never been restricted.

Third, the Ninth Circuit, the only circuit to decide whether intrastate use of a phone can satisfy the Travel Act, has held that an expansive reading of the Travel Act is permissible.<sup>311</sup> This holding is nearly a decade old, and it has never been challenged within or without the circuit. Moreover, the opinion is quite thoughtful; it breaks down the legislative history of the Act, analyzes the text of the Act, and demonstrates why the Act should be interpreted analogously with the murder-for-hire statute. Though *Nader* is only persuasive authority in other circuits, the Ninth Circuit rooted its analysis in case law from the Second, Fifth, Sixth, Seventh, and Eighth Circuits.<sup>312</sup> *Nader* is a sound opinion that reflects the reality of interstate commerce; as such, future courts that hear similar cases should use it as a guide.

### C. Applying the Travel Act to Intrastate Activity Is Not Worrisome

While at first blush allowing the federal government to prosecute wholly intrastate activity using a statute predicated on interstate facilities may be disconcerting, this should not be terribly worrisome.

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opted to read the enumerated crime of extortion broadly, allowing the act to pertain to more than just extortion involving public officials. 393 U.S. 286, 292–93 (1969).

307. See *supra* note 117 and accompanying text.

308. See *supra* note 119 and accompanying text.

309. No circuit has made this argument outright, but the Second Circuit has come close to implying it. For example, in *United States v. Archer*, the Second Circuit held that the federal government may not manufacture federal jurisdiction by enticing a would-be defendant to make an interstate phone call. 486 F.2d 670, 681–83 (2d Cir. 1973). There, federal agents traveled from New York to New Jersey to ensure that there was a multistate phone call. *Id.* at 673–74. Impliedly, the court acknowledged that an intrastate phone call in and of itself did not suffice to satisfy the Travel Act; otherwise, why would the federal agents manufacture jurisdiction by traveling across state lines when there were already intrastate phone calls? Nevertheless, it would be a far stretch to call this law in the Second Circuit. A recent guilty plea reveals that intrastate activity seems to satisfy the Travel Act. See *supra* note 278 and accompanying text.

310. See *supra* notes 117–19 and accompanying text.

311. *United States v. Nader*, 542 F.3d 713, 721 (9th Cir. 2008).

312. *Id.* at 718.

### 1. The Potential Harm Is Minimal

The most compelling argument against an expansive reading of the Travel Act is that such a reading would allow the federal government to usurp state police power. This contention, however, is unpersuasive. Kennedy made it clear that the Act was to be used to aid and assist local law enforcement, not take over its power. Moreover, it is not in federal prosecutors' interest to attempt to take over state prosecutions as they have large caseloads and there are already many opportunities to charge federal crimes. Federal prosecutors are not looking for ways to dominate all prosecutions; there is plenty of federal crime occupying their work. The Travel Act is merely a mechanism by which the federal government can assist states in preventing illegal activity.<sup>313</sup>

A second argument concerns overcriminalization.<sup>314</sup> Critics have long argued that there are too many federal crimes, a situation which often turns average citizens into federal prisoners.<sup>315</sup> Scholars have even argued that overly broad federal statutes ought to be read narrowly to prevent overcriminalization.<sup>316</sup> While there is certainly a danger in having far-reaching statutes that criminalize otherwise innocent individuals, this is simply not at issue with a jurisdictionally broad reading of the Travel Act. One cannot trip and fall into a Travel Act violation. The enumerated crimes in the act—prostitution, arson, extortion, among others—are not crimes that one accidentally commits. These crimes have a mens rea requirement. Thus, individuals who are prosecuted under the Travel Act are not the same individuals who raise overcriminalization concerns.

### 2. The Potential Benefits Are Maximal

While the potential for harm is minimal, an expansive reading of the Travel Act might be quite beneficial.

First, the Act has recently been used in health-care antifraud enforcement.<sup>317</sup> While thus far these enforcement actions have not

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313. There is also some support for the notion that federal prosecutors are cautious regarding the jurisdictional hook when bringing Travel Act cases and that they charge cases carefully to avoid overstepping their authority. See PETER J. HENNING, *THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION* 1–7 (2017).

314. Overcriminalization is the excessive legislation of criminal laws. This is different from federalization, which is where state crimes are converted into federally chargeable offenses.

315. See, e.g., Brian Walsh & Benjamin Keane, *Overcriminalization and the Constitution*, HERITAGE FOUND. (Apr. 13, 2011), <http://www.heritage.org/the-constitution/report/overcriminalization-and-the-constitution> [<https://perma.cc/ESY7-FL25>]; Brian W. Walsh, *You're (Probably) a Federal Criminal*, HERITAGE FOUND. (July 28, 2009), <http://www.heritage.org/crime-and-justice/commentary/youre-probably-federal-criminal> [<https://perma.cc/K5QM-92HZ>].

316. See generally Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012).

317. See Indictment, *United States v. Beauchamp*, No. 16-cr-00516-D (N.D. Tex. Nov. 16, 2016), ECF No. 1; Plea Agreement, *United States v. Aponte*, No. 13-cr-00464 (D.N.J. June 12, 2013), ECF No. 4.

implicated the jurisdictional component of the Travel Act, it is not a far stretch to imagine a situation in which a state health-care provider uses a facility in interstate commerce in an intrastate manner to further a kickback scheme in the era of the Affordable Care Act.<sup>318</sup> Given that the federal government has an interest in ensuring that its health-care program is not being used to promote fraud,<sup>319</sup> allowing the Travel Act to prevent such a harm should be welcomed. Scholars have long discussed the benefits of allowing such prosecutions,<sup>320</sup> and they have concluded that a kickback scheme—whereby doctors receive compensation for steering patients toward particular medical treatments—is analogous to bribery.<sup>321</sup> Thus, it is possible to prevent health-care fraud using the Travel Act, and therefore the broader the Act is interpreted, the better.

Second, the Travel Act gives federal prosecutors reasonable flexibility in charging crimes that might otherwise go unpunished. For example, when Michael Vick was indicted for running a dogfighting operation,<sup>322</sup> he was charged under the Travel Act.<sup>323</sup> Though Vick's prosecution was not without its critics,<sup>324</sup> it raised awareness about dogfighting<sup>325</sup> and helped clean up an otherwise unregulated industry.<sup>326</sup> Also within the realm of sports, the Travel Act was recently used to arrest individuals involved in a college basketball bribery scheme.<sup>327</sup> Such examples demonstrate the legitimate

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318. See generally Kate Pickert, *Scams, Fraud Among Obamacare Concerns*, TIME (Aug. 6, 2013), <http://nation.time.com/2013/08/06/more-obamacare-worries-scams-and-insurance-thats-really-not/> [<https://perma.cc/ZB6T-SCFK>].

319. Press Release, U.S. Dep't of Justice, Health Care Fraud Prevention and Enforcement Efforts Recover Record \$4 Billion; New Affordable Care Act Tools Will Help Fight Fraud (Jan. 24, 2011), <https://www.justice.gov/opa/pr/health-care-fraud-prevention-and-enforcement-efforts-recover-record-4-billion-new-affordable> [<https://perma.cc/DHF5-CCSA>].

320. See generally, e.g., James G. Sheehan & Jesse A. Goldner, *Beyond the Anti-Kickback Statute: New Entities, New Theories in Healthcare Fraud Prosecutions*, 40 J. HEALTH L. 167 (2007).

321. *Id.* at 189.

322. *Falcons' Vick Indicted by Grand Jury in Dogfighting Probe*, ESPN (July 18, 2007), <http://www.espn.com/nfl/news/story?id=2940065> [<https://perma.cc/WP9D-L9R7>].

323. Adam Harris Kurland, *The Prosecution of Michael Vick: Of Dogfighting, Depravity, Dual Sovereignty, and "A Clockwork Orange"*, 21 MARQ. SPORTS L. REV. 465, 468 (2011).

324. *Id.* at 478 (arguing that prosecutorial guidelines should have stopped federal prosecutors from charging the Vick case).

325. Matt Bershader, *Ten Years Later: How the Michael Vick Case Advanced the Cause to End Dog Fighting*, ASPCA (Apr. 26, 2017), <https://www.aspc.org/blog/ten-years-later-how-michael-vick-case-advanced-cause-end-dog-fighting> [<https://perma.cc/S3GS-BQEA>].

326. Vick, for example, supported legislation aimed at criminalizing spectators at animal fighting events. Patrick Graves et al., *2011 Legislative and Administrative Review*, 18 ANIMAL L. 361, 366 (2012).

327. See Press Release, U.S. Dep't of Justice, U.S. Attorney Announces the Arrest of 10 Individuals, Including Four Division I Coaches, for College Basketball Fraud and Corruption Schemes (Sept. 26, 2017), <https://www.justice.gov/usao-sdny/pr/us-attorney-announces-arrest-10-individuals-including-four-division-i-coaches-college> [<https://perma.cc/G7CD-55H7>]. Moreover, the Travel Act has also been used in the FIFA corruption cases. M.V., *How America Is Pursuing FIFA*, ECONOMIST: THE ECONOMIST EXPLAINS (June 1, 2015), <https://www.economist.com/blogs/economist-explains/2015/06/economist-explains> [<https://perma.cc/UU7N-WJKP>].

range of the Travel Act. As a versatile criminal statute that is grounded in clear criminal activity, the Travel Act's jurisdictional requirement ought to be interpreted broadly to permit it to clean up criminal enterprises that would otherwise go unpunished.

#### CONCLUSION

While the Travel Act was enacted over sixty years ago with the distinct purpose of combating organized crime, its broad language gives it utility beyond that narrow focus. The Act prohibits the use of a "facility in interstate commerce" to further one of the Act's enumerated crimes. Only one circuit court has decided the scope of this language as it pertains to the intrastate use of an interstate facility, and it concluded that this sufficed to establish federal jurisdiction under the Travel Act. Though this might seem like the federal government overstepping its authority, this language *should* be read broadly. Minimal harm can result from a broad jurisdictional reading of the Travel Act, yet the potential benefits that may come from such an interpretation justify it. The Travel Act has been used to prevent an array of crimes that would have otherwise gone unpunished, and it will prove useful in, for example, prosecuting health-care fraud in today's society. This should give courts reason enough to allow the intrastate use of an interstate facility to satisfy the Act.