

Cowboys and Indians

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The American Indians are a proud people. Legend has it that in the 1870s, around seventy-five Apache warriors, outnumbered, outgunned and facing certain defeat against the United States (“US”) cavalry, rode their horses off a mountain to their deaths, rather than be killed by the invaders. Their families cried and their tears turned to stone (so called “Apache tears”), upon hitting their sacred land. Today, tribes have sovereignty on Indian lands, which allows some, like the Seminoles in Florida, to legally operate a casino, mere minutes from Miami, in a state where they are otherwise verboten.

In 2017, the US Supreme Court (“SCOTUS”) repealed the Professional and Amateur Sports Protection Act (“PASPA”), which had hitherto banned states (excluding Nevada) from legalising betting, ushering in the intra-state-wide sports betting regulatory framework that exists today. PASPA was ruled unconstitutional under the tenth amendment, whereby “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”.

Federal sports betting, across state lines, remains illegal under the Wire Act. A noteworthy exception is the Interstate Horseracing Act of 1978 (“IHRA”). However, the IHRA text could not have been clearer that Congress’s intent was to override the Wire Act with respect to parimutuel horseracing pools. “States should have the primary responsibility for determining what forms of gambling may legally take place within their borders”, but “in the limited area of interstate-off track wagering on horse races, there is a need for federal action” and “it is the policy of Congress in this act to regulate interstate commerce with respect to wagering on horseracing”.

SCOTUS Justice, Antony Scalia, coined the memorable metaphor, “Congress does not hide elephants in mouseholes”, to highlight that it can never be the intent of Congress to enact major laws, only to bury them in the fine print. Simply put, where legislation is ambiguous, courts must assess congressional intent, when ruling. Indeed, the fourth circuit court of appeals recently ruled, “in areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless congress has made such an intention ‘clear and manifest’.”

Last year, Kalshi, a Commodity Futures Trading Commission (“CFTC”) registered exchange, which offers “event contracts”, won a landmark case against the CFTC, which had sought to prevent election contracts which they deemed to be “gaming”. The Commodities Exchange Act (“CEA”) gives the CFTC exclusive jurisdiction over “swaps”, which includes event contracts. Under a so-called special rule, the CEA gives the CFTC discretion to prohibit any contracts which it deems are contrary to the public interest, including “enumerated” activities which are (1) unlawful under any Federal or State law, (2) terrorism, (3) assassination, (4) war and (5) gaming. In 2012, the CFTC adopted rules which blanket ban all the enumerated contracts, which is still in effect.

In their 2024 ruling, the district court noted that the CFTC’s too broad interpretation of “gaming” could preclude many legitimate derivatives markets (weather, crop yields, earthquakes, etc.), which Congress clearly did not intend. Rather, the court found that “gaming” refers only to wagering on the outcome of underlying games (sports, or casino) and not the act of wagering in and of itself. The verdict: elections are not games; hence election event contracts are not illegal. That narrower interpretation of “gaming” borrowed the definition of “bet or wager” under the Unlawful Internet Gambling Enforcement Act (“UIGEA”) which is “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event”.

Shortly before US President Trump’s inauguration in January 2025, Kalshi announced that his son, Donald Junior, had joined the company as a Strategic Advisor. Thereafter, President Trump nominated Brian Quintenz, a sitting Kalshi director, as his nominee for CFTC chairman. Quintenz cuts a controversial figure because he is the ex-CFTC commissioner, who publicly released a dissenting diatribe in 2021 when another exchange sought approval to list sports contracts, in which he contended that all event contracts are swaps, including sports, hence under CFTC authority, because “practically any event has at least minimal ... economic consequence”. The CEA defines a swap as being “associated with a potential financial economic or commercial consequence”.

Shortly after the Quintenz kerfuffle, an emboldened Kalshi self-certified and listed event contracts on sports. Rather than halt the contracts, the CFTC, under caretaker commissioner, Pham, invited all gaming stakeholders (states, Indian tribes, etc.) to publicly submit feedback online, ahead of a roundtable. A month later, the roundtable was delayed and subsequently cancelled outright. Evidently, a castrated, or captured, CFTC is adopting a “non-enforcement” stance on sports contracts and wants the issue resolved through the courts. Subsequently, three of the remaining commissioners have resigned and chairlady Pham has announced her intention to resign upon Quintenz’s confirmation, leaving him as sole commissioner. All four commissioners are previously on the record as being against the CFTC allowing sports event contracts.

One would be forgiven for thinking the “fix is in”, but thankfully the “wild west” is history and cowboy Quintenz’s CFTC will not have the final say. Regulatory capture is impossible under the US Constitution because the Founding Fathers established a “separation of powers” between the three branches of government. The legislative branch (Congress) is tasked with enacting laws. The executive branch (federal agencies) is responsible for enforcing the law. The judicial branch interprets the laws. In terms of hierarchy, agencies (such as the CFTC) sit at the bottom rung, followed by district courts, appellate “circuit” courts and SCOTUS, the most senior, dealing with constitutional matters, or where there is a “circuit split” decision in lower courts. When it comes to the legislative ladder, the constitution (interpreted by SCOTUS) overrides federal law, which pre-empts state law.

Subsequently the states of Nevada, New Jersey and Maryland issued “cease and desist” letters to Kalshi regarding sports event contracts. Kalshi responded requesting relief from the courts through preliminary injunctions, which prevent the states from enforcement until the court case is resolved. Kalshi’s legal position is that (1) the CFTC has exclusive authority over swaps, and (2) federal law pre-empts state law, hence it is accountable to the CFTC, not the states. Kalshi was swiftly granted injunctions in both Nevada and New Jersey, whilst the cases continue.

The saying goes that “quick decisions make bad law”. In Maryland, Judge Abelson deliberated more deeply and denied Kalshi’s injunction. On exclusive authority, Abelson ruled the CFTC’s jurisdiction was only with respect to other federal agencies (such as the SEC), highlighting that the CEA includes a savings clause providing that, “nothing contained in this section.... shall supersede.... the laws of the United States, or of any State”.

enacting the CEA and Dodd Frank amendments, Congress implicitly intended to occupy the field of sports event contracts. Abelson disagreed, noting legal precedents of a strong presumption against pre-emption, particularly in fields where states have traditionally occupied (gaming). Abelson added that Kalshi’s interpretation would imply the partial repeal of other federal laws such as the Wire Act and Indian Gaming Regulatory Act (“IGRA”) and SCOTUS precedent is clear that “repeals by implication are disfavoured”.

At present, there are appeals pending at the third (NJ) and fourth (MD) circuit courts, which will rule over the coming months. Kalshi’s ultimate success hinges on some of the following arguments:

- Whether sports event contracts are swaps at all, hence under CFTC purview? Abelson assumed, for arguments sake, that they are swaps. However, other courts may take the view that “bets or wagers” as defined by UIGEA, are precluded from simultaneously being swaps - economic consequences be damned. Less likely, they could define the “economic consequences”, whereby a bet can become a swap. Clearly bets on the Super Bowl, Kentucky Derby, or Masters Golf Tournament could be construed as having economic consequence (beyond the participants), but college La Crosse, less so. One needs to squint to see economic consequences for exotic wagers such as point spreads, player props and parlays.
- Potential conflicts with other federal laws, such as the Wire Act and IGRA, which are not pre-empted. The Wire Act criminalises facilitating sports betting across state lines. IGRA gives Native American tribe’s exclusive authority over “gaming” on Indian lands. For Kalshi’s sports contracts to co-exist with these two federal laws, courts may seek to delineate a swap from a sports bet. After Kalshi’s two early victories, twenty-seven native Indian tribes have filed an “amicus curae” brief in Maryland and third circuit (New Jersey). Though not party to the case, a “friends of the court” briefing offers information, expertise and insight, which may assist the court in deciding the matter. For now, tribes such as the Seminole are seemingly content assisting states from the sidelines, which could bring legal clarity sooner than directly invoking IGRA.
- Ultimately, if the courts cannot craft clear boundaries for “gaming” and “economic consequence”, they may resort to ruling on “congressional intent” when crafting the CEA, as did Abelson. In the 2024 Kalshi election event contract case, the CFTC cited a colloquy on the Senate floor where Senator Lincoln, one of the architects of the special rule, explained to Senator Feinstein that it was Congress’ intent to prevent “gambling through supposed event contracts” around “sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament”, which, “would not serve any real commercial purpose. Rather, they would be used solely for gambling”.

Whereas one might disagree with Quintenz’s contention, at least he has been consistent. In contrast, Kalshi publicly acknowledged previously on six separate occasions during the election case that Congress did not want sports event contracts. Their motive back then was to differentiate sports - being based on an underlying game, from election contracts - which are not. Subsequently, Kalshi self-certified the very same contracts it previously claimed Congress did not want. Meanwhile today, Kalshi is taking the opposite position before the courts, compared to their election case last year.

Integrity once sold can never be bought back. Recently, ex-senator, now lobbyist, Blanche Lincoln, penned a letter to the CFTC advocating for the CFTC allowing event contracts on sporting events due to commercial consequences - which back in 2012 then legislator, Lincoln, claimed did not exist! Per OpenSecrets, Kalshi paid Lincoln Policy Group \$180,000 in 2024. Comedian, Tina Fey, once piped that “politics and prostitution have to be the only jobs where inexperience is considered a virtue” and that rings true here.

Kalshi portrays itself as an innovative technology startup, but the reality is that they operate above where incumbents believe the law to be. Global sports betting exchange leader, Betfair, is already twenty-five years old and is only unavailable in the US because Flutter Entertainment (the holding company) believes bets crossing state lines to be illegal. Flutter seems sanguine on the potential US opportunity for Betfair once there is legal clarity, noting that outside of the US, exchanges have long existed but generate only a fraction of the revenue of sportsbooks, due to a lack of liquidity outside of major events and lack of exotic bet types, which comprise the bulk of a sports book’s revenue.

Though Kalshi’s score is 2-1, in skirmishes against states whose laws may be pre-empted, now that the Indian cavalry has awoken asserting their exclusive right to gaming on Indian lands under federal law, which is not pre-empted, it’s hard (though not impossible) to envisage a future where a sports event contract “free for all” exists on CFTC exchanges. Victor Rocha, chair of the Indian Gaming Association, recently tweeted “I talked to Tarek Monsour (Kalshi founder) twice now, and my take from him is that he’s a lying little twerp”. Make no mistake, the Indians are at war with Kalshi, and they won’t stop until they have their scalp.



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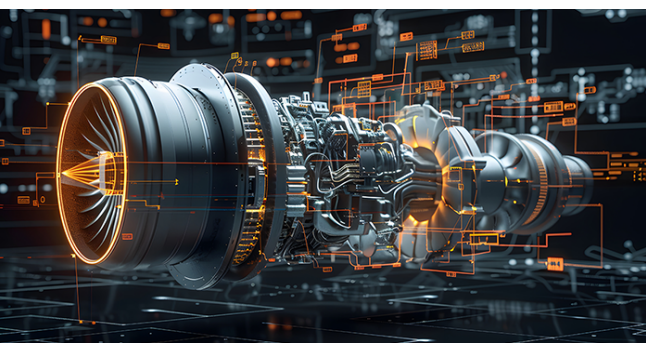
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