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Let's Reinvent the Wheel: The Internet as a Means of Interstate Commerce in United States v. Kieffer

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Cover Page Footnote
Many individuals deserve thanks for their work on this Note, but I would like to thank two of you in particular. First, thank you to Assistant United States Attorney Scott Williams for the research project and legal genius that inspired this Note—it would not have been born without you. Second, thank you to Professor and mentor Murray Tabb for your brainstorming sessions, editing expertise, and serenity throughout this process

NOTE

Let's Reinvent the Wheel: The Internet as a Means of Interstate Commerce in *United States v. Kieffer*[*]

I. Introduction

We have crossed the mountain and seen the Pacific. Well, we have seen the Internet, and like the discovery of the Pacific, the Internet has brought with it an expansion of the world as we know it and a host of uncharted territory. The Internet is everywhere, and it is a vital part of our lives. It is accessed in our houses, our computers, our cell phones, our televisions, our cars, and our local Starbucks. In May of 2013, the United States Census Bureau released a report stating that in 2011, 71.7% of households reported accessing the Internet.[1] This represents an increase of more than 50% in less than twenty years.[2] We use the Internet to shop, to conduct research, to entertain ourselves, and to stay connected with our family and friends. It has revolutionized the way in which we live our lives. So what harm, if any, can come from it? Unfortunately, the Internet has also influenced the way we commit crimes. For example, it is no longer necessary to physically steal money from an individual; simply hack the person's email and prey upon his unsuspecting contact list through pleas for help.[3]

In the wake of this new generation of criminals, the justice system is left scrambling in its attempts to apply Internet use in the commission of a crime to the existing criminal statutory framework.[4] Each federal criminal statute has an interstate commerce nexus (Interstate Nexus) requirement

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1. Thom File, *Computer and Internet Use in the United States: Population Characteristics*, CENSUS.GOV 1, 1 (2013), http://www.census.gov/prod/2013pubs/p20-569.pdf.

2. *Id.* at 1 (reporting 18% in 1997).

3. Elisabeth Leamy & Sally Hawkins, *'Stranded Traveler' Scam Hacks Victims' Emails, Asks Their Contacts for Money*, ABC NEWS (July 13, 2012), http://abcnews.go.com/Technology/stranded-traveler-scam-hacks-victims-emails-asks-contacts/story?id=16774896.

4. *See, e.g.*, Nathaniel H. Clark, Comment, *Tangled in a Web: The Difficulty of Regulating Intrastate Internet Transmissions Under the Interstate Commerce Clause*, 40 MCGEORGE L. REV. 947, 948-49 (2009); Michael D. Yanovsky Sukenik, *Distinct Words, Discrete Meanings: The Internet & Illicit Interstate Commerce*, 2011 U. ILL. J.L. TECH. & POL'Y 1, 2.

that delineates the extent to which Congress has the power to regulate. For example, in the federal wire fraud statute, which includes schemes to defraud via the Internet, Congress may regulate, and the Executive may prosecute, wire fraud crimes that occur "in interstate . . . commerce."[5] As the phrase suggests, the Interstate Nexus requires that the crime occur "in interstate," which traditionally requires that the communication cross state lines.[6] However, as we shall see, the Internet is not quite as simple as mailing a letter to another state, which must cross state lines. In fact, depending on the where the Internet servers are located, the Internet connection may cross state lines, or it may not.[7]

This fact has left the judiciary in quite a conundrum. Should the courts expand a nearly all-encompassing commerce clause power and assume the Internet has crossed state lines in every case? Or should the courts limit the expanse of the Commerce Clause and require prosecutors to show the connection crossed state lines, as some federal statutes require? Without fail, this question has caused numerous disagreements among courts.[8] Two of the best examples that demonstrate this pattern of disagreement are the federal wire fraud statute, 18 U.S.C. § 1343,[9] and the federal child pornography statutes, 18 U.S.C. §§ 2252[10] and 2252A.[11] Decisions interpreting these statutes exemplify how a common phrase, such as "in interstate commerce," can be interpreted in very different ways.[12] Unfortunately, the Supreme Court has yet to address these varied interpretations and applications of the Internet to interstate commerce.[13] Furthermore, Congress has only addressed this issue as it pertains to the child pornography statutes.[14]

The Tenth Circuit recently became the second court to address this issue in *United States v. Kieffer*.[15] The court asked whether the use of the Internet inherently satisfies the Interstate Nexus under the federal wire fraud

5. 18 U.S.C. § 1343 (2012).
6. *See infra* Part IV.A.
7. *See infra* Part II.A.1.
8. *See, e.g.*, *infra* Part II.A.
9. 18 U.S.C. § 1343.
10. 18 U.S.C. § 2252 (2012).
11. 18 U.S.C. § 2252A (2012). For the purposes of this Note, 18 U.S.C. § 2252 and § 2252A will be considered interchangeably.
12. *See infra* Part II.
13. *See infra* note 139 and accompanying text.
14. *See infra* Part II.
15. 681 F.3d 1143 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 996 (2013).

statute.[16] Unfortunately, its answer simply perpetuates the status quo. In this case, the court properly affirmed the conviction of Defendant Kieffer, and upheld the principle that the government must show that the Internet connection crossed state lines in order to prosecute.[17] However, the Tenth Circuit's opinion did little to settle the federal courts' dispute regarding this issue. Complicating matters, the Tenth Circuit's position directly contradicts the only other court to address the Internet and wire fraud, the United States District Court for the Eastern District of Pennsylvania.[18] Finally, this case only further divides the federal courts in their attempts to understand and apply criminal statutes in the context of Internet use.

In light of the prolonged disagreement, this Note addresses the need for resolution. The Internet is a pervasive part of our lives and as a legal community, we cannot afford to allow such disparate treatment of the Internet with respect to criminal statutes.[19] Part II addresses the Internet and interstate commerce conflict prior to *United States v. Kieffer*, particularly the circuit split surrounding the child pornography statutes, and how that conflict mirrors the current interpretive conflict regarding wire fraud. Parts III and IV analyze Defendant Kieffer's conviction of wire fraud—specifically the Tenth Circuit's articulation of a standard for applying commerce clause principles to Kieffer's use of the Internet in the commission of his crime. Part V then argues that although the Tenth Circuit properly affirmed the conviction of Defendant Kieffer and upheld the correct standard in applying interstate commerce principles to the Internet, its decision had a much further reaching impact than the court intended. Finally, Part VI proposes a new, uniform standard of applying the Commerce Clause to the Internet—a single standard which the Supreme Court and Congress can apply to all criminal statutes.

16. *Id.*; *see also* 18 U.S.C. § 1343 (2012). While the Tenth Circuit in *Kieffer* is the first circuit to decide this issue, a district court weighed in on whether the Internet satisfies § 1343's Interstate Nexus prior to *Kieffer*. United States v. Fumo, No. 06-319, 2009 WL 1688482 (E.D. Pa. June 17, 2009).

17. *Kieffer*, 681 F.3d at 1153.

18. *Compare id.* at 1155 (holding that the wire fraud statute's commerce phrase, "in interstate . . . commerce," requires the prosecution to prove the Internet transmission crossed state lines), *with Fumo*, 2009 WL 1688482, at *9 (holding wire fraud's "in interstate commerce" does not require proof that an Internet transmission crossed state lines).

19. *See infra* Part II.A.2.

II. Save the Kids: The Internet, Interstate Commerce, and Child Pornography Before United States v. Kieffer

United States v. Kieffer is by no means the only decision to discuss the relationship between the Internet and the Commerce Clause as it pertains to other criminal statutes.[20] Two statutes in particular, 18 U.S.C. §§ 2252, 2252A (together, the child pornography statutes), punish individuals for conduct involving child pornography. These statutes demonstrate the tension among the federal courts in their attempts to interpret commerce clause principles as applied to the Internet. The following section details the differences in judicial interpretation of the child pornography statutes resulting in a circuit split, which foreshadows the interpretive conflict surrounding the wire fraud statute.

A. Fighting over the Internet and Child Pornography

Congress passed The Protection of Children Against Sexual Exploitation Act (Child Pornography Act) in 1977.[21] The Act created the criminal statute, 18 U.S.C. § 2252,[22] and Congress later amended the Act to create 18 U.S.C. § 2252A.[23] Both statutes had, and still have, the same jurisdictional requirements.[24] When enacted, each statute criminalized transporting, shipping, distributing, or receiving child pornography in interstate commerce.[25] Despite the statute's seemingly straightforward

20. *See, e.g.*, United States v. Liton, 311 F. App'x 300, 301 (11th Cir. 2009) (interpreting the Interstate Nexus of 18 U.S.C. § 2422(b)); United States v. Agarwal, 314 F. App'x 473, 475 (3d Cir. 2008) (interpreting the Interstate Nexus of 18 U.S.C. § 1028(c)(3)(A)); United States v. MacEwan, 445 F.3d 237, 243-46 (3d Cir. 2006) (interpreting the Interstate Nexus of 18 U.S.C. § 2252A(a)(2)(B)).

21. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978).

22. *Id.*

23. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (1996).

24. *Compare* Protection of Children Against Sexual Exploitation Act of 1977, § 2, 92 Stat. at 7 ("in interstate . . . commerce"), *and* Omnibus Consolidated Appropriations Act § 121 ("in interstate . . . commerce"), *with* 18 U.S.C. § 2252(a)(1) (2012) ("in or affecting interstate . . . commerce"), *and* 18 U.S.C. § 2252A(a)(1) (2012) ("in or affecting interstate . . . commerce").

25. 92 Stat. 7; 18 U.S.C. § 2252A(a)(1)-(2) (2012). Both statutes make it a crime to transport, ship, receive, or distribute child pornography; however, § 2252 places more specific requirements on the type of visual depiction that constitutes child pornography, among other differences irrelevant for the purposes of this Note. *Compare* 18 U.S.C. § 2252(a)(1)-(2), *with* 18 U.S.C. § 2252A(a)(1)-(2). Therefore, these statutes will be used interchangeably for the purposes of this Note.

language—"in interstate . . . commerce"—the proliferation of the Internet in the twenty-first century has confounded federal courts attempting to apply that language to child pornography cases. This confusion created a circuit split between the federal courts.

On one side of the split, the Tenth Circuit determined the child pornography statute required that the prosecutor prove the Internet communication crossed state lines.[26] On the other side are the circuits that held the mere use of the Internet satisfied the Interstate Nexus under the statute.[27] These include the Third, Fifth, and Eleventh Circuits.[28] The Third Circuit's decision in *United States v. MacEwan* represents the most recent and cumulative opinion in this line of cases.[29]

1. United States v. MacEwan: *The Internet Is Interstate Commerce*

In this recent Third Circuit decision, the defendant, James MacEwan, was charged with three counts of receiving materials containing child pornography under the Child Pornography Act.[30] These counts were based on the defendant's conduct, which included multiple visits to child pornography websites containing graphic images of child sexual exploitation.[31] At trial, the defendant argued the court did not have jurisdiction because the government failed to prove he transported the pornographic images across state lines.[32] He further argued that absent proof of interstate transmission, it was just as likely the images had traveled intrastate, and therefore, his conduct fell outside of the purview of the Commerce Clause.[33]

In response, the government offered expert testimony from the manager of the defendant's Internet service provider, who described a process called

26. United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012).

27. *See* United States v. MacEwan, 445 F.3d 237, 243-45 (3d Cir. 2006) ("[O]nce a user submits a connection request to a website server or an image is transmitted from the website server back to user, the data has traveled in interstate commerce."); United States v. Machtley, 163 F. App'x 837, 838-39 (11th Cir. 2006); United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002).

28. *See supra* note 27.

29. 445 F.3d 237.

30. *Id.* at 240.

31. *Id.*

32. *Id.* at 241.

33. *Id.*

the "Shortest Path First."[34] The process is part of the interaction between the flow of data and an Internet connection.[35] The expert testified that when an individual attempts to access a website, the connection required to access the website starts in the individual's computer and then transfers to the cable modem in the individual's house.[36] From the modem, the connection travels to a regional data center, which processes the individual's request to access the website through various routers located in the regional data center.[37] Once the regional data center processes the request, the website request is sent to the Internet backbone, a framework of lines that sends the website request to the server containing the website.[38] As it travels through the Internet backbone to the website server, the Internet connection will take the "Shortest Path First."[39] This means, from the regional data center, the website request travels along a line with the least amount of Internet traffic, as opposed to the shortest geographical distance.[40] Therefore, if the individual's computer and the website server are located within the same state, the website connection will typically (but not necessarily) travel intrastate, and if the computer and website server are in different states, the connection will always travel interstate.[41]

The Third Circuit affirmed the district court by holding that regardless of whether the pornographic images originated in the same state as the individual accessing the images, the mere fact the defendant allegedly downloaded the images satisfied the interstate jurisdictional nexus.[42] The court concluded that, because the Internet was "inexorably intertwined with interstate commerce," it was an instrumentality and channel of interstate

34. *Id.* "Shortest Path First" means the Internet connection travels along the line with the least volume of traffic. *Id.* Therefore, while the individual's computer and the website server are located within the same state, if the Internet backbone in a particular state has a high volume of traffic, the Internet backbone will automatically transfer the connection to another line with a lower volume of Internet traffic, and the line with less Internet traffic could be located in another state. *See id.* at 241-42.

35. *Id.* at 241.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*; *see also supra* note 34 and commentary.

42. *MacEwan*, 445 F.3d at 243-44.

commerce, which Congress has the ability to regulate.[43] Therefore, the federal government had jurisdiction to prosecute the defendant.[44]

2. United States v. Schaefer *and the Circuit Split: The Internet Connection Must Cross State Lines*

While *MacEwan* represented the holding of the circuit courts at that time, the following year, the Tenth Circuit created a circuit split in its opinion, *United States v. Schaefer*.[45] A federal court convicted Defendant William Schaefer of receiving and possessing child pornography under the Child Pornography Act.[46] Like MacEwan, Schaefer argued on appeal that the government had not produced sufficient evidence to satisfy the statute's Interstate Nexus requirement.[47] He claimed the statute's Interstate Nexus requirements (in interstate commerce) necessitated that the government show he caused the Internet transmission of the pornographic images to cross state lines.[48] Therefore, Schaefer concluded, the government's showing that his use of the Internet in the commission of the crime was insufficient to satisfy the Interstate Nexus.[49]

Contrary to the weight of the other circuits, the Tenth Circuit agreed with the defendant and held that, although the Internet connection involves movement between states in most instances, it does not remove the need for the government to provide evidence of interstate movement.[50] In reaching its decision, the court analyzed prior case law, as well as the statute, specifically noting Congress's ability to limit its powers under the Commerce Clause.[51]

In its statutory analysis, the court focused on the phrase "in commerce."[52] It found the statute's use of "in commerce" instead of "affecting commerce" signaled Congress's intent to limit federal

43. *Id.* at 245-46 (citing United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004) ("Congress clearly has the power to regulate the [I]nternet, as it does other instrumentalities . . . of interstate commerce . . . ."); United States v. Lopez, 514 U.S. 549, 558 (1995) (holding Congress has the power to regulate the instrumentalities of interstate commerce even though the wrongful conduct may occur wholly intrastate)).

44. *Id.* at 246.

45. 501 F.3d 1197 (2007).

46. *Id.* at 1199.

47. *Id.*

48. *Id.* at 1200-01.

49. *Id.*

50. *Id.* at 1201.

51. *Id.*

52. *Id.*

jurisdiction because the latter exerts Congress's full Commerce Clause power, whereas the former signals a limitation.[53] In light of this interpretation, the court then rejected the other circuits' approaches based on a "cursory inspection" of the case law.[54] The court declined to analyze *United States v. Runyan*,[55] a Fifth Circuit case that held it was sufficient for the government to "make a specific connection between the [pornographic] images introduced at trial and the Internet" to satisfy the statute's Interstate Nexus.[56] It refused to apply *United States v. Carroll* because *Carroll* did not analyze the same statute as the statute at issue.[57] Finally, the court rejected *MacEwan*'s analysis because the *MacEwan* court neglected to analyze the Interstate Nexus phrase "in commerce" as it applied to the statute's jurisdiction.[58] The court concluded by reasserting its position that the Child Pornography Act did not include an "Internet exception" that would waive the government's burden to prove interstate movement.[59] This holding drove a wedge between the circuits, and highlighted that a uniform judicial application the Commerce Clause to the use of the Internet has proven problematic.

But the circuit split created by *Schaefer* did not last long. Immediately following the decision in *Schaefer*, Congress rectified the split by passing the Effective Child Pornography Prosecution Act of 2007.[60]

3. Congress Leaves the Tenth Circuit Out in the Cold

In passing this new legislation, Congress expressly adopted the position of the majority of the circuits and struck down what it deemed an erroneous

53. *Id.* at 1201-02 (citing Russel v. United States, 471 U.S. 858, 859 (1985) ("'[A]ffecting interstate or foreign commerce' conveys Congress's intent to exert full Commerce Clause power . . . .")); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115-16 (2001) (holding "in commerce" limits Congress's reach)).

54. *Schaefer*, 501 F.3d at 1203-04 (citing United States v. MacEwan, 445 F.3d 237, 244 (3d Cir. 2006)) (holding proof of downloading pornographic images from the Internet was sufficient to satisfy the jurisdictional nexus); United States v. Runyan, 290 F.3d 223, 242 (5th Cir. 2002) (holding the government must provide a connection between the images introduced as evidence and the Internet to satisfy the jurisdictional nexus); United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) (transmitting photographs using the Internet is moving them through interstate commerce under 18 U.S.C. § 2251(a))).

55. *Id.* at 1204-05.

56. *Runyan*, 290 F.3d at 242.

57. *Schaefer*, 501 F.3d at 1204-05.

58. *Id.*

59. *Id.* at 1205.

60. Effective Child Pornography Prosecution Act of 2007, H.R. 4120, 110th Cong. (2008).

holding by the Tenth Circuit.[61] The new legislation amended the interstate commerce element of §§ 2252 and 2252A to include "in or *affecting* interstate" or foreign commerce.[62] By including "affecting" in the jurisdictional requirements, Congress guaranteed that use of the Internet, standing alone, would satisfy the Interstate Nexus under the child pornography statutes.[63] To justify amending the statute, Congress cited specific findings that built upon its original concerns from 1977—specifically, that child pornography was "estimated to be a multibillion dollar industry of global proportions" which amounted to a "permanent record of a child's abuse."[64] Furthermore, Congress included findings about the nature of the Internet in relation to interstate commerce, namely, that "[t]he Internet is well recognized as a method of distributing goods and services across State lines," and "[t]he transmission of child pornography using the Internet constitutes transportation in interstate commerce."[65]

Although Congress settled the circuit split in applying interstate commerce requirements to the Internet for the purpose of the child pornography statute, the federal courts continue to struggle when defendants use the Internet in the commission of other federal crimes. In fact, this battle was doomed to repeat when the courts again squared off over this issue a mere five years later.[66]

B. Wire Fraud and the Internet Before Kieffer

Despite the apparent resolution obtained through congressional intervention in interpreting the Interstate Nexuses of the child pornography statutes, the courts once again struggle to answer the question of whether use of the Internet alone satisfies Interstate Nexus requirements; this time, in regards to wire fraud. Similar to the original versions of the Child Pornography act, the jurisdiction requirement for wire fraud requires that the communication(s) in support of the wire fraud scheme occur in interstate commerce.[67] The interpretative dispute began when the United States District Court for the Eastern District of Pennsylvania became the

61. *See generally*, Sukenik, *supra* note 4, at 14.
62. H.R. 4120 § 103(b) (emphasis added); see also 18 U.S.C. §§ 2252, 2252A (2012).
63. *See, e.g.*, *supra* note 53.
64. Act of Oct. 8, 2008, Pub. L. No. 110-358, § 102, 122 Stat. 4001, 4001.
65. *Id.*
66. 18 U.S.C. § 1343 (2012).
67. *Id.*

first court to affirm that the use of the Internet satisfies the Interstate Nexus for wire fraud.[68]

In *United States v. Fumo*, the Eastern District of Pennsylvania convicted Defendant Vincent Fumo on 137 counts related to fraud and conspiracy to defraud the Pennsylvania Senate, the Citizens Alliance for Better Neighborhoods, and the Internal Revenue Service, as well as fraud relating to the Independence Seaport Museum.[69] Twelve of the 137 charges were charges of wire fraud.[70] Upon conviction the defendant filed a motion for judgment on acquittal and a motion for new trial.[71] Regarding the wire fraud counts, the defendant argued the government did not provide substantial evidence to show the emails he sent in furtherance of the wire fraud scheme traveled in interstate commerce.[72] Specifically, the defendant argued the emails never traveled outside of Pennsylvania, the defendant's state of residence.[73]

In its decision, the district court cited *United States v. Lopez* and *United States v. MacEwan* to support its holding that Internet use alone satisfied the jurisdictional nexus for wire fraud.[74] The court reiterated the holding in *Lopez*, which articulated that Congress has the authority to regulate instrumentalities of interstate commerce and activities with a substantial relationship to interstate commerce, despite the fact that those activities may occur entirely intrastate.[75] In addition, the court adopted the ruling in *MacEwan* which held that "nothing in the statute required that the images crossed state lines."[76] Further, because the fluctuations in Internet traffic could result in the "Shortest Path First" traveling across state lines before connecting with the website server, it was sufficient for the purposes of interstate commerce that the emails in conjunction with the scheme were sent and received through the Internet.[77] The court concluded that "[t]o hold otherwise would conflat[e] interstate commerce with interstate transmission

68. United States v. Fumo, No. 06-319, 2009 WL 1688482, at *1 (E.D. Pa. June 17, 2009).

69. *Id.* at *1.

70. *Id.* at *1, *3.

71. *Id.* at *1.

72. *Id.* at *3.

73. *Id.* at *8.

74. *Id.*

75. *Id.* (citing United States v. Lopez, 514 U.S. 549, 558-59 (1995)).

76. *Id.* (citing United States v. MacEwan, 445 F.3d 237, 243-44 (3d Cir. 2006)).

77. *Id.* at *8-9; *see also supra* note 45 and accompanying text.

and confuse the nature of the jurisdictional basis for [the] charged offense."[78]

The *Fumo* Court remained true to the weight of precedent which established that Internet use, standing alone, was sufficient to satisfy the Interstate Nexus of criminal statutes, even statutes that required the illegal activity to occur in interstate commerce. Uniformity, however, was short-lived.

III. Statement of the Case

Rather than yield to the majority, the Tenth Circuit seized an opportunity to upend consensus with its opinion in *Kieffer*. With *Kieffer*, the court reestablished its belief that, when it comes to the Internet and conduct "in interstate commerce," the government must show the Internet communication or transmission crossed state lines.[79]

A. The Tale of an "Attorney"

Though Defendant Howard Kieffer did not possess a license to practice law, had not attended law school, and had not passed the bar, he obtained authorization to practice law in North Dakota, Minnesota, Colorado, and the Western District of Missouri.[80] In fact, Kieffer was a successful nation-wide criminal law attorney based in Santa Ana, California.[81] Moreover, Kieffer awarded himself the title of Executive Director of the Federal Defense Associates and advertised his practice via websites, legal conferences, and professional contacts.[82] His career as an attorney came to a halt in 2009, when a disgruntled client wrote to the District of North Dakota court clerk and claimed that Kieffer was not an attorney.[83] Kieffer's lack of a legal license initiated federal prosecution in North Dakota, charging him with mail fraud and making false statements about his "legal practice."[84]

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78. *Fumo*, 2009 WL 1688482, at *8-9 (internal quotations omitted) (quoting *MacEwan*, 445 F.3d at 243).

79. United States v. Kieffer, 681 F.3d 1143, 1155 (10th Cir. 2012).

80. *Id.* at 1146. Defendant Kieffer originally gained admission to the District of North Dakota by making a materially false application to the court. *Id.* Using his successful admission to North Dakota, Defendant then gained admission in the District of Minnesota, District of Colorado, and the Western District of Missouri. *Id.*

81. *Id.*

82. *Id.* at 1147-50.

83. United States v. Kieffer, 621 F.3d 825, 830 (8th Cir. 2010).

84. *Kieffer*, 681 F.3d at 1146.

In October of 2007, approximately two years before Kieffer's conviction in North Dakota, Stephen Bergman retained Kieffer to represent his sister, Gwen Bergman, in a criminal case brought against her in the District of Colorado.[85] Kieffer was hired to replace Ms. Bergman's then counsel, Edward Pluss, a federal public defender.[86] Stephen became aware of Kieffer after viewing his website, www.boplaw.com.[87] At the time Stephen contacted Kieffer, Ms. Bergman was in federal prison and receiving treatment for a mental condition.[88] In fact, it was Ms. Bergman's status in prison that led Stephen to contact and hire Kieffer based on representations from www.boplaw.com and other websites that Kieffer was particularly accomplished at Bureau of Prison conflicts.[89]

Kieffer commenced his representation of Ms. Bergman at a competency hearing, followed by Ms. Bergman's bench trial several months later where the district court found her guilty of solicitation to commit murder, as well as conspiracy to commit murder for hire.[90] To complicate matters, just after Ms. Bergman's trial, Kieffer received an order from the District of North Dakota to show cause as to the truth of statements Kieffer made on his application to practice in that district.[91] Around the same time, a reporter from the Denver Post called Stephen Bergman, and their conversation caused Mr. Bergman to question whether Kieffer was a licensed attorney.[92] By then, Stephen had paid Kieffer $65,750 for representing Ms. Bergman, even taking out a second mortgage on his home to afford the cost.[93] Kieffer's time as an attorney, however, would shortly come to an end.

This series of events not only precipitated Kieffer's criminal charges in North Dakota and his subsequent conviction, but also led to Kieffer's indictment in the District of Colorado on three charges: wire fraud, making false statements, and contempt of court.[94] Kieffer's charge of making a false statement was based on his false representation that he was a licensed attorney in the District of Columbia, which he used to gain admission to the District of Colorado.[95] The contempt-of-court charge was based on the fact

85. *Id.* at 1151.
86. *Id.*
87. *Id.* at 1150.
88. *Id.*
89. *Id.*
90. *Id.* at 1151.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1151-52.
95. *Id.* at 1146.

that Kieffer "jeopardized the administration of justice" when he lied to the court clerk about his status as an attorney and then proceeded to represent a criminal defendant before the court.[96] Finally, the basis of Kieffer's wire fraud charge was the fact he used his professional website, www.boplaw.com, to support and advertise his unlawful practice of law and to defraud Stephen Bergman of thousands of dollars.[97] Shortly after the indictment, a federal petit jury found Kieffer guilty on all three counts.[98] Kieffer subsequently appealed his conviction to the Tenth Circuit.

B. On Appeal to the Tenth Circuit

Kieffer raised three main arguments on appeal to the Tenth Circuit. This Note focuses on the issue of whether or not the government sufficiently established that Kieffer's communication through his website satisfied the Interstate Nexus for the wire fraud statute. Although Kieffer's remaining issues on appeal will not be considered in depth, they are worth briefly mentioning. For his first issue on appeal, Kieffer argued he should receive a judgment of acquittal on the wire fraud count because the government failed to prove all elements of the offense.[99] He based this argument on the fact that the government did not show that his Internet communications traveled in interstate commerce or that the communications were used to execute a scheme to defraud.[100] Kieffer's remaining issues on appeal consisted of a claim that the jury was erroneously instructed on reasonable doubt,[101] as well as five separate challenges to his sentencing.[102] The Tenth Circuit affirmed the lower court on Kieffer's first three issues on appeal, but ruled in his favor on the sentencing issues.[103]

In ruling on Kieffer's wire fraud challenge, the Tenth Circuit held that the government provided sufficient evidence to show that Kieffer's Internet communications crossed state lines, and therefore, satisfied the Interstate Nexus requirement under § 1343.[104] The following section will discuss the Tenth Circuit's analysis in determining that Kieffer caused his Internet communications to cross state lines. In addition, the section will address the

96. *Id.*
97. *Id.*
98. *Id.* at 1152.
99. *Id.* at 1147.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1160, 1170-72.
104. *Id.* at 1155.

circuit's affirmation of its holding in *United States v. Schaefer*, specifically, that a defendant's "use of the [I]nternet, 'standing alone,' does not establish an interstate [nexus]."[105]

IV. Adding to the Conundrum: Deciding United States v. Kieffer

To determine whether the government offered sufficient evidence to show that the Internet communications through Kieffer's website had crossed state lines, the Tenth Circuit looked at a variety of factors, including the plain language of the rule and the applicability of case law.[106] And, in addition to deciding the issue on appeal, the court briefly concluded its opinion by resurrecting the holding from *United States v. Schaefer* and applying that doctrine to the federal wire fraud statute.[107]

A. Statute and Case Law

As its first step, the court turned to the language of the wire fraud statute to determine whether it required the government to show a defendant's internet connection crossed state lines.[108] Under the statute, an individual commits the crime of wire fraud if that person "transmits or causes to be transmitted by means of wire, [or] radio . . . communication *in interstate . . . commerce*."[109] Based on this wording, the court found the statute required the government to show that Kieffer used interstate wire or wireless communications in the execution of his scheme to defraud.[110] And it was that requirement, Kieffer argued, that the government failed to meet.[111] Kieffer claimed that the government had not offered evidence to show interstate movement between Kieffer's website, where he advertised his legal services, and the victim, Stephen Bergman, who hired Kieffer based on representations made on the website.[112]

In support of his argument, Kieffer cited one case, *Schaefer*.[113] He compared the child pornography statute at issue in *Schaefer*[114] with the

105. *Id.* (citing United States v. Vigil, 523 F.3d 1258, 1266 (10th Cir. 2008)); *see also supra* Part II.A.2.

106. *Kieffer*, 681 F.3d at 1152-55.

107. *Id.* at 1155.

108. *Id.* at 1153.

109. 18 U.S.C. § 1343 (2012) (emphasis added).

110. *Kieffer*, 681 F.3d at 1152.

111. *Id.*

112. *Id.* at 1150, 1153.

113. *Id.* at 1153.

federal wire fraud statute.[115] At the time of *Schaefer*, both statutes required that the Internet transmission or communication used in the crime occur *in interstate commerce*.[116] Kieffer sided with the *Schaefer* court and argued that to properly support a conviction, the language "in interstate . . . commerce" necessitated that the transmission actually cross state lines.[117] In light of this standard, Kieffer argued that he should receive a judgment of acquittal because the government presented no evidence that the communication from the advertisement posted on his website to Mr. Bergman had crossed state lines.[118] The Tenth Circuit, however, disagreed.[119]

The court ruled that, viewing the evidence in a light most favorable to the government, a reasonable jury could conclude that the government's evidence established the Interstate Nexus required under wire fraud.[120] To articulate its holding, the court employed certain facts of the case to show that a juror could reasonably infer the transmission had crossed state lines.[121] First, the court found that Kieffer controlled the website, www.boplaw.com, and therefore controlled the content of the site.[122] In addition, Kieffer registered the domain name with Name Secure, a company owned and controlled by Network Solutions.[123] The court noted that Network Solutions used a host server in Virginia, which facilitated the viewing of Kieffer's website once the name was registered through Network Solutions.[124] Finally, the court found that Stephen Bergman accessed boplaw.com from a computer in Colorado, and Edward Pluss[125] from a computer in Tennessee.[126]

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114. *See supra* Part II.A.2. Recall that at the time of *Schaefer*, the child pornography statute, § 2252, had not yet been amended to state "in or affecting interstate . . . commerce." *See* United States v. Schaefer, 501 F.3d 1197, 1201-02 (2007); Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 103, 122 Stat. 4001, 4002 (2008).

115. *Kieffer*, 681 F.3d at 1153.

116. *Id.*

117. *Id.* (citing *Schaefer*, 501 F.3d at 1202).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1153-54.

122. *Id.* at 1153.

123. *Id.* at 1154.

124. *Id.*

125. Following Kieffer's entry of appearance to Ms. Bergman's case, Mr. Pluss, Ms. Bergman's Federal Public Defender, testified that he researched Kieffer. *Id.* at 1151. In the course of his research, Mr. Pluss encountered Kieffer's website, boplaw.com. *Id.* Mr. Pluss

Using these facts, the court ruled that Kieffer caused content from his website to be transferred across state lines because the presence of individuals accessing the website in different states, along with nature of the Internet, allows for the inference that, absent evidence to the contrary, the same host server delivered the website's content to both Colorado and Tennessee.[127] The court based its ruling upon the satisfaction of two preconditions.[128] First, Kieffer uploaded boplaw.com content to the website's origin server located in any state.[129] And second, the origin server transmitted the content across state lines to local servers.[130] This second precondition necessitates that the origin server was located in Colorado (if Bergman's computer accessed the content from Tennessee), Tennessee (if Pluss's computer accessed the content from Colorado), or in a third state.[131] The court concluded that the presence of the origin server in one state and the host server in another state is sufficient to show that the transmission crossed state lines, and therefore, the government provided sufficient evidence to satisfy the Interstate Nexus.[132]

In addition to holding that the government had sufficiently proven its case against Kieffer and satisfied the Interstate Nexus of § 1343, the Tenth Circuit attempted to rescue as much from its opinion in *Schaefer* as possible.[133]

B. Salvaging Schaefer *and its Ramifications*

From the beginning of its application of *Schaefer* to the issue at hand, the court noted its use of the opinion would be limited, even describing *Schaefer* as a "war-torn decision."[134] However, the court attempted to resurrect the opinion by reaffirming the narrow ruling that evidence of a defendant's use of the Internet alone would not suffice as proof that an

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also stated he believed Kieffer to be an attorney because Kieffer entered his appearance on Ms. Bergman's case, as well as the representations made on Kieffer's website. *Id.*

126. *Id.* at 1154.

127. *Id.* at 1154-55.

128. *Id.* at 1154.

129. *Id.* The Court noted the location of the host server was of no consequence because it ultimately reached individuals in two different states, allowing for the inference that the transmission of information from the website crossed state lines. *See id.*

130. *Id.*

131. *Id.* (citing Akami Tech., Inc. v. Cable & Wireless Internet Servs., Inc., 344 F.3d 1186, 1189 (Fed. Cir. 2003)).

132. *Id.* at 1154-55.

133. *Id.* at 1153, 1155; *see also supra* Part II.A.2-3.

134. *Kieffer*, 681 F.3d at 1153.

Internet transmission traveled in interstate commerce.[135] The court justified its affirmation of this holding on the basis of the nature of origin and host servers.[136] More specifically, it noted the possibility that the origin and host server, if separate servers at all, could be located in the same state as the computer which accesses the website.[137] Therefore, *Schaefer* would serve as a safeguard against instances in which a defendant should not be subject to federal prosecution because Internet transmission failed to cross state lines.[138]

The Tenth Circuit's affirmation of its holding from *Schaefer* reignites the conflict faced by the judiciary over the child pornography statutes. By upholding *Schaefer*, the court evidenced the legal community's continuous struggle to apply the statute's commerce clause requirements to the use of the Internet. However, unlike the split of authority over the child pornography statutes, Congress has remained silent on the issue of the Internet and wire fraud, as well as any other criminal statutes. And unfortunately, the Supreme Court has repeatedly declined to address the issue.[139] With renewed deadlock between the courts as to the proper legal relationship between Internet use and interstate commerce, and with the Supreme Court and Congress's lack of interest in resolving the dispute, it is unlikely that the conflict will end any time soon.

V. Analysis: It's Schaefer *All Over Again*

The following sections of this Note serve three main purposes. First, they analyze the Tenth Circuit's decision in *Kieffer*, showing that the court reached the correct decision when it held the government provided sufficient proof to show Kieffer's Internet transmissions had crossed state lines. This is accomplished by a study of statutory interpretation, congressional intent, and relevant precedent. Second, they posit that the court's dicta, stating it is necessary for the prosecution to show the transmission or communication crossed state lines, is not entirely proper and fails to move the legal community closer to a resolution on this pressing issue. Finally, this Note proposes a much-needed, unified standard and test from which to regulate the Internet as it relates to interstate

135. *Id.*
136. *Id.* at 1155.
137. *Id.*
138. *See id.*
139. *See, e.g.*, Kieffer v. United States, 133 S. Ct. 996 (2013) (denying certiorari); MacEwan v. United States, 549 U.S. 882 (2006) (same).

commerce. This new standard establishes a uniform basis that aids in solving the inconsistencies among the courts in their application of statutory commerce clause requirements to the use of the Internet, and eases confusion surrounding federal criminal jurisdiction for prosecutors and defendants alike.

An analysis of the Tenth Circuit's ruling in *Kieffer* can be divided into three steps. These steps include an analysis of statutory interpretation, the nature of the Internet as applied to the case, and finally a discussion of the court's belief that use of the Internet, standing alone, would not be satisfying proof of an interstate transmission or communication in interstate commerce. The Tenth Circuit was correct in affirming Kieffer's wire fraud conviction and in holding that the government provided sufficient proof to establish that Kieffer's Internet transmission crossed state lines. However, the court's reiteration that the mere use of the Internet would not satisfy interstate commerce, although facially correct, does little to solve the conflict over the Internet and interstate commerce.

When conducting its first task, the court acknowledged and accepted the requirement that an Internet transmission, as it pertains to wire fraud, must actually cross state lines to satisfy interstate commerce.[140] And the court did so correctly. The language of the federal wire fraud statute reads that wire or wireless communications or transmissions made with the intent to defraud must occur *in interstate commerce*.[141] Employment of the phrase "in [interstate] commerce" is acknowledged by the Supreme Court as evidence of Congress's desire to limit federal jurisdiction.[142] Based on accepted statutory interpretations of "in interstate commerce" and applicable case law, the Court, as well as Defendant Kieffer, appropriately determined it was necessary that the government show the interstate nature of Kieffer's Internet transmissions.

Next, based on the nature of the Internet and existing case law, the Court correctly determined that the government had provided sufficient evidence to show that Kieffer caused Internet transmissions from his website to cross state lines. Kieffer uploaded the content of his website to an origin server in a state different from the states in which the website was accessed by victim Stephen Berman and the Berman's former attorney, Edward Pluss (Colorado and Tennessee respectively).[143] The mere nature of the Internet supports the court's conclusion that the transmission crossed state lines. As

140. *Kieffer*, 681 F.3d at 1153.
141. 18 U.S.C. § 1343 (2012).
142. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115-16 (2001).
143. *Kieffer*, 681 F.3d at 1154.

discussed in the Third Circuit's *United States v. MacEwan*, if a computer that accesses a website (Bergman and Pluss) is located in a different state or states from the website server (Kieffer), the connection will travel *interstate*.[144] Consequently, the Tenth Circuit correctly held that Kieffer's Internet transmission crossed state lines.

Before concluding its analysis regarding the wire fraud charge, the court took the opportunity to restate its belief that use of the Internet alone does not prove a transmission or communication occurred in interstate commerce.[145] This dicta represents one side of the issue in the conflict over how to apply interstate commerce requirements to the use of the Internet in federal criminal statutes. That is, should use of the Internet alone satisfy the Interstate Nexus for criminal statutes, or should the government prove that Internet communication or transmissions actually crossed state lines before they are allowed to prosecute? The Tenth Circuit chose the latter.[146] This answer is correct because use of the Internet alone should not satisfy the Interstate Nexus; however, the standard proposed by this Note argues the court is nevertheless incorrect.

Kieffer and the conflict over the child pornography statutes represent the struggle of the courts to answer that question, and show that courts can take the same statute and the same language and answer the question very differently. The final section of this Note focuses on the inconsistent interpretations and applications of interstate commerce requirements to the use of the Internet in federal criminal statutes, proposes a standard and a test to alleviate those inconsistencies, and implores the Supreme Court and Congress to take action.

VI. Reinventing the Wheel: A New Standard for the Internet and Interstate Commerce

There is a definite and obvious need for a uniform standard when applying use of the Internet to the interstate commerce requirements of federal criminal statutes. This Part addresses that need by proposing a uniform standard, which could apply to all statutes. Instead of asking the courts to answer the question of whether use of the Internet alone satisfies the Interstate Nexus in all instances, or whether the government must

144. *See* 445 F.3d 237, 241 (3d Cir. 2006); *see also* Akami Tech., Inc. v. Cable & Wireless Internet Servs., Inc., 344 F.3d 1186, 1188-89 (Fed. Cir. 2003) (describing the relationship between host and origin servers' interstate transmissions).

145. *Kieffer*, 681 F.3d at 1155.

146. *Id.*

provide proof that the Internet transmission crossed state lines, this Note proposes a standard that essentially combines those two answers into one. However, before embarking on an analysis of a new standard, a brief history of the Commerce Clause will provide insight into the source of the problem; that is, the courts' long struggle to define the parameters of Congress's power to regulate interstate commerce.[147]

A. Clear as Mud: The Commerce Clause, United States v. Lopez*, and its Ramifications*

"[Congress shall have the power t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[148] To be sure, this is a considerable grant of power, and arguably the reason such conflict exists surrounding the federal courts' attempts to fit Internet use into the existing interstate commerce requirements of the criminal statutes. After *Gibbons v. Ogden*,[149] the Supreme Court's Commerce Clause precedent has flipped back and forth on how much and what kinds of commerce Congress is allowed to regulate.[150] Although the Supreme Court employed a fairly broad interpretation of the Commerce Clause for several decades,[151] the Court began reining in the breadth of the clause with *United States v. Lopez*.[152] Not only did *Lopez* limit the scope of Congress's power under the Commerce Clause, it provided a more detailed framework from which to analyze Congress's power.

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147. *Compare* Wickard v. Filburn, 317 U.S. 111, 125-28 (1942) (interpreting the Commerce Clause as allowing Congress to regulate purely intrastate activities with substantial effect on interstate commerce), *with* United States v. Lopez, 514 U.S. 549, 563 (1995) (declining to allow Congress to regulate purely local, non-economic activity), *and* United States v. Morrison, 529 U.S. 598, 617-19 (2000) (rejecting congressional regulatory power based on an aggregation of local violent crime).

148. U.S. CONST. art. I, § 8, cl. 3.

149. 22 U.S. (9 Wheat.) 1 (1824).

150. *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding Congress can regulate intrastate non-economic activity if failure to regulate the activity would undercut Congress's regulatory scheme); *Lopez*, 514 U.S. at 549 (holding Congress can regulate intrastate economic activity that substantially affects commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937) ("[A]cts[, even intrastate acts,] which directly burden or obstruct interstate or foreign commerce . . . are within the reach of the congressional power."); United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895) (limiting Congress's power to the regulation of commerce between the states or with foreign nations).

151. *See, e.g.*, *Wickard*, 317 U.S. at 125-28; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964) (approving Congress's reliance on the Commerce Clause to regulate hotels and ban racial discrimination).

152. *Lopez*, 514 U.S. at 563.

The *Lopez* Court was tasked with determining whether the Gun-Free School Zones Act, which prohibited possession of a fire arm in a school zone, was outside the parameters of Congress's Commerce Clause powers.[153] In the majority opinion, Chief Justice Rehnquist took the opportunity to place limitations on Congress's power. One limitation required that the statute's regulatory scheme must have a substantial relationship to commerce.[154] The Court relied on its prior recognition of three classifications of activities that Congress may regulate under its Commerce Clause powers. These three classifications included channels of, instrumentalities of, and activities substantially affecting interstate commerce.[155] Although the Court failed to specifically define each classification, this classification system has become vitally important to an analysis of Congress's power under the Commerce Clause.

Whether or not an activity is a channel, instrumentality, or a substantial effect of interstate commerce determines Congress's power to regulate that activity. In *Lopez*, the Supreme Court intimated differing levels of congressional power based on the classification of an activity. For example, the Court provided that Congress may regulate instrumentalities of intrastate commerce, "even though the threat may come only from interstate activities."[156] However, the Court did not grant the same qualification to channels, merely stating that Congress may regulate channels of interstate commerce.[157] Aptly stated by Nathaniel Clark, this difference suggests Congress only has the power to regulate channels when the activity occurs in interstate commerce.[158] Therefore, one can assume Congress has more power to regulate instrumentalities of interstate commerce than it does channels.

Further, when the *Lopez* Court stated that Congress has the power to regulate activities that substantially affect interstate commerce, the Court cited *NLRB v. Jones & Laughlin Steel Corp.*[159] as support for its holding.[160] The Court in *Jones & Laughlin Steel* stated that Congress has the power to regulate activities which substantially affect interstate commerce, even

153. *Id.* at 551.
154. *Id.* at 558.
155. *Id.* at 558-59.
156. *Id.* at 558.
157. *Id.*
158. Clark, *supra* note 4, at 955.
159. 301 U.S. 1 (1937).
160. *Lopez*, 514 U.S. at 558-59.

activities that occur wholly intrastate.[161] Activities which substantially affect commerce arguably give Congress its greatest power to regulate interstate commerce. This is because Congress may regulate *any* activity that substantially affects commerce, including channels and instrumentalities. Therefore, the classification of particular activity has a major impact on the level of power Congress has to regulate that activity. As a result, the classification of Internet use is vitally important in determining Congress's power to regulate the Internet.

B. Channels, Instruments, and Effects, Oh My!

The classification of Internet use has become the subject of debate in the legal community. Unfortunately, the Supreme Court has never defined these terms specifically, which means that any scholarship based on classifications is based on district and circuit court opinions, as well as other legal writers. Based on an analysis of legal scholarship and circuit court definitions, this Note posits that the Internet constitutes a channel and instrumentality of interstate commerce, and it substantially affects interstate commerce.

"[A] channel of interstate commerce is a path, route, or course that commerce may flow or move through."[162] In *Tangled in a Web: The Difficulty of Regulating Intrastate Internet Transmissions Under the Interstate Commerce Clause*,[163] Nathaniel Clark analyzed three Supreme Court cases and described a channel as "rivers, roads and railways."[164] The Internet is equivalent to a river, road, and railway because it is the means which one uses to "travel" in interstate commerce, and this is supported by opinions from the Third and Eleventh Circuits, each of which held the Internet is a channel (and instrumentality) of interstate commerce.[165] Therefore, the Internet is a channel of interstate commerce.

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161. *Jones & Laughlin Steel*, 301 U.S. at 36-37.

162. Jonathan R. Gray, Comment, United States v. Schaefer *and* United States v. Sturm*: Why the Federal Government Should Regulate All Internet Use as Interstate Commerce*, 90 DENV. U.L. REV. 691, 699 (2012).

163. Clark, *supra* note 4, at 954-55.

164. *Id.* (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 271 (1964) (standing for the assertion that highways are treated differently from instrumentalities of interstate commerce); Caminetti v. United States, 242 U.S. 470, 491 (1917) (holding a statute regulating railroads as within the power of Congress); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 1-2 (1824) (holding navigable waterways as within the power of Congress).

165. United States v. MacEwan, 445 F.3d 237, 245 (3d Cir. 2006); United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004).

Next, unlike the seemingly unified definition of a channel, the definitions of an instrumentality are more diverse. One article quotes Black's Law Dictionary, and states an instrumentality is a "'thing used to achieve an end or purpose.'"[166] Further, Professor Michele Campbell argues the Internet is an instrumentality of interstate commerce, basing her conclusion on the fact that numerous lower courts have so found, and that no federal court addressing the question has found that the Internet is not an instrumentality.[167] However, if rivers, roads, and railways are channels of interstate commerce, then instrumentality could also be described as a vehicle of interstate commerce, such as a car or an airplane.[168] Regardless, the Internet can easily be described as a "thing used to achieve an end or purpose,"[169] because one must use the Internet to achieve an end, for example, to send an email. In addition, the weight of case law supports this conclusion.[170] Therefore, the Internet is also an instrumentality of interstate commerce.

Finally, Internet use substantially affects interstate commerce. Unlike channels and instrumentalities, the types of activities that result in a substantial effect on interstate commerce are better defined. In *United States v. Lopez*, the Court stated that Congress may regulate when an "economic activity substantially affects interstate commerce."[171] However, the Court restricted the substantial-effects classification to activities that actually substantially affected interstate commerce, not activities that simply affected or had a "trivial impact" on commerce.[172] For example, in his article, Cody Stafford analyzed whether the Internet, as it pertains to the

166. Gray, *supra* note 164, at 699 (quoting BLACK'S LAW DICTIONARY 264 (9th ed. 2009)).

167. Michele Martinez Campbell, *The Kids Are Online: The Internet, the Commerce Clause, and the Amended Federal Kidnapping Act*, 14 U. PA. J. CONST. L. 215, 243 (2011); *see also MacEwan*, 445 F.3d at 245 (holding the Internet is a channel and instrumentality of interstate commerce); *Hornaday*, 392 F.3d at 1311 (same).

168. Clark, *supra* note 4, at 958 (citing Perez v. United States, 402 U.S. 146, 150 (1971) (noting aircraft are instrumentalities of interstate commerce); S. Ry. Co. v. United States, 222 U.S. 20, 25 (1911) (distinguishing vehicles from highways of interstate commerce and noting vehicles may be regulated for intra or interstate travel)).

169. Gray, *supra* note 164, at 699 (citing BLACK'S LAW DICTIONARY 870 (9th ed. 2009)).

170. *See, e.g.*, United States v. Sutcliffe, 505 F.3d 944, 952-53 (9th Cir. 2007); United States v. Trotter, 478 F.3d 918, 920-21 (8th Cir. 2007); *MacEwan*, 445 F.3d at 245.

171. 514 U.S. 549, 560 (1995).

172. *Id.* at 559.

child pornography statutes, substantially affects commerce.[173] In concluding the use of the Internet under the child pornography statutes substantially affect interstate commerce, Stafford focused on a variety of factors.[174] For example, child pornography's status as a major industry tied it to interstate commerce.[175] In addition, the finding that the statute contained a jurisdictional nexus that would otherwise limit Congress's power served as a safeguard against congressional overreach.[176]

Child pornography statues are not the only statutes under which the Internet would substantially affect commerce. Internet use for the commission of wire fraud, for example, would substantially affect interstate commerce. In 2009, the Internet Crime Complaint Center reported that it received 336,655 complaints with a total of $559.7 million in losses,[177] suggesting that wire fraud is a major "industry." Further, the wire fraud statute contains an Interstate Nexus requirement that would otherwise limit congressional power to regulate. Finally, *Gonzales v. Raich* states that activities that undercut a federal regulatory scheme are activities that substantially affect interstate commerce.[178] Therefore, use of the Internet in the commission of a crime, specifically in the commission of wire fraud, substantially affects interstate commerce because it undercuts the federal scheme that regulates illegal conduct over the "wires."[179]

Classifying the Internet as a channel, instrumentality, and/or activity substantially affecting interstate commerce may seem tedious, but the classification of the Internet plays a large role in proposing a new standard of applying the use of the Internet to interstate commerce. One current trend is to propose a standard that would either allow Congress to regulate the Internet as a channel,[180] or allow Congress to regulate Internet use as an

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173. Cody W. Stafford, Note, *Substantial Effect: What* United States v. Schaefer *Reveals about Congress's Power to Regulate Local Activity Under the Commerce Clause*, 62 BAYLOR L. REV. 290 (2010).

174. *Id.* at 309-10; *see also* Gray, *supra* note 162, at 704-06 (concluding that, as applied to the child pornography statutes, the Internet substantially affects interstate commerce based on the same analysis).

175. *See* Stafford, *supra* note 174, at 309; Gray, *supra* note 162, at 704-06.

176. *See* Stafford, *supra* note 174, at 309; Gray, *supra* note 162, at 704-06.

177. *IC3 2009 Annual Report on Internet Crime Released*, INTERNET CRIME COMPLAINT CTR. (Mar. 12, 2010), http://www.ic3.gov/media/2010/100312.aspx.

178. 545 U.S. 1, 17-19 (2005) (holding activities that undercut a federal regulatory scheme of conduct substantially affect interstate commerce).

179. *See* 18 U.S.C. § 1343 (2012).

180. *See* Casey O'Connor, Comment, *Cutting Cyberstalking's Gordian Knot: A Simple and Unified Statutory Approach*, 43 SETON HALL L. REV. 1007, 1035-36 (2013).

activity that substantially affects interstate commerce,[181] and as we have seen, one's classification of the internet dramatically impacts Congress's power to regulate.

C. The Problem with Channels and Effects

The need for a uniform standard of applying interstate commerce requirements of federal criminal statutes to the Internet has not gone unnoticed. In fact, several pieces have contributed to solving the problem at hand, but there is one problem. Most of these standards propose to regulate the Internet as either a channel of interstate commerce, or as an activity substantially affecting interstate commerce.[182] However, regulating the Internet as a channel of interstate commerce requires that the government must show an Internet transmission or communication crossed state lines in order to prosecute, and therefore limits federal jurisdiction over crimes.[183] On the other hand, regulating the Internet as substantial affecting interstate commerce allows Congress to regulate interstate, as well as intrastate, activities with its full Commerce Clause powers,[184] which places too much power in the hands of Congress and could deny a state its right to prosecute.[185]

Both of the standards above advocate for what is, effectively, an all-or-nothing approach to regulating the Internet, and it is this type of approach that creates such polarized concerns in both camps. Further, neither extreme is entirely fair because, as seen, the approaches either deny the federal government the power it should have to prosecute, or deny the states their police power by giving the federal government too much power. So what

181. *See* David M. Frommell, Survey, *Pedophiles, Politics, and the Balance of Power: The Fallout from* United States v. Schaefer *and the Erosion of State Authority*, 86 DENV. U. L. REV. 1155, 1176 (2009).

182. *See, e.g.*, Clark, *supra* note 4, at 967-68 (stating the Internet should be regulated as a channel of interstate commerce, unless the conduct substantially affects interstate commerce); Gray, *supra* note 162, at 706-07 (stating the Internet should be regulated as an activity substantially affecting interstate commerce).

183. Campbell, *supra* note 167, at 257; Gray, *supra* note 162, at 708, 713; O'Connor, *supra* note 180, at 1035-36; Ryan K. Stumphauzer, Note, *Electronic Impulses, Digital Signals, and Federal Jurisdiction: Congress's Commerce Clause Power in the Twenty-First Century*, 56 VAND. L. REV. 277, 318 (2003); *see also* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 3-5 (2012).

184. *See supra* Part IV.A.

185. Campbell, *supra* note 167, at 252; Clark, *supra* note 4, at 969; Frommell, *supra* note 181, at 1176; Stumphauzer, *supra* note 183, at 301-02; *see also* Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 758 (2003).

must we do? The best answer, and the standard that resolves most of the concerns of both sides, is one that advocates for a middle ground. That is, a standard that honors the federal government's right to regulate commerce and prosecute criminals for federal crimes while also honoring the states and their rights as police powers.

D. Stuck in the Middle: A New Standard of Applying Federal Criminal Statutes to the Internet

The goal of this Note is to create a uniform standard that could be used to interstate-commerce requirements of criminal statutes to the Internet. This standard strikes a balance between the two alternatives above by allowing the federal government sufficient latitude to adequately prosecute crimes perpetrated through the Internet, while making sure the federal government does not become too powerful and interfere with the states' rights to prosecute local crimes. By regulating the Internet as substantially affecting interstate commerce, the standard ensures the government has the authority to prosecute intrastate crimes. However, instead of allowing the government to use its power to regulate activities, particularly non-economic intrastate activities which have no effect on interstate commerce, this standard implements a test borrowed from *NLRB v. Jones & Laughlin Steel Corp.*[186] to ensure the federal government does not coopt the states police power.

In *Jones & Laughlin Steel*, the Supreme Court determined whether an act by the NLRB was within the bounds of Congress's Commerce Clause powers. As its first step, the Court defined the Act's Interstate Nexus phrase, "affecting commerce", as "mean[ing] in commerce, or burdening or obstructing commerce or the free flow of commerce."[187] The Court reaffirmed the holding that acts which fell within that definition were within the reach of Congress's commerce power.[188] However, the Court also acknowledged that, while the NLRB may have the power to regulate in that instance, the federal government's authority must not be pushed to such excess that it destroyed distinction between interstate commerce and the "internal concerns of a [s]tate."[189] To protect against the possibility of the federal government's authority overrunning a state, the Court established a new rule. The Court held that a determination of whether or not a particular action closely and intimately (substantially) affects commerce such that it is

186. 301 U.S. 1 (1937).
187. *Id.* at 31.
188. *Id.*
189. *Id.* at 30.

subject to federal control must be made on a case by case basis,[190] and this decision has been upheld numerous times since then.[191]

Therefore, although the proposed standard would regulate the Internet as substantially affecting interstate commerce, whether or not the Internet activity substantially affected interstate commerce must be determined in each case. Making this determination in each case balances the substantial grant of power to the federal government by allowing it to regulating the Internet as substantially affecting interstate commerce. In practice, this standard would allow the federal government to regulate both interstate and intrastate activities *only if* the court finds the activity substantially affects interstate commerce.

In determining whether or not an Internet activity substantially affects interstate commerce, there are several factors that courts may consider, and these factors are generally based on whether the activity is interstate or intrastate in nature. For example, the mere fact that an activity is interstate in nature should be sufficient to show that it substantially affects interstate commerce. The process becomes more complicated, however, when the activity occurs intrastate. The *Jones & Laughlin Steel* Court stated that the government could regulate intrastate activities if the activities had a close and substantial relationship to interstate commerce such that federal control would be essential or appropriate to protect commerce.[192] Although neither the Supreme Court, nor any court since, has specifically identified factors that would determine whether an intrastate activity had a close and substantial relationship to commerce, there are several that can be inferred from case law which the courts could use to make such a determination: (1) does the intrastate activity amount to more or less constant practice and threaten to obstruct or unduly burden interstate commerce,[193] (2) is the activity related to a productive industry,[194] (3) is the activity a

190. *Id.* at 32.

191. *See* Consol. Edison Co. v. NLRB, 305 U.S. 197, 213-14 (1938); NLRB v. Benevento, 297 F.2d 873, 875 (1st Cir. 1961); NLRB v. Santa Cruz Fruit Packing Co., 91 F.2d 790, 795-96 (9th Cir. 1937); Taft, Ingalls & Co. v. Truck Drivers, Chauffeurs & Helpers Local Union No. 100, 202 F. Supp. 317, 318 (S.D. Ohio 1962); *see also* Campbell, *supra* note 167, at 259-60 (citing the modified Federal Kidnapping Act which requires the trial court to access the strength of the federal interest in the prosecution by determining whether the facts as alleged establish a sufficient nexus between the defendant's conduct and interstate commerce).

192. 301 U.S. at 37.

193. *Id.*

194. *Id.* at 38.

communication of a business nature,[195] and (4) does the activity exert a substantial economic effect.[196] Of course, these factors are neither exhaustive, nor are they dispositive, but they could provide a court a framework with which to make its determination.

Finally, this standard is similar to the uniform standard proposed by Ryan Stumphauzer in his article, *Electronic Impulses, Digital Signals, and Federal Jurisdiction: Congress's Commerce Clause Power in the Twenty-First Century*.[197] In the article, Stumphauzer proposes eliminating the *Lopez* classifications (channel, instrument, substantial affect) and implementing a standard which would allow Congress to regulate economic activities that substantially affect interstate commerce.[198] In addition, Stumphauzer's proposal would allow the government to regulate non-economic activities as long as the activity substantially affected interstate commerce.[199]

In spite of the similarities between these standards, there are three notable differences. First, this standard would only apply to the regulation of the Internet as it pertains to federal criminal statutes, whereas Stumphauzer's applies to the entirety of the Commerce Clause. Second, this standard requires a court to make a determination in every case that the activity substantially affects commerce, not merely in instances where the activity is non-economic. Finally, this proposal would not eliminate the *Lopez* classifications because they are useful in regulating activities that do not involve the Internet. However, one key feature of both proposed standards is they balance power between the federal government and the states, which is the best and fairest method of regulating commerce.

While no uniform standard which proposes to apply interstate commerce to the use of the Internet will be perfect, this standard avoids the problems that present themselves when one tries to choose between the powers of the federal government and the states. In addition, this new standard provides for a uniform application of interstate commerce requirements of federal criminal statutes to the Internet. The legal community, as well as all future defendants, needs a uniform standard of application, especially in light of the vastly differing judicial applications discussed in this Note. A uniform standard provides consistent prosecutions and court opinions, informed defendants and prosecutors, and satisfied lawyers who no longer have to guess whether or not they should prove that an Internet connection crossed

195. Polish Nat'l Alliance v. NLRB, 136 F.2d 175, 179 (7th Cir. 1943).
196. Wickard v. Filburn, 317 U.S. 111, 125 (1942).
197. Stumphauzer, *supra* note 183, at 315.
198. *Id.*
199. *Id.*

state lines. For all of these reasons and more, Congress and the Supreme Court should act, and this Note offers a suggested standard which they could apply.

VII. Conclusion

The inconsistencies present in judicial application of use the Internet to interstate commerce have never been more present than in the Tenth Circuit's *United States v. Kieffer*. When viewed within the aggregate of cases to address the Internet and interstate commerce, the need for a uniform standard that courts can apply to criminal statutes becomes clear. The best standard is one that honors both Congress's Commerce Clause powers and the states' police power, and this Note's standard accomplishes both of those tasks. However, proposed standards are useless without action by Congress or the Supreme Court, and it is critical they act. The Internet permeates all aspects of life, including the ways in which we commit crimes. It is no longer an option to "wait and see" what happens to the Internet in a few years. We must acknowledge this and enact a scheme that uniformly and fairly enforces crimes committed via the Internet—let's reinvent the wheel.

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