RESTORE AMERICA'S WIRE ACT: CLOUD KILLER?

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If passed, the technological side effects of the Restore America's Wire Act (RAWA) could set the regulated gaming industry back 20+ years and keep it there. RAWA would not simply make online gaming illegal, it would also be damaging to the regulated land-based casino industry.

I. WHAT IS RAWA?

A. Nomenclature: Gambling games

What is a gambling game, gambling, a game of chance, or gaming? For the purposes of this article, all are functionally synonymous and may be referred to as gambling, gambling games, gaming, or games of chance. In the United States, the legal determination that a game is a gambling game typically includes the assessment of three elements: (i) consideration, (ii) chance, and (iii) prize.¹ The consideration element and the prize element are typically easy to ascertain, while the chance element may not be.

A commonly used legal test to determine if a game has a chance element is the "dominant factor" test. The dominant factor test views games as a combina-

tion of skill and chance. A game is determined to be a game of chance if the chance factor is larger than the skill factor.² Under this test, pure chance games, such as slot machines and craps, are gambling games as expected. But, some games that have some amount of chance and some amount of skill may also be considered games of chance. Poker is one example of a game having both chance and skill. In poker, the draw from a randomized deck determines the cards held in each player's hand. Players may use the randomly selected cards in their hand well or poorly. In a majority of states that use the dominant factor test, poker is typically found to be a game of chance rather than a game of skill. However, it is a controversial issue with case law³ and research⁴ continuing to find poker on both sides of the skill versus chance debate.

The advent of individual players playing poker over the Internet using personal computers, no matter where they were located in the U.S., and playing against other players potentially from around the world (e.g., online poker), was the most visible form of online gaming that led to the original creation of RAWA.

B. RAWA and background of the Wire Act of 1961

RAWA is legislation that has been introduced⁵ in the U.S. Congress with the advertised goal being to stop online gambling by "restoring" the purported original intent of the Wire Act of 1961, also called the Federal Wire Act or simply the Wire Act.

Leading up to 1961, then-U.S. Attorney General Robert F. Kennedy championed several bills, including those that became the Wire Act, the Travel Act, and the Wagering Paraphernalia Act. All became federal law in 1961. This package of bills was intended to combat organized crime by cutting off what the Kennedy administration saw as one primary source of

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¹ANTHONY N. CABOT AND KEITH C. MILLER, *THE LAW OF GAMBLING AND REGULATED GAMING*, ch. 1 (2011).

²Thomas J. Miles, Steven Levitt, and Andrew M. Rosenfield, *Is Texas Hold 'Em a Game of Chance? A Legal and Economic Analysis*, 101 GEO. L.J. 581, 587 (2013).

³Robert C. Hannum and Anthony N. Cabot, *Toward Legalization of Poker: The Skill vs. Chance Debate*, 13.1 UNLV GAMING RES. & REV. J. 1–20 (Apr. 2009).

⁴R.J.D. Potter van Loon, M.J. van den Assem, and D. van Dolder, *Beyond Chance? The Persistence of Performance in Online Poker*, 10.3 PLoS ONE e0115479 (Mar. 2015), <http://dx.doi.org/10.1371/journal.pone.0115479>.

⁵Versions of the Restore America's Wire Act (RAWA) have been introduced in the 113th and 114th sessions of Congress. In the 113th Congress, RAWA was introduced as Senate bill S. 1259 and as House bill H.R. 4301 (both were referred to the committee and did not make it out). In the 114th Congress, RAWA was introduced as Senate bill S. 1668 and House bill H.R. 707; as with the previous bills neither made it out of committee.

organized crime's funding—illegal gambling on sports events and horseracing.⁶

The Wire Act was codified as 18 U.S.C. § 1084. Paragraphs (a), (b), and (e) of the Wire Act read as follows (underlining added for emphasis):

18 U.S.C. § 1084 Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

...

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

C. Ambiguity in the Wire Act

One question that is central to this article lies in the ambiguity found in paragraph (a): does the Wire Act cover wagering on sports events or all wagering?⁷

When the Wire Act is looked at syntactically, the wording of the Wire Act in paragraph (a) permits parsing of the phrase

“. . . of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, . . . ”

as either

“. . . of bets or wagers or information assisting in the placing of bets or wagers on any *sporting [event or contest]*, . . . ”

where there is one type of bet/wager with “sporting” amending both “event or contest,” or as

“. . . of bets or wagers or information assisting in the placing of bets or wagers on any *sporting event or [contest]*, . . . ”

where there are two separate types of bets/wagers, one on “sporting event” and one on “contest.” In the later case, “sporting” only modifies “event” and does not modify “contest.”

D. Status of non-sports wagering under the Wire Act

Case law is divided on the question of non-sports wagering being covered under the Wire Act. The highest court to issue a holding on this matter is the Fifth Circuit in *In re Mastercard* in 2002.⁸ *In re Mastercard* originated from the Eastern District of Louisiana.⁹ The district court's holdings were affirmed by the Fifth Circuit stating that it agreed with the district court's statutory construction, reading of related case law, its summary of the legislative intent and, therefore, its conclusion regarding the Wire Act.¹⁰ Since the Fifth Circuit did not reiterate the arguments and analysis of the district court, the district court's opinion is cited for specifics. The Fifth Circuit

⁶Statement of the Honorable Robert F. Kennedy Attorney General of the United States, Before Subcommittee No. 5 of the House Committee on the Judiciary, in Support of Legislation to Curb Organized Crime and Racketeering, May 17, 1961, accessible at <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/05-17-1961.pdf>.

⁷If the Wire Act is construed to cover non-sports wagering, then a determination must also be made if the wager is based on a gambling game; in the case of poker, in a majority of jurisdictions, a determination must then be made if poker is predominantly a game of skill or chance. If the wagering is based on poker and poker is

deemed to be a game of skill, the Wire Act would not apply no matter how the Wire Act is construed.

⁸*In re Mastercard International Inc.*, 313 F.3d 257 (5th Cir. 2002).

⁹*In re Mastercard International Inc. Internet Gambling Litigation*, 132 F. Supp. 2d 468 (E.D. La. 2001).

¹⁰*In re Mastercard International Inc.*, 313 F.3d at 262.

affirmed the holding of the district court that the Wire Act applies only to sports betting and not other types of gambling.¹¹

In *United States v. Lombardo*,¹² the district court disagreed with *In re MasterCard*. The court in *Lombardo* concluded that the Wire Act applies to all forms of wagering. This holding is diametrically opposite to the holding of *In re MasterCard*.

The *In re MasterCard* court used typical rules of construction and reasoned, “a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest.”¹³ The court also noted that past legislative attempts to broaden the Wire Act to cover more than gambling on sports would have been unnecessary if the Wire Act already covered all gambling, rather than just gambling on a sports event or sports contest.¹⁴

The *Lombardo* court disagreed with Fifth Circuit by focusing on the lack of a sporting qualifier associated with the phrase “betting or wagering” in portions of the Wire Act.^{15,16} *Lombardo* also noted that the statute’s language includes exceptions that refer to sports betting alone and, therefore, the language in other parts of the statute do not clarify the first section of the statute.¹⁷

Under *Lombardo*, the resulting structure of 18 U.S.C. § 1084 becomes problematic. *Lombardo* requires § 1084(a) to be read as a narrow prohibition regarding sports betting followed by two general prohibitions that apply to all betting; that is, a specific restriction followed by general prohibitions. Legislation is normally written as the reverse of the *Lombardo* reading, having general prohibitions followed by specific restrictions. Secondly, *Lombardo* does not answer the issues raised when later sessions of Congress proposed bills to broaden the Wire Act to cover all betting.¹⁸ Thirdly, *Lombardo* does not address the

context of related legislation that would appear to conflict with its interpretation of the Wire Act. For example, the Unlawful Internet Gambling Act (UIGEA) of 2006¹⁹ prohibits the use of electronic communications for unlawful monetary transactions. UIGEA clearly contemplates the existence of both legal and illegal betting activities using electronic communications. If all electronically communicated betting had been made illegal under the Wire Act, there would be no need for UIGEA’s recognition that both legal and illegal electronically communicated betting exists.

Additional insight and support for the narrower reading of the Wire Act (i.e., it applies only to wagering on sports events) may be found in “The Original Intent of the Wire Act and Its Implications for State-Based Legalization of Internet Gambling,” by Michelle Minton.²⁰ Minton discusses speeches, papers, and hearing materials given at the time the Act was under consideration. The records show that Robert Kennedy’s intent was to undermine the single largest source of funds for organized crimes: sports gambling. In one Senate hearing for the bill, Assistant Attorney General Miller explicitly stated that the bill was limited to sporting events or contests.

Minton also presents arguments that the Wire Act, when viewed as part of a whole package of legislation that includes the Travel Act and the Wagering Paraphernalia Act, is narrowly focused. The three acts each cover different betting activities. For example, the Wagering Paraphernalia Act²¹ explicitly includes wagering activities such as bookmaking, wagering pools with respect to a sporting event, numbers games, policy games, bolita, and “similar game aspects and types of sports betting or wagering activities.”²² Clearly, the Kennedy administration was capable of writing legislation that addressed other forms of betting and related activities in addition to sports gambling when they wanted to. It is not credible

¹¹*Id.*

¹²*U.S. v. Lombardo*, 639 F. Supp. 2d 1271 (D. Utah 2007).

¹³*In re MasterCard Inc. Internet Gambling Litigation*, 132 F. Supp. 2d at 480–481.

¹⁴*Id.*

¹⁵18 U.S.C. § 1084(a).

¹⁶639 F. Supp. 2d at 1280–1282.

¹⁷*Id.*

¹⁸*In re MasterCard Inc. Internet Gambling Litigation*, 132 F. Supp. 2d at 480–481.

¹⁹Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. § 5361 et seq.

²⁰Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-Based Legalization of Internet Gambling* (Occasional Paper Series 29, Las Vegas Center for Gaming Research, University of Nevada Las Vegas (UNLV) University Libraries, 2014).

²¹18 U.S.C. § 1953.

²²Minton, *supra* note 20, at 3–4.

to assume that the Kennedy administration, when presenting these three bills as a package, did not understand what each was intended to cover. Minton concludes that the most reasonable understanding of the Wire Act is that it was written to cover the transmission of sports gambling information only.²³

Overall, the reasoning found in *In re MasterCard* is more persuasive than the arguments found in *Lombardo*. When considered with contextual information that includes later attempts to broaden the Wire Act to cover all wagering, related legislation that clearly contemplates both legal and illegal wagering, plus other legislative history and context of the Wire Act as discussed in Minton, it appears that the holdings in *In re MasterCard* are well founded.

Different administrations have had different interpretations of the Wire Act. The period of interest for this article coincides with online gambling from the 1990s to the present. The administrations during that period have been the Clinton, George W. Bush, Obama, and Trump administrations. The Wire Act was impliedly interpreted by the Clinton administration and was directly interpreted by the George W. Bush administration and the Obama administration. The Trump administration has not made any interpretations of the Wire Act as of the date of this article.

The Clinton administration made some general statements that implied a belief that the Wire Act applied to all online gambling wagering, not just sports wagering.²⁴ However, the Clinton administration never issued formal opinions or formal letters attesting to that belief and the Clinton Department of Justice (DOJ) did not make any public prosecutorial efforts using the Wire Act.

The DOJ under the George W. Bush administration issued letters directly on point, stating that it believed the Wire Act prohibited all forms of online gambling.²⁵ Additionally, the George W. Bush DOJ used the Wire Act in its indictment of online poker operator Anurag Dikshit, who co-founded and ran the online poker site PartyGaming (and who pled out in 2008²⁶).

The DOJ under the Obama administration issued a memorandum dated September 20, 2011 that the Wire Act applied to sports wagering only.²⁷

Note: the “Black Friday” indictments of April 15, 2011, which included defendants PokerStars, Full Tilt Poker, and Absolute Poker, did not make use of the Wire Act; the charges were based on UIGEA.²⁸

Although the views of the different administrations’ DOJ do not carry the weight of law or regulation, they do indicate how the law may be applied by that administration’s DOJ. For example, in the case of the Obama administration, no indictments related to online gambling (other than sports wagering) were made using the Wire Act, consistent with the Obama administration’s memorandum.

The differing interpretations of the Wire Act by different administrations and the split in case laws are a result of the ambiguity found in the Wire Act.

E. Wire Act ambiguity and the Internet

The ambiguity found in the wording of the Wire Act rose to importance during the last half of the 1990s and continues to the present. The refocus on the Wire Act was due to the rise in use of the Internet by the general public during the 1990s, together

²³*Id.* at 8.

²⁴Chet Dembeck and Lori Enos, *Net Gambling Ban Stalls in U.S. House*, E-COMMERCE TIMES (July 18, 2000), <http://www.ecommercetimes.com/story/3798.html>, which includes statements made by the Clinton administration that indicates a belief that H.R. 3125 (Internet Gambling Prohibition Act of 2000) contained provisions that would legalize some online gambling that were currently illegal, apparently referencing the Wire Act.

²⁵Letter from the U.S. Department of Justice (DOJ) to the Chairman of the Nevada Gaming Control Board Dennis Neilander (Aug. 2002), and Letter from the U.S. DOJ to the North Dakota Attorney General, (Mar. 2007). Both letters asserted that the Wire Act prohibited all online bets or wagers.

²⁶Press Release, U.S. Attorney for the Southern District of New York, PartyGaming Founder Pleads Guilty in Internet Gambling Case and Agrees to \$300 Million Forfeiture (Dec. 16, 2008), <https://www.justice.gov/archive/usao/nys/pressreleases/December08/dikshitanuragpleapr.pdf>.

²⁷Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. (Sept. 20, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>, which includes analysis that focuses on the Legislative intent of the Wire Act and includes arguments that reading the statute as applying to all wagering requires parsing the statute into an in-harmonious patchwork that sometimes addressing all online wagering and sometimes addressing only sporting wagers.

²⁸Press Release, Federal Bureau of Investigation (FBI) New York Field Office, Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses, and Laundering Billions in Illegal Gambling Proceeds (April 15, 2011), <https://archives.fbi.gov/archives/newyork/press-releases/2011/manhattan-u.s.-attorney-charges-principals-of-three-largest-internet-poker-companies-with-bank-fraud-illegal-gambling-offenses-and-laundering-billions-in-illegal-gambling-proceeds>.

with a concurrent rise in Internet (online) gambling activities.

One very popular form of online gambling was online poker. Initially played for free,²⁹ in 1998, Planet Poker started an online poker site using real dollar deposits and payouts.³⁰ Over the next five years, other well-known sites such as PartyPoker, Paradise Poker, PokerStars, Planet Poker, 888Poker, Full Tilt Poker, Absolute Poker, Ultimate Bet, and others came online.³¹ In addition to the major sites, there were numerous small sites.³²

Existing laws appeared to be largely ineffective as tools against online poker and other gambling. The Wire Act, as explained above, appeared to address the issue most closely but its applicability to online poker appears to be problematic at best. To enable law enforcement to stop online poker (or online gambling in general) there are three options:

- a. interpret the Wire Act as covering all gambling games, not just sports wagering;
- b. pass new legislation to specifically prohibit Internet gambling;³³ or
- c. amend the Wire Act to cover all online gambling activities.³⁴

The last option is the focus of this article. RAWA is the latest attempt to amend the Wire Act to cover all online gambling activities.

F. RAWA: Response to the 2011 DOJ Memorandum of the Wire Act

In response to the 2011 DOJ Memorandum, Senator Graham of South Carolina introduced the original RAWA bill to the U.S. Senate in 2014.³⁵ The bill was reintroduced in 2015.³⁶ As of March 2017, RAWA has not been reintroduced in the Senate. Si-

milar bills were introduced in the House in 2014 and 2015.³⁷ RAWA would amend the current version of the Wire Act. Portions of the Wire Act are shown below, as they would be amended by RAWA.

The amendments shown here are made according to S. 1668 of 2015. The entire text of S. 1668 can be found in Appendix A.

Additions to the original Wire Act are indicated by underlining and subtractions are indicated using ~~stri-
kethroughs~~.

18 U.S.C. §1084 Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of ~~bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest~~ any bet or wager, or information assisting in the placing of any bet or wager, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of ~~bets or wagers~~ any bet or wager, or ~~for information as-
sisting in the placing of bets or wagers~~, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

. . .

²⁹One example was IRC poker, now defunct. *IRC poker*, WIKIPEDIA, https://en.wikipedia.org/wiki/IRC_poker.

³⁰Planet Poker, WIKIPEDIA, https://en.wikipedia.org/wiki/Planet_Poker.

³¹*The Poker Boom Part 2: Online Poker Grows*, POKER LISTINGS (Feb. 9, 2008), <http://www.pokerlistings.com/the-poker-boom-part-2-online-poker-grows-23519/888poker>, WIKIPEDIA, <https://en.wikipedia.org/wiki/888poker>.

³²For a partial list of defunct poker sites, indicating the number of sites that have come and gone: *Defunct Poker Sites*, POKER LISTINGS, <http://www.pokersites.com/defunct>.

³³One example was the Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997), which was introduced, made it out of committee, but was not voted into law.

³⁴Examples of attempts to change the Wire Act *before* RAWA was proposed include: Crime Prevention Act of 1995, S. 1495, Title XV, 104th Cong. (1st Sess. 1995); Computer Gambling Prevention Act of 1996, H.R. 3526, 104th Cong. (2d Sess. 1996); Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1st Sess. 1997); and the Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. (2d Sess. 2000)

³⁵S. 2159, <https://www.govtrack.us/congress/bills/113/s2159>.

³⁶S. 1668, <https://www.govtrack.us/congress/bills/114/s1668>.

³⁷H.R. 4301 and H.R. 707, respectively.

~~(e) As used in this section, the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.~~

(e) As used in this section—

(1) the term *bet or wager* does not include any activities set forth in section 5362(1)(E) of title 31;

(2) the term *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory, or possession of the United States;

(3) the term *uses a wire communication facility for the transmission in interstate or foreign commerce of any bet or wager* includes any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise; and

(4) the term *wire communication* has the meaning given the term in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

The key changes include the expansion of covered wagers in paragraph (a), shown below with portions underlined for added emphasis:

Wire communication facility for the transmission in interstate or foreign commerce of any bet or wager, or information assisting in the placing of any bet or wager, or for the transmission of a wire communication, which entitles the recipient to receive money or credit as a result of any bet or wager . . .

and the addition of what is covered by a wire communication in paragraph (e)(3), shown below with portions underlined for added emphasis:

(3) the term *uses a wire communication facility for the transmission in interstate or foreign*

commerce of any bet or wager includes any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise.

G. Objections to RAWA

Most objections to RAWA fall into one of two categories. One category is states’ rights. RAWA would govern intrastate gambling matters that have previously been the purview of each state.³⁸ A second category are the objections coming from state lotteries, where state officials fear that enacting RAWA would severely undercut their sales and/or their ability to run their lotteries as they see fit.³⁹

There is an additional area of concern if RAWA passed. RAWA may have damaging technical consequences for legal land-based casinos. That RAWA’s retrograde technical consequences may be unintentional appears to be supported by the fact that the bill’s primary advocates come from non-technical backgrounds.⁴⁰

II. TECHNICAL BACKGROUND

This technical area is complex. Technical people get their PhDs studying sub-components of the subject matter described in this section. Abstractions and overarching general concepts must therefore be used. The main thrust of the technical concepts described herein are just those required to understand the unintended affects RAWA would have if it were passed into law.

This technical section will not use cites intermixed with the technical descriptions. Instead, cites for the entire technical section are footnoted below.⁴¹ These cites are to sources of information that can provide more general and in-depth coverage of the technical topics presented in this overview.

³⁸See, e.g., Press Release, American Conservative Union, American Conservative Union Supports States’ Rights on Internet Gambling (against RAWA), (Feb. 6, 2015), <http://conservative.org/american-conservative-union-supports-states-rights-internet-gambling-right-state-prohibit-regulate-activity-not-federal-government/>.

³⁹See, e.g., the North American Association of State and Provincial Lotteries (NASPL) open letter to Senator Graham expressing dislike for RAWA, at <http://c4cop.com/wp-content/uploads/2014/04/NASPL-Grahamletter-Final1.pdf>.

⁴⁰The primary non-technical person backing RAWA is Sheldon Adelson. Adelson is the chief executive officer (CEO) of the Las Vegas Sands Corporation. If an online search is executed using search terms that include Adelson and RAWA, pointers to many articles discussing Adelson’s support of RAWA will be displayed.

⁴¹For networking and the TCP/IP protocols, Wikipedia has a quick overview at https://en.wikipedia.org/wiki/Packet_switching; Microsoft has a free downloadable introduction to TCP/IP at <https://www.microsoft.com/en-us/download/details.aspx?id=8781>; two good text books are: *TCP/IP Illustrated, Vol. 1: The Protocols* (Addison-Wesley Professional Computing Series) by W. Richard Stevens, and *Computer Networks* (Prentice Hall PTR) by Andrew S. Tanenbaum. For Cloud computing, MIT Press has a good introductory, easy to read, non-condescending book for non-technical readers: *Cloud Computing* (MIT Press Essential Knowledge Series) by Nayan B. Ruparelia.

A. Networking and the Internet

All wire communications use combinations of hardware and software technologies. Although substantially different communication technologies have coexisted in the past, currently, long distance wired or wireless communications (e.g., longer than a Bluetooth connection or a cord to a printer) used in the public's daily life will involve digital packet networks. These combine hardware and software components to enable the transmission of "packetized" information. No matter what you are sending or receiving (voice, e-mails, long documents, Internet searches, data, streamed data such as movies, etc.), the matter to be transmitted is broken up into small packages of information called packets. If the matter to be sent is large, a streamed video for example, there may be thousands of packets.

Each packet is sent individually over multiple networks that make up the Internet to reach a final destination. Each packet has its own addresses (a "to" address and a "from" address) as well as other data that surrounds the information in the packet. Network technology allows all of these packets to be carried reliably over large distances with great speed and efficiency. The network technology uses a set of network protocols called TCP/IP (Transmission Control Protocol/Internet Protocol). Depending on your background and your work, you may hear TCP/IP discussed daily, occasionally, or (for most people) never.

The Internet is made up of smaller networks that are connected to each other. The connections between networks (and subnetworks within a network) are made using network routers. Routers are a combination of hardware and software that receive packets coming from one network (or source within a network) and sends them out on a second network (or destination in a second network). The second network or destination is used as part of the packet's journey to its final destination. The Internet's multitudes of connected networks contain thousands and thousands of routers.

The technology that enables millions and millions of packets to travel over the Internet simultaneously, being routed as needed, is embodied in the TCP/IP protocol. TCP/IP is a decentralized protocol. Each router receives packets addressed to it, and determines where to send each packet next. The next destination

may be the packet's final destination, if the final destination is reachable directly by this router, or, to a next router. When a router sends a packet to a next router, the next router is selected based on a number of criteria. One criterion is availability—is the potential router responding (is it down or otherwise unreachable)? If there is not a timely response, the router selects a different next router.

A similar determination is made based on traffic. If the traffic to a router or set of routers begins to slow down, the router sending a packet to a next router will not send to the busy routers, it will send the packet to a less busy router. The selection of routers is not based on geographical location. Rather, it is based on electronic transmission performance and availability. Availability and transmission speed are higher between major network router installations that have larger capabilities than smaller local network router installations. Since most packets are transmitted in time measured in milliseconds, sending a packet 3,000 miles across the U.S. is, from a users' perspective, functionally equivalent to sending the packet 100 miles from one city to another.

This dynamic method of routing packets has a consequence: for any specific packet, there is *no* guarantee that the packet will be transmitted through a specific router or set of routers, and there is *no* guarantee what actual physical links any particular packet may traverse. It all depends on traffic, router availability, and other considerations. In general, packet paths will vary and substantially all packetized data may include packets that crossed state lines at some point in their travels.

As one simple example, an Apple laptop was used to access the Nevada Gaming Control Board (NGCB) website from a Nevada town west of Las Vegas. Using networking tools available in Apple's OS X operating system, two different network paths were observed. One path went from the Nevada town to Phoenix to Las Vegas, and one went from the Nevada town to Los Angeles to Sacramento to Reno to Las Vegas. Notice that the beginning and end points of the transmissions are within Nevada, yet the packets always crossed state boundaries. That is the key point when using public networks for any communications—it is virtually guaranteed that some packets

will cross state boundaries, even when the start and end points of a transmission are within a single state.

No one can ever guarantee that a packet from a communication stream starting and ending in the same state will not cross a state boundary. At some point, some packet(s) will.

B. The Cloud

The Cloud may be characterized as the business of offering large and variable amounts of data storage that is physically remote from a client (user) site, and associated software for client use. Cloud storage allows clients to store large amounts of data using large amounts of storage space at the Cloud storage facilities and to expand or shrink storage usage very quickly (on demand).

This eliminates a huge headache for the client. For example, clients can avoid the typical capital expenditure cycle, including: justifying equipment purchases; buying additional local storage; getting it installed; upgrading the computer room environment for the new storage (including considerations of cooling, heat, false floors, halogen fire suppression systems, backup power, data backups, disaster protection); moving data sets onto the new storage; etc. Someone else has all these headaches while providing on-demand storage to the client.

The Cloud may also offer pay-for-service applications. Pay-for-service or pay-for-use applications are like renting a car for specific uses rather than buying one. Users that make use of Cloud software applications may be charged to use the software based on time-and-use models. One typical situation where this can be an advantage is with large data sets that use large database applications to manage them. It is typically more cost effective to use a pay-for-use model when extracting data from your Cloud storage than it is to try and manage your own database application remote from the data. Other software services may be Cloud-based as well.

Cloud storage and Cloud services are frequently spread amongst multiple physical locations, even when you are purchasing Cloud storage/service

from a single provider. There is no reason that all of the virtual (in the Cloud) storage/services would be at a single physical location, and, for disaster recovery reasons and worldwide access, you would not want Cloud storage in a single physical location. The physical locations may be anywhere on the Earth. Cloud storage and Cloud services are accessed via public networks.⁴² Using Cloud services, including Cloud storage, would result in the client's data being packetized and crossing state boundaries.

For the purposes of this article, the important aspects of Cloud storage and Cloud services include: (i) being cost effective for the storage capability and storage flexibility provided; (ii) providing software services on a pay-for-use or pay-as-you go model; and (iii) accessibility through public networks so that clients can access their data inexpensively from anywhere.

III. RAWA ELEMENTS

Looking at RAWA paragraph (e)(3) (underlining added for emphasis):

(3) the term *uses a wire communication facility for the transmission in interstate or foreign commerce of any bet or wager* includes any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise;

and combining that with an understanding of how TCP/IP and the Internet work, it is clear that RAWA would apply to any and all communications that use any portion of the Internet. Put differently, the wording of RAWA means that any use of any portion of the Internet, no matter how apparently small in geographic terms such as between intrastate locations, would be covered.

Looking at elements from paragraph (a) and (e)(1) (underlining added for emphasis):

wire communication facility for the transmission in interstate or foreign commerce of any bet or wager, or information assisting in the placing of any bet or wager, or for the transmission of a wire communication, which entitles the recipient to

⁴²Clouds may be private rather than public, but private Clouds are expensive and typically out of reach for all but governmental agencies or the largest companies.

receive money or credit as a result of any bet or wager

(1) the term *bet or wager* does not include any activities set forth in section 5362(1)(E) of title 31;⁴³

RAWA uses the words “bet or wager” without any qualifications, excepting the one specific exclusion in (e)(1) where “bet or wager” does not mean financial market activities. Thus, RAWA’s use of “bet or wager” is the broadest possible.

RAWA would therefore cover any use of the Internet, including intrastate transmissions, which are used by all brick-and-mortar casino operators who make use of Cloud services. RAWA covers any bet/wager, any information that assists the placement of a bet/wager, and any communication that entitles a recipient to any money or credit based on a bet/wager. The combination is deadly for the future of brick-and-mortar casinos that need to keep abreast of technical advances. In addition to covering all wagering activity, RAWA covers any credit associated with wagering since “credit” is not qualified or narrowed. For example, credit arguably includes any redeemable points that results from any betting activities (i.e., player rewards), so that any storage or tallying of any indicia of points or other player rewards would be illegal to transport over any public network under RAWA.

IV. RAWA: CLOUD KILLER

For the purposes of this article, it will be assumed that modern casinos would make best use of current technologies if they could. This points to the use of Cloud storage and/or Cloud software services, especially by small and mid-sized land-based (brick-and-mortar)⁴⁴ and online casinos. The largest land-based casinos could, theoretically, afford their own data centers and private Clouds, so may or may not make use of public Cloud services; however, they will still transport data between multiple casinos or data centers owned by one corporate entity using some portion of the Internet.

RAWA would be a Cloud killer for legal land-based casinos.

The elements needed to apply RAWA are:

- (1) in the business of betting or wagering
- (2) use of interstate or foreign wire communications, including the Internet, even if incidental
- (3) to transmit
 - (i) a bet/wager,
 - (ii) any information that assists the placement of a bet/wager, and,
 - (iii) any communication, which entitles a recipient to any money or credit, based on a bet/wager

The first two elements are always met by modern legal land-based casinos. Clearly, a legal casino is in the business of betting and wagering. Any casino that uses the Internet in any way will result in some, if not all, of the casino’s packetized data travelling “incidentally” across state boundaries. Even the largest land-based casinos with private Clouds that use the Internet for any data transfers (i.e., network operating centers) would be adversely affected by RAWA.

The final RAWA element can be met by falling under the wording of any one of (i), (ii), or (iii) of element 3, shown underlined immediately above.

Consider each of the three.

Element (i), “bet or wager,” means that any transmission over any portion of a public network containing any bet or wager would be illegal. That appears to cover at least the following:

- Server-based gaming (Class II or Class III) making use of third-party server hosting services (Cloud servers), or making use of third-party servers to transmit gaming information between casinos;
- Class II and Class III WAPs (wide area progressives), which by definition transmit betting data between properties (may be a public or private network; if public RAWA would prohibit the transmission) and a network operations center (NOC), which is

⁴³31 U.S.C. § 5362(1)(E) excludes stock market transactions from being included in “bet or wager.” See <https://www.law.cornell.edu/uscode/text/31/5362>.

⁴⁴“Land-based” and “brick-and-mortar” are used interchangeably in this article.

typically over a public network to the NOC;⁴⁵

- Inter-casino linked systems (as defined in Nev. Rev. Stat. § 463.01643);
- Mobile slot gaming (as defined in Nev. Rev. Stat. § 463.0176);
- Mobile race and sports wagering (“account wagering” as found in Nevada Regulations 5A, 22, 26A-26C, and other regulations); and
- Centralized Class II (bingo) servers, where a central property or location serves multiple properties.

Element (ii), “any information that assists the placement of a bet/wager” appears to include at least the following:

- all sports or race line setting data provided from any source outside of a casino;
- any off-site wagering data delivery system.

Element (iii), “any communication which entitles a recipient to any money or credit based on a bet/wager” appears to include at least the following:

- Any Cloud storage of any player data, such as that associated with player loyalty programs that may result in any type of redeemable tangible reward;
- Any Cloud processing of any databases having the potential to award players’ credit or awards for gaming purposes; and
- any advertising that could be redeemed in any way for playing credits on the gaming floor of a casino.

Operators will probably be aware of other useful network-connected capabilities that might become illegal if RAWA is passed. For example, some gaming equipment that is used with traditional gambling games make use of an Internet connection to report game-play data that would likely become illegal. That might even include certain signage (if it helps a player make a bet), electronic

promotional devices that run in parallel to slots or table games that are used across multiple properties and more.

An additional area of concern is social gaming. Social gaming has many definitions.⁴⁶ For the regulated gaming industry, it traditionally means online games that mimic casino games, such as online versions of slots, craps, poker, etc. Players may pay to gain entrance to the site and may pay for in-play items such as virtual coins/credits/tokens/chips, etc. But, they are not paid any cash winnings usable outside the online environment. To entice online players to come to land-based casinos, operators of land-based casinos offer various online rewards such as transferable slot play, virtual credits (some usable for game play at a land-based casino), and other enticements. It appears that RAWA may make any kind of reward gained while playing online illegal if useable in any way at a land-based casino.

Some individuals might argue this is too alarmist in that no administration would go that far when using RAWA. But is it? The breadth of prosecution based on RAWA would depend on the vagaries of future administrations and how the DOJ run by future administrations want these laws enforced. Even arguing for a narrow reading of RAWA, it appears that Cloud storage and Cloud services used by land-based casinos would be illegal. Other gaming uses of the Internet would be made illegal as well.

Thus, RAWA would make it illegal for legal casinos to make use of the best technical solutions for data (in terms of both cost and reliability). Further, small casinos who cannot afford their own data centers would be forced to go back to casino technology as it existed in the mid-1990s and earlier, that is, casino technology as it existed before the Internet became viable for commercial use.

Is this what casino operators really want? Is RAWA “good” for land-based casinos? It appears RAWA would push all or a vast majority of land-based casinos into a technically stagnant backwater, unable to

⁴⁵ See, for example, figure 2 in U.S. Patent 6,830,515, which shows a public Internet connecting casino properties to a network operations center (NOC). <https://www.google.com/?tbn=pts#tbn=pts&q=6%2C830%2C515>.

⁴⁶ A paper on social gaming produced by the United Kingdom Gambling Commission provides a useful and brief overview. The entire paper is only nine pages,

with social gaming definitions covered in the first two pages: GAMBLING COMMISSION (UK), SOCIAL GAMING (2015), <http://www.gamblingcommission.gov.uk/pdf/Social-gaming-January-2015.pdf>.

respond to technical advances. This will allow non-casino entertainment forums to leap ahead while land-based casinos stagnate (online casinos would be illegal).

An additional area of concern is that these restrictions and resulting stagnation applies to all land-based casinos, including tribal casinos. RAWA appears to be directly contrary to the underlying public policy purposes and considerations behind the Indian Gaming Regulatory Act (IGRA) by limiting tribal economic development. This is another example of an unintended consequence of RAWA.

V. SUMMARY

RAWA would force all legal land-based casinos, including tribal casinos and traditional commercial casinos, into a technological backwater that would be functionally equivalent to networking technology as it existed approximately 20–25 years ago. Put differently, RAWA would force legal land-based casinos back into the pre-Internet era and would freeze them in an obsolescent technological time warp. Land-based casinos would be unable to adapt to new and evolving technologies. Eventually, this technical stagnation would lead to financial stagnation.

RAWA would also kill emerging opportunities. For example, RAWA would prohibit the ability to monetize multiplayer online games, such as where game tournaments enable top players to play against each other while spectators make bets on the outcomes (esports). Think of all the other opportunities that are not yet known and that may originate from other online sources of entertainment. RAWA eliminates all these potentialities. For all of the reasons discussed in this article, passing RAWA would be very damaging to the land-based casino industry.

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APPENDIX A: RAWA

114th CONGRESS

1st Session

S. 1668

IN THE SENATE OF THE UNITED STATES

June 24, 2015

Mr. Graham (for himself, Mrs. Feinstein, Mr. Lee, Ms. Ayotte, Mr. Rubio, Mr. Coats, and Mr. Tillis) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To restore long-standing United States policy that the Wire Act prohibits all forms of Internet gambling, and for other purposes.

1. Short title

This Act may be cited as the Restoration of America’s Wire Act.

2. Wire Act clarification

Section 1084 of title 18, United States Code, is amended—

- (1) in subsection (a)—
 - (A) by striking bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, and inserting any bet or wager, or information assisting in the placing of any bet or wager,;
 - (B) by striking result of bets or wagers and inserting result of any bet or wager; and
 - (C) by striking or for information assisting in the placing of bets or wagers; and

(2) by striking subsection (e) and inserting the following:

(e) As used in this section—

- (1) the term *bet or wager* does not include any activities set forth in section 5362(1)(E) of title 31;
- (2) the term *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory, or possession of the United States;
- (3) the term *uses a wire communication facility for the transmission in interstate or foreign commerce of any bet or wager* includes any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise; and
- (4) the term *wire communication* has the meaning given the term in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

3. Rule of construction

Nothing in this Act, or the amendments made by this Act, shall be construed—

(1) to preempt any State law prohibiting gambling; or

(2) to alter, limit, or extend—

- (A) the relationship between the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.) and other Federal laws in effect on the date of enactment of this Act;
- (B) the ability of a State licensed lottery (including in conjunction with its supplier) or State licensed retailer to make on-premises retail lottery sales, including through a self-service retail lottery terminal, or to transmit information ancillary to such sales (including information relating to subscriptions or fulfillment of game play), in accordance with applicable Federal and State laws;
- (C) the ability of a State licensed gaming establishment or a tribal gaming establishment to transmit information assisting in the placing of a bet or wager on the physical premises of the establishment, in accordance with applicable Federal and State laws; or
- (D) the relationship between Federal laws and State charitable gaming laws.