TO THE “STATUS-QUO” AND BEYOND: THE POSSIBLE UNINTENDED CONSEQUENCES OF THE “RESTORATION OF AMERICA’S WIRE ACT”

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INTRODUCTION

To say that 18 U.S.C. § 1084, more commonly known as the Wire Act, has been a thorn in the side of lawmakers, gaming industry leaders, historians, and anyone else that hazards an analysis into the role it has played in gaming jurisprudence, does not do justice to the convoluted nature of the statute and the headaches it has caused those who try to understand it. What began as part of then-Attorney General Robert F. Kennedy’s package of bills designed to

1 The author would like to thank his faculty advisor, Professor Greg Gemignani. The analysis contained in this note was inspired by a conversation the author had with Professor Gemignani, and his initial analysis of the impact of the Restoration of America’s Wire Act upon the Federal Wire Act and issues it may cause other forms of gambling. Professor Gemignani’s original notes and conclusions are on file with the author. In addition to Professor Gemignani, who graciously encouraged the author to use his initial analysis as a launching point to write on this student note topic, the author would also like to thank Professor Jennifer Roberts. Both Professors Gemignani and Roberts were always a quick speed dial away when the author needed help untangling from the textual web that is the Federal Wire Act. The author further notes that several individuals kindly donated time to help him conduct his research, and any material cited to those individuals is strictly for the purpose of supporting the cited assertion and should not be considered an endorsement of the author’s individual analysis in any way.

combat organized crime,\textsuperscript{3} has become the focus of interpretations—or depending on whom you listen to, re-interpretations—as online gambling has grown from an industry fantasy into a technological reality.\textsuperscript{4} It is against this backdrop that the newest chapter in the Wire Act’s quirky saga is being written. A 2011 interpretation of the Wire Act by the Department of Justice, meant to put to rest ambiguity and the lack of direction on the statute’s applicability, has instead set the stage for the next decisive battle on the future of Internet gaming in the United States.\textsuperscript{5} The Restoration of America’s Wire Act (RAWA), a bill meant to both combat unilateral action by the Department of Justice\textsuperscript{6} as well as codify the moral ideologies of its backers\textsuperscript{7} has been the main tool of Internet gaming’s opponents in this battle.\textsuperscript{8} However, like any weapon, it is important to understand the power that one wields with it. Part I of this note will give a brief overview of the background of the Wire Act and how the law got to where it stands today. Part II will introduce the RAWA bill and offer a brief overview of its provisions and how the provisions relevant to this Note may be construed. Part III will then dig into the minutiae of the bill’s language, and explore the unintended consequences it may have on legal gaming that is likely not intended to be captured by its drafters and sponsors. Part IV will present this author’s conclusions on why attempting to repair the proposed defects in the bill may be nothing more than a futile effort, because of the general evolution in technology.\textsuperscript{9}


\textsuperscript{4} \textit{See generally} DOJ 2011 Opinion, supra note 2 (analyzing the applicability of the Wire Act); Minton, supra note 3 (providing an overview of the history of the Wire Act and how it has been applied at different points in time); USSenLindseyGraham, \textit{FULL PRESS CONFERENCE: Graham, Chaffetz Introduce Legislation to Restore America’s Wire Act}, YOUTUBE (Mar. 26, 2014), https://www.youtube.com/watch?v=xdt2q40DE1w&noredirect=1 (discussing proposed legislation intended to negate the Department of Justice’s 2011 opinion) [hereinafter RAWA Press Conference].

\textsuperscript{5} \textit{See} DOJ 2011 Opinion, \textit{supra} note 2; RAWA Press Conference, \textit{supra} note 4.

\textsuperscript{6} RAWA Press Conference, \textit{supra} note 4.


\textsuperscript{9} To aid the reader in following this note’s analysis, the author has attached the language of 18 U.S.C. § 1084 at Attachment A, the language of the proposed Restoration of America’s Wire Act bill, H.R. 707, at Attachment B, the language of 18 U.S.C. § 1084 as amended by the H.R. 707 at Attachment C, the language of the Senate version of the bill, S. 1668 at Attachment D, and the language of 18 U.S.C. § 1084 as amended by S. 1668 at Attachment E.
I. BACKGROUND

Attempting to cut off communication abilities essential to the Mob’s gambling racket, which was believed to be a major source of Mob profit, Robert Kennedy introduced in his bill package the Federal Wire Act. In discussing the bill, Kennedy asserted a goal of “assist[ing] the various States in enforcement of their laws pertaining to gambling and bookmaking. It would prohibit the use of wire communication facilities for the transmission of certain gambling information in interstate and foreign commerce.”

As currently written, the operable prohibitions relevant to this paper are the prohibitions outlined in § 1084(a), and the exceptions outlined in § 1084(b), of the Federal Wire Act. The § 1084(a) prohibition makes it a crime for those “in the business of betting or wagering” to transmit via a “wire communication facility . . . bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest” in “interstate or foreign commerce.” Section 1084(a) also prohibits transmissions that “entitle[] 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.” Section 1084(b) states an exception to the § 1084(a) prohibitions, providing that

the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or . . . 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

are not prevented under the law.

Several scholars who have analyzed the historical context in which the Wire Act was born have advocated that the true intention of the Wire Act has always been to target transmissions related to sports wagering, particularly racehorse wagering from which organized crime profited. This viewpoint draws upon instances of Robert Kennedy’s testimony on the statute focusing on


13 Id. § 1084(a).

14 Id.

15 Id. § 1084(b).

horse and sports wagering, examination of other bills in the package proposed by Kennedy, and several instances in which Congress revisited the Wire Act where it acknowledged its applicability to only sports wagering.\textsuperscript{17}

Jumping forward to around the turn of the century, issues pertaining to the Wire Act’s scope with regard to online gambling arose.\textsuperscript{18} Inconsistent holdings as to the unclear language in the Wire Act’s prohibitions stirred debate on whether the act was just limited to sports wagering, or if it could be applied to any kind of gambling activity, namely Internet poker.\textsuperscript{19} Case law has not been the only source of confusion; The Department of Justice has also had an erratic methodology in its approach to the Wire Act. In 2002, the Department’s Criminal Division responded to a request for guidance from Nevada gaming regulators.\textsuperscript{20} In its letter, the Department indicated that the Wire Act was one of the “main statutes” that was “applicable to Internet gambling,” but offered no real justification causing its reasoning to be rather conclusory.\textsuperscript{21} The Department sent a similar letter in 2005 to North Dakota offering essentially the same conclusory advice.\textsuperscript{22} A speech delivered by the Deputy Assistant Attorney General for the Department of Justice’s Criminal Division in 2002 was similarly vague in how the Department arrived at this conclusion.\textsuperscript{23} The

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\item[\textsuperscript{17}] See Minton, supra note 3, at 3–5. See \textit{Schwartz}, supra note 16 and Minton, \textit{supra} note 3 for a more thorough historical analysis of the Wire Act and its application.
\item[\textsuperscript{18}] See infra Part I.
\item[\textsuperscript{19}] \textit{Roundtable, Department of Justice and the Wire Act}, 16 \textit{GAMING L. REV. & ECON.}, 407, 407 (2012) [hereinafter \textit{Roundtable}]. \textit{Compare United States v. Lombardo}, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) (holding that only the first prohibition stated in § 1084(a), the prohibition pertaining to transmission of “bets or wagers or information assisting in the placing of bets or wagers,” is limited to sports wagering), \textit{with In re Mastercard Int’l Inc.}, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) (holding that the entirety of § 1084(a) applied to sports wagering), \textit{aff’d}, 313 F.3d 257 (5th Cir. 2002).
\item[\textsuperscript{21}] DOJ 2002 Letter, supra note 20.
\item[\textsuperscript{23}] \textit{See} John G. Malcolm, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice: Criminal Div., Statement at the World Online Gambling Law Report’s Special
Department did not just preach these conclusions, but also acted on them with several prosecutions for non-sports related activity under the Wire Act. The historical applicability of the Wire Act regarding Internet gambling, and non-sports wagering in general, is rather convoluted and has been examined in great depth: A detailed historical analysis of the Wire Act is however not the focus of this Note. Rather, let us jump to 2011, when the Department of Justice finally presented a concrete answer to the question of the Wire Act’s scope, which holds up today.

In brief, Illinois and New York sought guidance from the Department of Justice regarding the legality of proposed systems that would allow each respective state to “use the Internet and out-of-state transaction processors to sell lottery tickets to in-state” customers. In its response to the Criminal Division issued on September 20, 2011, the Department conducted an intricate analysis utilizing a combination of statutory construction and legislative history, concluding that “the Act’s prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.” The 2011 interpretation ended any ambiguity that the Wire Act created a prohibition against online (non-sports) wagering. With the road clear for Illinois and New York to implement their intrastate online lottery schemes, other states—namely Nevada, New Jersey, and Delaware—began to take advantage of the reduced prohibition and implemented online poker, and in New Jersey and Delaware’s case, some schemes of online casino gaming. However, the threat of more

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24 See Roundtable, supra note 19 (statement of Barry Boss).
25 See generally SCHWARTZ, supra note 16; Minton, supra note 3.
26 See generally DOJ 2011 Opinion, supra note 2.
27 Id. at 1.
28 Id. at 3–11.
29 Id. at 12.
30 See id. at 13. This interpretation however did not lead to wide open Internet gambling. Gaming law is primarily a state issue, with the states taking the lead in governing gaming within their territories with some assistance from the federal government. WALTER T. CHAMPION, JR. & I. NELSON ROSE, GAMING LAW IN A NUTSHELL 41 (2012). The Department of Justice’s opinion did not so much legalize online, non-sports wagering, but rather moreso made it “not illegal” in that it such activity was not a violation of the Wire Act. See generally, DOJ 2011 Opinion, supra note 2. Such gambling activity can still be illegal under a state’s own gaming laws. See CHAMPION, JR. & ROSE, supra. For example, Internet poker would be illegal in Utah because the state prohibits all forms of gambling by law. See Utah Gambling Laws, GAMBLINGONLINE.COM, http://www.gamblingonline.com/laws/utah/ (last visited Oct. 6, 2015). Also, a violation of a state’s prohibition on gambling, such as offering online poker in Utah, can also carry with it federal crimes separate from the Wire Act, as long as certain elements are met. See, e.g., 18 U.S.C. § 1955 (2013).
31 See United States Online Gaming: Monthly Statewide and National Data —
widespread adoption of online gaming among the states\textsuperscript{32} caused a group of lawmakers to push for a concrete federal ban on online gaming.\textsuperscript{33}

II. THE “RESTORATION OF AMERICA’S WIRE ACT”

A. Background of RAWA

On March 26, 2014, members of Congress introduced the “Restoration of America’s Wire Act” in the House of Representatives and the Senate.\textsuperscript{34} Representative Jason Chaffetz, the bill’s sponsor in the House, made the contention that the bill does “not try to make other alterations” other than restoring the Wire Act to its pre-2011 interpretation.\textsuperscript{35} Rather than actually changing the nature of the Wire Act, RAWA would merely revert the law back to what the bill’s sponsors—specifically Senator Mike Lee—described as the Wire Act’s “status quo.”\textsuperscript{36}

RAWA acts as an amendment to the language of 18 U.S.C. § 1084.\textsuperscript{37} In summation, the general nature of the changes imposed by RAWA upon the Wire Act include:\textsuperscript{38}

\begin{itemize}
  \item Section (a) – replacing any instances where “bet or wager” language is used with “any bet or wager,” and removing the “sporting event or contest” language to resolve the ambiguities on the Wire Act’s application to non-sporting wagers.\textsuperscript{39}
  \item Section (e) – making the current language in § (e) into a sub-point to an expanded § (e) that includes exceptions to the term “bet or wager,” clarification on the term “uses a wire communication facility for the transmission in interstate or foreign commerce of any bet or
\end{itemize}

\textit{February 2015}, UNLV CTR. FOR GAMING RES. (Feb. 2015), \url{http://gaming.unlv.edu/reports/US_online_gaming.pdf}. The author uses the phrase “casino gambling” to describe gambling on house banked games. \textit{See ROBERT C. HANNUM & ANTHONY N. CABOT, PRACTICAL CASINO MATH 123} (2d ed. 2005) (explaining that a house-banked game is a game where “a casino risks its money against the player’s money”).


\textsuperscript{33} Minton, supra note 3.
\textsuperscript{34} Restoration of America’s Wire Act, H.R. 4301, 113th Cong. (2014); Restoration of America’s Wire Act, S. 2159, 113th Cong. (2014).
\textsuperscript{35} H.R. 4301; RAWA Press Conference, supra note 4.
\textsuperscript{36} RAWA Press Conference, supra note 4.
\textsuperscript{37} H.R. 4301; S. 2159.
\textsuperscript{38} For a comprehensive illustration of the proposed amendments to the Wire Act see infr{}a Attachments C and E.
\textsuperscript{39} \textit{See} H.R. 4301 § (2)(1); S. 2159 § (2)(1).
wager,” and the meaning of the term “wire communication.”

- Rule of Construction – A rule of construction is added to create express limitations on the scope of the Wire Act.

The bill has been particularly contentious in both the gaming industry and political spheres. It is widely believed that Las Vegas Sands Corp. CEO Sheldon Adelson has been a large contributor to whatever momentum the proposed bill has received. However, Adelson’s industry peers have largely taken an opposing stance. That being said, RAWA has created curious bedfellows, such as Nevada’s Harry Reid—leader of the Democrats in the United States Senate—who has thrown his weight behind the bill. Of course, this does not mean that Senator Reid necessarily has the same motivations as Sheldon Adelson—he primarily sees it as a means of compromising to carve out an exemption to legalize online poker on the federal level, a goal he has yet to achieve.

After the 2014 Congressional election, the bill appeared to be losing traction, at least in terms of seeing any progress during the lame duck session of Congress. However, RAWA was given new life when Representative Chaffetz, with the support of six fellow Republicans and one Democrat, reintroduced the bill on February 4, 2015 in the House of Representatives.

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40 H.R. 4301 § (2)(2); S. 2159 § (2)(2).
41 H.R. 4301 § (3); S. 2159 § (3).
43 See id.
44 See id.
46 Tetreault, supra note 45.
Later, that year, on June 24, Senator Lindsey Graham reintroduced a slightly altered version of the bill to the Senate. The reduced traction at the end of the 113th Congress has not caused opponents of RAWA to lower their guard; The National Governors Association has voiced their disapproval of the bill to Representative Chaffetz himself, and pro-online poker commentators had criticized the structure of a congressional hearing on RAWA. The Pennsylvania House Gaming Oversight Committee even passed a resolution urging both Congress and the Pennsylvania Congressional Delegation to defeat H.R. 707.

While the aim of RAWA seems to be intended to focus on gambling activities that utilize the internet in a more traditional consumer transaction sense—i.e. making wagers from one’s personal computer, be it poker, house backed games, or lotteries—some portions of the bill’s draft remain questionable as to their applicability and may unintentionally (absent a carved out exception) rope in currently legal gaming activity that utilizes interstate transmissions and intrastate Internet transmissions as part of its functionality.

B. Interpreting RAWA

Before analyzing how RAWA unintentionally impacts various forms of legal gambling, it is worth exploring the language of the statute a little more in depth to get a better idea of what the bill says and how such language may be

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40 Restoration of America’s Wire Act, S. 1668, 114th Cong. (2015); see also Chris Grove, The Restoration of America’s Wire Act - Inside the Proposed Ban on Regulated Online Gambling, ONLINE POKER REP. (June 25, 2015, 12:26 PM), http://www.onlinepokerreport.com/11725/graham-chaffetz-introduce-anti-online-gambling-bill/ (summarizing the differences between the reintroduced Senate bill and the reintroduced House bill). Senator Graham was initially joined by six fellow senators—one Democrat and five Republicans—and as of November 5, 2015, had picked up one more cosponsor. S.1668 - Restoration of America’s Wire Act, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/1668/cosponsors?q=%7B%22search%22%3A%5B%22wire+act%22%5D%7D&resultIndex=1#cosponsors (last visited Nov. 5, 2015).


44 See RAWA Press Conference, supra note 4.

45 See infra Parts III.A.2, B.2.
construed.\textsuperscript{55}

The plain language of the Wire Act’s § (a) as amended by RAWA indicates that the prohibitions in that section are intended to apply to “any” form of betting or wagering, with the exception of those enumerated by RAWA’s Rule of Construction and parts of section (2)(2)(e)\textsuperscript{56} of the bill.\textsuperscript{57} Even though an examination of legislative history is usually not undertaken when the plain language of the bill is clear and unambiguous,\textsuperscript{58} for the sake of context, it is worth reiterating that by altering the language of § (a) of the Wire Act, the bill’s sponsors are effectively codifying a rejection of the Department of Justice’s 2011 interpretation (and what some may argue is the only correct historical interpretation)\textsuperscript{59} that the Wire Act only applies to sports related wagering activity.\textsuperscript{60} However, and here begins the headache of RAWA, construction of the statute as such actually presents a fairly paradoxical situation.

While the bill’s drafters have demonstrated a clear intent to reverse the Department of Justice’s interpretation of the Wire Act by amending the confusing language in the prohibition provisions, which the Department construed to only apply to sports related wagering,\textsuperscript{61} they did not extend an

\textsuperscript{55} Because of the slightly altered text between H.R. 707 and S. 1668, the author has written his analysis using H.R. 707 as his primary reference for RAWA, and will address any differences in S. 1668 where they are material to the author’s analysis.

\textsuperscript{56} To aid in readability, when the author refers to an individual clause in section (2)(2) of any version of RAWA, he has chosen to designated the individual clause as though it is a subsection to RAWA’s section (2)(2), even though the section identifiers are in fact part of the language RAWA is actually attempting to add to 18 U.S.C. § 1084. For example, if the author wishes to refer to the RAWA proposed language “(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,” the author will refer to this as section (2)(2)(e)(1) in the body text of the note. However, the author will continue to use a proper citation format (in this case, the citation would be H.R. 707 § (2)(2)).


\textsuperscript{58} Statutory Construction Treatise, supra note 57.

\textsuperscript{59} See generally Minton, supra note 3.

\textsuperscript{60} See 18 U.S.C. § 1084(a); H.R. 707 § (2)(1); DOJ 2011 Opinion, supra note 2, at 12; Statutory Construction Treatise, supra note 57, at Part I.I (“The Court should assume, as it ordinarily does, that Congress legislated against a background of law already in place and the historical development of that law.”) (quoting Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 587 (2005)); RAWA Press Conference, supra note 4.

\textsuperscript{61} DOJ 2011 Opinion, supra note 2, at 12.
analogous retooling to § (b) of the Wire Act. Under RAWA, the language in § (b) remains unchanged with the operative exemptions applying to transmissions of “information for use in news reporting of sporting events or contests,” and “information assisting in the placing of bets or wagers on a sporting event or contest from a State . . . where betting on that sporting event or contest is legal into a State . . . in which such betting is legal.” The lack of action taken on this section presents a somewhat paradoxical situation in trying to ascertain the correct meaning of the provision post-amendment. On the one hand, if one were to look at the Department’s 2011 opinion and accept its analysis as the correct, valid interpretation, § (b) of the Wire Act should be read as only applying to sports wagering activity, for it serves as an exemption to the purely sports wagering prohibitions in § (a). It is this interpretation that RAWA’s sponsors believe to be an incorrect reinterpretation of the law by “a single person in . . . the Department of Justice.” However, the fact that the “restoration” crusade involves altering the language of the Wire Act may be an implicit acknowledgement that for the Wire Act to do what RAWA proponents claim it does (apply to all forms of wagering—not just sports wagering at the Department of Justice claims), clearer statutory language is needed that will in effect invalidate the Department’s analysis. Because of this, even though RAWA’s proponents may claim the Department of Justice is incorrect in its analysis, it may be construed that by changing § (a), the bill intends to reverse the Department’s interpretation with regard to that provision, and by leaving § (b) intact, the bill intends to leave the Department’s interpretation of that provision intact because it’s drafters are purposely not taking action on that section of the Wire Act whereas they are making an active effort on § (a).

III. UNFORESEEN CONSEQUENCES

A cursory analysis of RAWA leaves little doubt as to the intended targets of the bill. However, upon a closer inspection that takes into account particular technological improvements in gaming not contemplated with the drafting of the original Wire Act—and probably not contemplated in the drafting

62 RAWA Press Conference, supra note 4; see H.R. 707.
63 See 18 U.S.C. § 1084(b) (emphasis added); H.R. 707.
64 See DOJ 2011 Opinion, supra note 2, at 5; 18 U.S.C. § 1084(a)–(b).
65 RAWA Press Conference, supra note 4.
66 DOJ 2011 Opinion, supra note 2, at 12.
68 RAWA Press Conference, supra note 4.
69 See Statutory Construction Treatise, supra note 57, at Part I.H (“First, we presume that when Congress legislates, it is aware of past judicial interpretations and practices.”) (quoting In re Egebjerg, 574 F.3d 1045, 1050 (9th Cir. 2009)); see also id. (“As counterintuitive as it may seem sometimes, we operate under a presumption that Congress understands what words it uses in a statute and that Congress intended to use those specific words.”).
70 Roundtable, supra note 19.
RAWA—它可以被看作RAWA可能对其他游戏系统有未意料到的影响。

A. System Based Gaming

一个领域的游戏，其中RAWA的语言可能构成潜在的未意料到的威胁是“System-Based Gaming”方案，特别是那些在系统部分之外的电路设备。因为游戏方案会根据独特的游戏法律而变化，所以本笔记检查在内华达州实施的System-Based Gaming方案。这是一个足够广泛的方案，它可以捕捉到RAWA可能成为问题的管辖权，这些管辖权有类似的游戏法规。

1. Background on System-Based Gaming

2010年初，内华达州赌博委员会采纳了1.172号条例，该条例定义了“System-Based Game”为“一个由服务器或系统部分和客户端站组成的设备，一起形成单个集成设备，其中设备部分决定个别游戏的成果，而客户端站则不能独立于系统运行。”

在更通俗的术语中，System-Based Gaming的定义是由规范所下的。即一个电子游戏设备，如老虎机（客户端站），它仅仅作为输入终端和显示设备，供用户操作。
the game. However, unlike a self-contained game, such as a traditional physical reel slot machine, where the entirety of the game and its outcome take place within the physical cabinet, the actual “game” that is being played is taking place on a computer (the “server”) independent from the client gaming cabinet. At the moment, the limited amount of system gaming in Nevada is in fact System Supported Gaming. System Based Gaming has yet to see much adoption in Nevada, despite being legal under the Regulations.

At the time Nevada’s system gaming regulations were promulgated, Nevada statutes prohibited servers from being located off-site. Even though gaming machines were no longer confined to the four walls of a single cabinet on the casino floor, they were still very much anchored in the properties on which they were located. The broad language of Regulation 1.172 nonetheless contemplated that a game utilizing System-Based Gaming could be “played” in two separate locations—where the wager is being placed (the client gaming terminal) and where the wager is being accepted (the server that actually plays out the electronic game). It was not until the next year in 2011 that the servers on which System-Based Gaming could take place were unchained from the

76 See id.
77 See ANTHONY F. LUCAS & JIM KILBY, INTRODUCTION TO CASINO MANAGEMENT 198–99 (2012) (describing the inner workings of a slot machine such as the processor and random number generator).
78 See Reg. 1.172; see also GLI-21: Client-Server Systems, supra note 74, at 25. It is worth noting the distinction between a “system based game” defined in Regulation 1.172, and a “system supported game” defined under Regulation 1.174. Reg. 1.172 (emphasis added); Reg. 1.174 (emphasis added). In a system supported game setup, the client station is connected to a server, but the game is played entirely within the client terminal, with the server connected for the purpose of downloading programs such as a new game to the terminal. See Reg. 1.174. The Aria resort in Las Vegas is an example of a gaming property that has adopted a system-supported gaming setup for its electronic gaming machines in the form of IGT’s sbX System. IGT’s sbX(TM) System Now Live at ARIA Resort & Casino, IGT (Dec. 21, 2009), http://www.igt.com/explore-igt/news/news?id=1368476.
80 Id.
82 See Hosting Center Hearing, supra note 81.
83 See Reg. 1.172. In the United States, when a wager is transmitted, it is traditionally considered to be made in two locations: where the wager is made from and where it is received. Malcolm, supra note 23.
casinos.

In May 2011, the Nevada legislature enacted Nevada Revised Statute Chapter 463.673, with the Nevada Gaming Commission enacting its analogous regulations shortly thereafter in July. The statute and applicable gaming regulations apply generally to “Hosting Centers,” which the regulations define as “a facility located in the State of Nevada which houses certain parts of computer systems or associated components of games, gaming devices, cashless wagering systems . . . and which is not located on the premises of a licensed gaming establishment.” The adoption of these regulations not only made it possible for the actual determinative outcomes of a game to take place on a server separate from the gaming terminal where the player is seated as contemplated under a System-Based Gaming scheme, but for that server to be in a different general location entirely, so long as it is located within Nevada and is approved by the gaming regulators. The legislative history behind Nevada Revised Statute Chapter 463.637 demonstrates that part of the driving force behind the bill was desire from members of the Nevada gaming industry—device manufacturers in particular—to be able to house computing centers for System Based Gaming in off-premises facilities that had the necessary space and sufficient technical capabilities.

The Gaming Control Board did not hesitate in moving the Hosting Center mechanism from concept to reality. In April 2013, the Board approved Switch Communications Group, LLC, as the first registered Hosting Center in Nevada pursuant to Regulation 5.232. ViaWest followed suit in October, and Cobalt

86 See Reg. 1.172.
87 Reg. 1.137; Reg. 5.232.
88 Interview with Greg Gemignani, Professor, UNLV William S. Boyd Sch. of Law, in Las Vegas, Nev. (Mar. 24, 2015); see Hosting Center Hearing, supra note 81. Allowing off-premises hosting centers would help eliminate issues with bringing System Based Gaming to gaming facilities too small to house the servers on their own premises. Interview with Greg Gemignani, supra; see Hosting Center Hearing, supra note 81.
was registered in September of the following year.91 While the fanfare over the approval of Hosting Centers for Nevada gaming was viewed primarily through the lens of online poker,92 the legislative history certainly seems to indicate an intention that such Hosting Centers also be utilized for System-Based Gaming.93

Regarding how a client gaming terminal may communicate with a server housed in a Hosting Center, the regulations contain broad enough language that would allow a casino to utilize a more advanced setup beyond a direct connection or Local Area Network94 than they might have otherwise used if the server was located on property.95 Regulation 14, which governs various technical standards for use in Nevada gaming, provides merely that prior to installation of a System Based or System Supported game, Board approval is needed for “the system network implementation.”96 The use of the broad term “network” would conceivably allow Internet based connections, such as Virtual Private Networks,97 so long as they meet regulation standards.98

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93 See Hosting Center Hearing, supra note 81.

94 A Local Area Network, or a “LAN” is “a communications network that interconnects a variety of data communications devices within a small geographic area and transmits data at high data transfer rates.” CURT M. WHITE, DATA COMMUNICATIONS AND COMPUTER NETWORKS: A BUSINESS USER’S APPROACH – INSTRUCTOR’S EDITION 176 (Joe Sabatino et al. eds., 7th ed. 2013).

95 See Nev. Gaming Reg. 14.105 (2015) (“A licensee shall not install or use a system based game . . . without prior . . . approval of the system network implementation . . . ‘); see infra text accompanying note 96.

96 Reg. 14.105. The use of the term “network” creates a broad array of allowed topologies. Network, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/network (last visited Oct. 7, 2015) (defining “network” as “a system of lines, wires, etc., that are connected to each other: a system of computers and other devices (such as printers) that are connected to each other”).

97 A Virtual Private Network, or a “VPN,” is “a data network connection that makes use of the public telecommunications infrastructure but maintains privacy through the use of a tunneling protocol and security procedures.” WHITE, supra note 94, at 285.

98 See Reg. 14.105; Network, supra note 96. The submission requirements for a system based gaming installation request are also broad in the types of systems that are expected to be described in an applicant’s submission materials, specifically in that it utilizes the broad term “network.” See System Based, System Supported, and Mobile Gaming System Installation Request Submission Requirements, NEV.
2. Impact of RAWA on System Based Gaming

While RAWA may unintentionally present challenges to multiple forms of currently legal gaming, the issues caused to each type of gaming would result from different provisions in the bill, and their changes to the current Wire Act. With regard to System-Based Gaming—at least as defined per Nevada regulations and any analogous jurisdictions—the provisions that cause the most issue are sections (2)(1)(A) and (2)(2)(e)(3) of RAWA. To understand the impact of RAWA, it is first necessary to understand of the nature of how the Wire Act applies to intrastate Internet gambling.

Between the Department of Justice’s two letters to Nevada and North Dakota, in 2002 and 2005 respectively, and the 2011 interpretation of the Wire Act, Congress enacted the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) at the end of the 2006 Congressional session. The act, aimed at making it a federal crime to transfer financial instruments for “unlawful internet gambling,” contained several exemptions to what was construed as a “bet or wager,” or “unlawful internet gambling” with respect to the act. Despite the statute’s Rule of Construction explicitly stating it was not intended to affect the application of any currently existing gaming laws (what was deemed to be unlawful internet gambling and its exemptions in UIGEA were for the purpose of determining what was a financial crime under that statute), the exemptions have caused much confusion in their application since the passing of the statute. Until 2015, the top Daily Fantasy Sports site operators cited to the UIGEA exemptions to justify the legality of their operations.

99 See infra Part III.A.2.
Even the Department of Justice used the § 5362(10)(B)(i) exemption for intrastate wagering and the § 5362(10)(E) provision for intermediate routing in their 2011 Wire Act opinion.\textsuperscript{105} The UIGEA provisions were of such note that in 2007, prior to the 2011 interpretation, Nevada wrote to the Department of Justice asking if intrastate gaming was covered by the Wire Act in light of the “conflicting” exemption in UIGEA because they were still interested in legalizing online poker, even on an intrastate level.\textsuperscript{106} No response was ever rendered to the inquiry.\textsuperscript{107} It is hard to say whether the absence of an answer was understood by the legislature as an implied blessing by the Department of Justice for gaming activity of the sort that would utilize Hosting Centers as is possible today. For instance, the letter written to the Department of Justice in 2007 was sort of a spiritual successor to the 2002 letter, written under the backdrop of the state’s attempt to legalize interactive gaming.\textsuperscript{108} The idea of system gaming, namely the type taking place off property via an Internet network was not announced as a type of gaming under consideration by Nevada in their letter.\textsuperscript{109} Even more telling is the Nevada legislature’s consideration—or lack thereof—of the Wire Act in the Hosting Center bill’s legislative history.\textsuperscript{110} During committee hearings on the bill, the Wire Act never came up during discussions on the topic of Hosting Centers\textsuperscript{111} despite the hearings taking place in the first half of 2011, a timeframe which fell in between the 2007 letter and the Department’s interpretation issued at the end of 2011.\textsuperscript{112}

Even without the UIGEA exemptions, the scope of the Wire Act on intrastate online gambling was still questionable without guidance from the Department of Justice. Here it is worth a short explanation of how information flows on the Internet, as it is essential to understand the issues analyzed below. When data is sent across the Internet, it is broken up into “packets,” smaller

\textsuperscript{105} DOJ 2011 Opinion, supra note 2, at 2–3; see 31 U.S.C. § 5362(10)(B)(i), (E).
\textsuperscript{107} Interview with Greg Gemignani, supra note 89.
\textsuperscript{109} See Nevada 2007 Letter to DOJ, supra note 106.
\textsuperscript{110} See \textit{generally} SB218, supra note 84 (offering hyperlinks to the entire legislative history of S.B. 218, including additional committee hearings).
\textsuperscript{111} See \textit{generally} Hosting Center Hearing, supra note 81; SB218, supra note 84.
\textsuperscript{112} See Hosting Center Hearing, supra note 81, at 1 (dating the hearing on March 11, 2011); DOJ 2011 Opinion, supra note 2 (dating the opinion on September 20, 2011); Nevada 2007 Letter to DOJ, supra note 106 (dating the letter on March 26, 2007); see also SB218, supra note 84.
pieces of data that are reconstructed when they arrive at their destination. As the packets travel to their destination, they may take different paths for the purposes of avoiding network congestion, or even if part of the network breaks down. However, because of this self-healing nature of the Internet, it is conceivable that packets traveling across the network may cross boundaries, such as state lines. As such, sending an “intrastate” transmission to your next-door neighbor, such as an email, may in fact travel out of state and back in depending on how it is routed through the network.

The 2011 interpretation of the Wire Act finally offered clarity, albeit somewhat roundabout on the matter of intrastate online gaming. Because the opinion was catalyzed by New York and Illinois’ online lottery schemes, the Department of Justice took up its analysis in that context. The department concluded that the Wire Act only applied to interstate transmissions related to sports wagering and declined to take up the issue of the UIGEA intrastate provisions because the question regarding the lotteries was answered in that they were not-sporting events or contests, and thus the Wire Act did not apply to them. What is clear is that under the current interpretation of the Wire Act, system gaming as implemented by Nevada would not be in violation, because by definition it does not concern sports wagering. However, RAWA not only threatens to backtrack on the Department’s interpretation of the Wire Act, but in fact reignites the tangentially answered question of its applicability to intrastate online wagering. RAWA achieves this by essentially codifying and expanding case law that may be sufficiently analogous to the incidental interstate transmissions that are sent over the Internet—case law that would not be favorable to such a scheme as System Based Gaming.

In 1962, the United States District Court for the Northern District of West Virginia offered an opinion on how the Wire Act applies to incidental interstate

114 Id.
115 Datacenterscanada1, How Does the Internet Work ?, YOUTUBE (Feb. 28, 2011), https://www.youtube.com/watch?v=i5oe63pOhLI; see Strickland, supra note 113.
116 See Datacenterscanada1, supra note 115.
117 See generally DOJ 2011 Opinion, supra note 2.
118 See id.
119 Id. at 12-13. The exact language from the opinion states “that the Act’s prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.” Id. at 12. Even though this may seem like a clear and unambiguous answer, some case law concerning Wire Act violations, if adapted for analogous modern technology, raise the possibility of intrastate Internet transmissions being considered interstate transmissions due to the nature in which Internet transmissions are carried. See Datacenterscanada1, supra note 115; infra Part III.A.2.
121 See infra Parts III.A.2–3.
transmissions. In *Yaquinta*, six defendants were charged with violating the Wire Act as a result of their involvement in operating an off-track horse wagering operation. The operation consisted of one defendant watching the race on-site relaying the results to a cohort in a trailer near the track, who then proceeded to communicate the information by long distance telephone to two bookmaking shops stationed in Wheeling and Weirton, West Virginia. The telephone lines over which the information was transmitted to the bookmaking shops crossed a river into Ohio, where the operator made the connection between the West Virginia endpoints. The court denied the defendants’ motions to dismiss, citing the legislative intent of the Wire Act statute to “assist the various States... in the enforcement of their laws pertaining to gambling... by prohibiting the use of... wire communication facilities which are or will be used for the transmission of certain gambling information in interstate... commerce.”

Even though the transmissions began and ended in the same state, the court found that “West Virginia needs just as much help in the enforcement of its anti-gambling statutes when the information which assists their violation comes from another point in West Virginia.” Although this is a single District Court case, and not the strongest authority when it comes to intrastate online gaming pre-2011, its existence becomes significantly more relevant based on the language of RAWA as explained below.

RAWA breathes new life into the *Yaquinta* opinion through section (2)(c)(3) of the proposed bill. The provision states that “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.” At a minimum, this section codifies *Yaquinta*’s holding in a way that is applicable to the Internet. The phone wires that incidentally crossed state lines, but began and ended in the same state, are sufficiently analogous to the nature of Internet transmissions that by their very nature cross state lines, even if the transmission begins and ends a foot away from each other. This analysis is further

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123 Id. at 277.
124 Id.
125 Id.
127 Id.
129 See *Yaquinta*, 204 F. Supp. at 277; Mark Hichar, *The Wire Act Should Not Be Used to Prohibit Internet Gambling Carried Out under the UIGEA Intrastate Wagering Exception*, 13 GAMING L. REV. & ECON. 106, 112 (2009); Datacenterscanada1, *supra* note 115; *supra* Part III.A.2. It was not until after completing his first final draft of this student note in March of 2015 that the author came across Mark Hichar, Esq.’s published works relating to Wire Act issues, but
reinforced by statements during the aforementioned RAWA press conference, in which Representative Chaffetz and Senator Graham answered in the negative to a question as to whether the “bill would grandfather in the states that have already legalized [internet gambling].”

The three states that currently offer (non-lottery) internet gambling—Nevada, New Jersey, and Delaware—generally offer online gaming on an intrastate basis, meaning that players must actually be within the bounds of the state to place wagers on approved gaming websites. Even though the changes RAWA makes to § (a) of the Wire Act broaden it to apply beyond sports betting, those changes in and of themselves still only apply to wagering of an interstate nature. Section (2)(2)(e)(3) of RAWA is necessary to achieve the stated intentions of the bill’s supporters that the currently legalized online gaming schemes not be grandfathered, even those that are intrastate. This lends more credibility to the idea that section (2)(2)(e)(3) is intended to impose a legal framework that is very similar to the legal reasoning expressed in *Yaquinta*.

The nature of System Based Gaming that utilizes hosting centers via Internet transmissions is placed at risk by this grafting that RAWA does of the *Yaquinta* incidental interstate transmission analysis onto the post-2011 Wire Act. Because System Based Gaming utilizes the physical gaming cabinet as merely a client where the player controls the game, but the game takes place at a different location (the hosting center), there is a transmission of a bet or

would very much like to direct the reader to his works for more background on legal issues around the Wire Act, including RAWA that have seen publication in between the initial drafting of this note and the final editing for publication. To view a list of Mr. Hichar’s extensive works, see *Mark Hichar, Partner: Publications, Hinckley Allen*, http://www.hinckleyallen.com/mark-hichar/publications/ (last visited Nov. 7, 2015).


131 The intrastate nature of these gambling schemes is not something that is necessarily mandated by state law, but rather a result of other factors such as not wanting gaming firms to offer Internet gambling into states that do prohibit it under their laws, as well as states having various gaming regulatory structures that may impose different requirements on firms doing business in that state, such as approval by its respective gaming regulators. *See generally Champion, Jr. & Rose, supra* note 30. In fact, two of the three states that offer online gambling, Nevada and Delaware, have entered into a “Multi-State Internet Gaming Agreement” that created a shared regulation structure for internet gaming offered to patrons in both states simultaneously. *Multi-State Internet Gaming Agreement, Nev.-Del., Feb. 25, 2014, http://gov.nv.gov/uploadedFiles/govnvgov/Content/News_and_Media/Press/2014_Images_and_Files/MultistateInternetGamingAgreement.pdf.*

132 See *NEV. REV. STAT.* § 465.093 (2014) (describing the restrictions placed on wagering transmission activity); *NEV. REV. STAT.* § 465.094 (2014) (providing the exceptions to the prohibitions on wagering transmissions codified in § 465.093).

133 See *18 U.S.C.* § 1084(a) (2013); *H.R. 707 § (2)(1).*

134 See *H.R. 707 § (2)(2); RAWA Press Conference, supra* note 4.

wager. When the transmission occurs, it is being sent to and received in locations both in Nevada. However, if the provider of the system has chosen to utilize an Internet based configuration, such as a VPN, then at any given time, the transmission is subject to the possibility of incidentally crossing state lines as contemplated by RAWA section (2)(2)(e)(3). On its own, section (2)(2)(e)(3) would in fact have no impact on server based gaming, because it is not sports wagering. However, when combined with the amendments made by RAWA section (2)(1)(A), which expand the prohibitions from sports wagering to “any bets or wagers,” the bets or wagers being incidentally transmitted across state lines stand to possibly run afoul of the Wire Act.

3. A Closer Look at Yaquinta

The analysis of how RAWA impacts system based gaming provides an illustration of how non-sports bets or wagers that utilize the internet in an intrastate manner (yet incidentally interstate) can be an unintended casualty of the Wire Act beyond the intended online gaming target of the bill. But it is worth noting that RAWA’s codification of Yaquinta’s analysis regarding incidental Interstate transmissions likely has even further impact that extends beyond a mere restoration of the Wire Act’s “status quo.”

First, there are two main factual elements of the Yaquinta case that were not factors in the analysis above. The first is that what was being transmitted in the case was “information assisting in the placing of bets or wagers on any sporting event,” not the bets or wagers themselves. The second is that the activity at bar in Yaquinta was a violation of the Wire Act because it was unlawful (off-track horse betting) in both the sending and receiving jurisdiction (West Virginia). The fact that the transmissions were held to be crossing state lines was merely what satisfied the interstate commerce element of the cause of action. Had off-track wagering been lawful in West Virginia, the

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136 See Nev. Gaming Reg. 1.172 (2015) (stating that in a System Based Gaming, the determinative outcome of the wager is taking place on the server).
137 See Hosting Center Hearing, supra note 81, at 6–7.
138 As discussed earlier, the broad language of the regulations certainly leaves possible the ability for an Internet based configuration to be used, which the author uses as illustration for the purpose of this note’s analysis. See supra notes 95–96.
139 See H.R. 707 § (2)(2); Datacenterscanada1, supra note 115.
140 See H.R. 707 § (2)(2); Reg. 1.172; DOJ 2011 Opinion, supra note 2, at 12.
142 See infra Part III.A.2.
145 Id.
146 Id. at 277–78; see JEFFREY R. RODEFER, NEV. ATTORNEY GEN.’S OFFICE: GAMING DIV., INTERNET GAMBLING IN NEVADA: OVERVIEW OF FEDERAL LAW AFFECTING ASSEMBLY BILL 466 8–9 (2002), in INTERNET GAMING: PREPARED FOR
activity committed by the defendants would still have run afoul of the § (a) prohibition on transmissions of “information assisting in the placing of bets or wagers on any sporting event” because of the court’s holding that the transmissions were indeed interstate for the purposes of the Wire Act. However, such transmissions would have found shelter under the § (b) exemptions, because the transmissions were being sent “from a State . . . where betting on that sporting event . . . is legal into a State . . . in which such betting is legal.” Because the wagering was illegal in West Virginia (both the sending and receiving State), the § (b) exemption did not apply.

To demonstrate how RAWA’s codification of Yaquinta’s incidental interstate transmission holding dramatically expands the powers of the Wire Act, let us imagine a wagering scheme similar to Server Based Gaming, but instead of transmissions of “any bet or wager” taking place let us hypothetically retool the scheme to be a transmission of “information assisting in the placing of any bet or wager” and hold all other previously discussed features of Nevada’s server based gaming scheme constant.

Under this scheme, in a pre-2011-Department-of-Justice-interpretation world where the Yaquinta analysis for incidental interstate transmissions is applied, this would be information assisting in placing of non-sports wagering (debatably illegal under a pre-2011 § (a)) that is being transmitted intrastate within Nevada, but would be considered an incidental interstate transmission due to utilization of the Internet. However, the transmission of the assisting information would be exempt from the Wire Act because of § (b), due to the point of origin and destination for the transmission (Nevada) being a jurisdiction where such wagering scheme is lawful. With the 2011 Department opinion, the analysis simply becomes no sports wagering, no Wire Act.


148 18 U.S.C. § 1084(b); see Yaquinta, 204 F. Supp. at 277 (stating that the signals began and ended in the same state).
150 See Nev. Gaming Reg. 1.172; supra Part III.A.1.
151 As discussed above, under RAWA server based gaming would likely be a violation of the law because it would constitute prohibited transmissions of betting or wagering activity under a revised § (a) of the Wire Act, to which there is no § (b) exemption. See 18 U.S.C. § 1084(a)–(b); Restoration of America’s Wire Act, H.R. 707 § (2)(1)(A), 114th Cong. (2015); supra Part III.A.2.
152 H.R. 707 § (2)(1)(A) (emphasis added).
154 See 18 U.S.C. § 1084(b); Reg. 1.172; Hosting Center Hearing, supra note 81, at 6–7.
155 DOJ 2011 Opinion, supra note 2, at 12.
Now enter RAWA. Here we have information assisting in a non-sports wager (prohibited under RAWA’s amendment to § (a) of the Wire Act)\footnote{H.R. 707 § (2)(1)(A); see 18 U.S.C. § 1084(a). RAWA amends the prohibition to extend to “information assisting in the placing of any bet or wager.” H.R. 707 § (2)(1)(A) (emphasis added).} being transmitted over the Internet in an intrastate manner (prohibited under RAWA’s amendment to § (e) of the Wire Act).\footnote{H.R. 707 § (2)(2). The language of RAWA only stipulates that transmissions of any bet or wager over the Internet are the kind that can kick in the incidentally interstate Internet transmission inclusion. \textit{Id.}} The setup looks very similar to the scenario described above in a Pre-2011 Department-of Justice Opinion atmosphere.\footnote{See supra Part III.A.3.} However, unlike that situation, the prohibited transmission cannot find refuge in an amended Wire Act’s § (b). RAWA proposes no amendment to § (b) of the Wire Act, leaving the exemption’s language regarding “sporting event or contest” intact.\footnote{See H.R. 707; 18 U.S.C. § 1084(b).} Following accepted canons of construction, this omission of an amendment to § (b) can be construed as an intentional adoption of the Department of Justice’s interpretation that the “sporting events or contests” language applies only to sports wagering (and that such language applies to all of the prohibitions), as an active effort was made to amend such language in § (a).\footnote{H.R. 707 § (2)(1); see 18 U.S.C. § 1084(a)–(b); DOJ 2011 Opinion, supra note 2, at 5–10, 12 n.11; \textit{Statutory Construction Treatise}, supra note 57.} This interpretation of the bill demonstrates that RAWA threatens to expand the scope of the Wire Act greater than ever before, in that if a transmission of even information assisting in the placement of non-sport wagers is transmitted over the Internet intrastate, within a state where such wagering is completely legal, it may still be a federal crime for lack of an exemption (as the Wire Act’s § (b) would still only apply to “sporting events or contests”).\footnote{See generally United States v. Yaquinta, 204 F. Supp. 276 (N.D.W. Va. 1962).}

A possible counter-argument may be made about the interpretation of RAWA’s section (2)(2)(e)(3) provisions. Section (2)(2)(e)(3) reads “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.”\footnote{H.R. 707 § (2)(2).} The provision seems to only apply the inclusion of interstate Internet transmissions, even incidental ones, to transmissions of actual bets or wagers.\footnote{H.R. 707 § (2)(2).} However, this limiting interpretation is likely due to a drafting oversight. For example, this provision is the only one that explicitly reinforces that interstate Internet

\footnote{Id.}
transmissions are covered under the Wire Act.\textsuperscript{164} Even though such a provision would cover activity targeted by the bill, such as intrastate online poker, it seems counter-intuitive given the purpose of the bill to target Internet gambling that it would only apply the Internet transmissions solely to any bet or wager, but exclude it from any other activity covered by the Wire Act.\textsuperscript{165} Furthermore, the drafting seems strange in that it characterizes “uses a wire communication facility for the transmission in interstate or foreign commerce of any bet or wager” as a “term.”\textsuperscript{166} When integrated into the full language of the Wire Act’s § (a), the prohibition on “us[ing] a wire communication facility for the transmission in interstate or foreign commerce” appears to be modified by both “any bet or wager” and “information assisting in the placing of any bet or wager.”\textsuperscript{167} By reading the section (2)(2)(e)(3) amendment to only apply to “any bet or wager,” this creates an odd segregation of the “information assisting” provision from the language it modifies.\textsuperscript{168}

Another possible, though likely faulty, counterargument against the assertion that RAWA expands the Wire Act is with regards to language only found in the most recent draft of the bill introduced in the Senate. Section (3)(2)(C) states that

\begin{quotation}
[nothing in this Act, or the amendments made by this Act, shall be construed . . . to alter, limit, or extend . . . 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 . . .] \textsuperscript{169}
\end{quotation}

It may be argued that this provision was added to the Senate bill—the most recent version of RAWA legislation in one of the Congressional bodies\textsuperscript{170}—to correct the issue discussed above and affirmatively declare that the prohibition on incidentally interstate Internet transmissions does not include “information assisting in the placing of any bet or wager.”\textsuperscript{171} However, even if this was the intention of adding this provision to the bill, the language adds little to no additional support for this assertion. The plain language of the provision states that the act is not intended to affect “transmit[ting] information . . . on the physical premises.”\textsuperscript{172} The only additional strength this language could possibly add to the argument that incidentally interstate Internet transmissions do not

\begin{footnotes}
\item[164] See H.R. 707.
\item[165] See id.
\item[166] H.R. 707 § (2)(2).
\item[168] See H.R. 707 § (2)(2).
\item[169] Restoration of America’s Wire Act, S. 1668 § (3)(2)(C), 114th Cong. (2015). This language was not present on any prior proposed draft of the bill. See H.R. 707; Restoration of America’s Wire Act, S. 2159, 113th Cong. (2014); Restoration of America’s Wire Act, H.R. 4301, 113th Cong. (2014).
\item[170] See S. 1668.
\item[171] See id. 1668 § (2)(1)(A); supra Part III.A.3.
\item[172] S. 1668 § (3)(2)(C).
\end{footnotes}
apply to “information assisting in the placing of any bet or wager” would be that it applies to such Internet transmissions of information that are occurring solely “on the premises”—i.e. a transmission that begins in the casino over the Internet, incidentally crosses state lines, and ends in the same casino. The transmissions in Yaquina and our hypothetical System Based Gaming discussed in the analysis above originated and ended in the same state, but was between different locations within that state. The Senate bill’s Rule of Construction states that the bill is not meant to affect transmissions of information originating and ending within the very same “gaming establishment.” If this new language in the Senate draft is intended to limit RAWA’s expansion of the Wire Act as contemplated above, it either has an extremely narrow and minimal effect, or flat out fails entirely.

As the above analysis demonstrates, RAWA almost certainly captures System Based Gaming that utilizes the internet due to the bill’s expansion of the Wire Act’s prohibitions and spiritual codification of Yaquina’s analysis for incidental interstate transmission that are quite analogous to the sort transmitted in the System Based Gaming scheme. Also, based on the lack of amendments to the Wire Act’s exemptions, and dependent on the construction of RAWA’s section (2)(2)(e)(3), the bill threatens to expand the statute’s scope to encompass information assisting in the placing of any bet or wager that is sent over the Internet, even intrastate within a jurisdiction where such wagering is legal.

B. Wide Area Progressives

Another type of lawful gaming activity that RAWA’s language may have unintended consequences upon are Wide Area Progressives.

1. Background on Wide Area Progressives

Wide Area Progressives, more colloquially known as “WAPs,” “are electronically linked gaming machines, offering large, progressive jackpots to customers in many gaming venues, simultaneously.” Some of the WAPs most recognizable to consumers include International Game Technology’s

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173 See id. § (2)(1)(A), (3)(2)(C).
174 Recall—our hypothetical is differentiated from actual System Based Gaming in that only information assisting in the placing of bets or wagers are being transmitted from the casino to the hosting center.
175 See S. 1668 § (3)(2)(C); supra Part III.A.3.
176 See supra Part III.A.2.
177 See supra Part III.A.3.
179 Id.
“Megabucks”\textsuperscript{180} and “Wheel of Fortune”\textsuperscript{181} slot machines—games that can typically be characterized by a meter above the bank\textsuperscript{182} of machines displaying a large, enticing jackpot that is offered on similarly linked games at other properties.\textsuperscript{183}

The transmissions being made by Wide Area Progressives can best be characterized as a synchronization of progressive jackpots.\textsuperscript{184} The general way a WAP operates is that all of the electronic gaming machines grouped in a bank of WAP connected machines transmit their coin-in\textsuperscript{185} data to a central computer within the bank.\textsuperscript{186} Depending on how the progressive is set up, it will calculate based on that coin-in data how much the progressive meter should advance across all linked machines across casinos,\textsuperscript{187} and now, jurisdictions.\textsuperscript{188} It will communicate that data while at the same time receiving data from other linked machines to advance the progressive meter in a synchronized manner.\textsuperscript{189} If a


\textsuperscript{182} A “bank” is gaming industry jargon typically used to describe a configuration of electronic gaming machines that are specifically grouped together. LUCAS & KILBY, supra note 73, at 225–27. For an example of a set of slot machines segregated into a bank by a common theme, see Rendering of Star Wars Slot Machine Bank, NOTCOT (June 21, 2010), http://www.notcot.com/images/2010/06/starwars_igt_multilevel_progressive.jpg.


\textsuperscript{184} See LUCAS & KILBY, supra note 77, at 202–03.

\textsuperscript{185} “Coin-in” refers to “the dollar-amount of wagers placed in slot machines, over a specified period of time.” Id. at 42. The coin-in does not actually represent the revenue made by a casino on a given machine. Id. The coin-in merely reflects the amount of money put into a machine and does not account for money paid out (coin-out) or other currency transfers made by the machine. Id. at 42, 206. For example, if a patron places $5 into a slot machine, plays $1 on the first spin, and receives a payout of $10, the coin-in for that particular wagers is $1 (the amount actually wagered). See Id. at 206. For a more detailed explanation of calculating slot machine revenue, see id.

\textsuperscript{186} Id. at 202–03.

\textsuperscript{187} Id.

\textsuperscript{188} See infra Part III B.1.

\textsuperscript{189} See LUCAS & KILBY, supra note 77, at 203.
machine linked in a Wide Area Progressive hits a jackpot, notification is sent out to the rest of the WAP that a jackpot has been hit and the meters will revert back to their starting points to begin increasing the progressive again.\footnote{3} No information other than how much the meter should advance across the WAP and if a jackpot has been hit is transmitted between the linked machines.\footnote{4} WAPs have seen a recent regulatory evolution that is particularly relevant to this Note. Casinos have begun offering interstate Wide Area Progressives, with the jackpots being shared among not only different casinos, but also different gaming jurisdictions.\footnote{5} Nevada was the first out of the gate in November 2013 when the Nevada Gaming Commission adopted amendments to its gaming regulations to permit “multi-jurisdictional progressive prize system[s]” in response to a petition filed by Bally Technologies, Inc. (Bally) and IGT.\footnote{6} New Jersey followed soon thereafter in February 2014, when the State’s Division of Gaming Enforcement announced its approval of a multi-jurisdictional Wide Area Progressive system.\footnote{7} South Dakota rounds out the current interstate Wide Area Progressive jurisdictions, having initiated a shared pool with New Jersey in April of 2014.\footnote{8} As of the authoring of this note, there are currently two interstate WAP systems in operation: Bally’s “Cash Connection” which links slot machine progressives between Nevada and New

\footnote{1} Id.  
\footnote{2} See id. at 202–03.  
Jersey, and IGT’s “Powerbucks” which links slot machine progressives between Nevada, New Jersey, and South Dakota.

2. Impact of RAWA on Wide Area Progressives

Several elements of the proposed RAWA language may impact these interstate Wide Area Progressives. As has been touched on above, the Department of Justice’s 2011 opinion explicitly established that the Wire Act applies only to interstate transmissions related to sports wagering activity. Under the 2011 opinion, WAPs would not fall under the scope of the Wire Act, as no sports wagering activity is taking place, and the analysis ends right there. However, the amendments RAWA makes to the various provisions of the Wire Act may unintentionally place the WAPs in the Act’s crosshairs. Given the interstate nature of multi-jurisdictional WAPs, it is certainly worthwhile to analyze the potential impact RAWA might have upon this kind of gaming activity.

When it comes to interstate Wide Area Progressives, there is without a doubt some form of an interstate transmission occurring, whether or not such transmission is occurring on the Internet. Even though much of the underlying motivation for the drafting of RAWA is to target the types of Internet gambling that has found legalization in the post-2011 interpretation landscape such as online poker, the bill still utilizes a very broad definition of “wire communication.” Section (2)(2)(e)(4) of RAWA seeks to amend the Wire Act by incorporating the definition of “wire communication” from the Communications Act of 1934. Regulations that concern Wide Area Progressives are generally broad in what kind of configuration may be used—Nevada for example places WAPs under “Inter-casino linked system[s]” which the regulations define to include “[a] network of electronically interfaced

198 DOJ 2011 Opinion, supra note 2, at 12.
199 See id.; supra Part III.B.1.
200 See infra Part III.B.2.
201 See RAWA Press Conference, supra note 4.
203 Id. RAWA incorporates the broad definition that “[t]he term ‘wire communication’... means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission. Communications Act of 1934, 47 U.S.C. § 153(59) (2013); H.R. 707 § (2)(2).
similar games which are located at two or more licensed gaming establishments.”

The aforementioned amendments to the regulations add interstate WAPs as a subsection to the term, being defined as “multi-jurisdictional progressive prize system[s].” Even though a network of interlinked slot machine progressives would intuitively utilize an Internet communication, especially for WAPs that are communicating across the country, the regulation is broad enough to cover configurations ranging from the Internet all the way down to running a direct cable across state lines by its usage of the broad term “network.” The point being that regardless of what type of communication method the interstate Wide Area Progressive utilizes, be it the Internet or a direct line (as is permitted by the broad regulations), it is of an interstate nature that is sufficient to kick in the “uses a wire communication facility for... transmission in interstate... commerce” element of a RAWA-amended Wire Act. The transmission would either be an interstate transmission using a “wire communication” under RAWA section (2)(2)(e)(4), or an interstate transmission utilizing the Internet which would be explicitly included in RAWA section (2)(2)(e)(3).

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205 Id. at 14.010(18)(c).
206 The exact nature of the network and means by which communications are sent is typically proprietary information belonging to the vendor, and anyone else involved in the implementation of the network’s operation. See Interview with Jim Barbee, supra note 79.
207 See Reg. 14.010(18)(a); Network, supra note 96.
210 See H.R. 707 § (2)(2). It is worth noting that the National Indian Gaming Commission (NIGC) has offered some guidance on their interpretation of what kind of transmission a WAP utilizing a VPN is. See Penny J. Coleman, Letter from Penny J. Coleman, Acting Gen. Counsel, Nat’l Indian Gaming Comm’n, to Donald Bailey, President, Atlantis Internet Grp. Corp. 4 (Sept. 24, 2009), http://www.nigc.gov/images/uploads/game-opinions/CasinoGatewayNetwork09242009.pdf. In 2009, the NIGC offered its opinion on whether UIGEA applied to WAPs and multi-site bingo systems. Id. at 1–6. The primary question was whether transmissions between the sites would constitute “unlawful internet gambling” for the purposes of UIGEA. See id. at 1–2. The opinion concluded that given the private communication nature of a VPN, the transmission did not constitute a transmission using the Internet that would constitute unlawful internet gambling as contemplated by UIGEA, and thus was not in violation of the law. See id. at 2–4. Regardless of the agreeability of the NIGC’s conclusion that a VPN transmission is not an Internet transmission (at least for the purposes of UIGEA), the analysis is likely inconsequential to the conclusion that WAP transmissions across state lines would be captured under RAWA. Even if the NIGC’s conclusion were correct that a WAP utilizing a VPN connection over state lines is not an Internet transmission, it would still be captured under the broad definition of a “Wire Communication.” See 47 U.S.C. § 153(59); H.R. 707 § (2)(2); Letter from Penny J. Coleman, supra, at 2–4. Essentially, what matters is not so much the means of transmission, but rather that the transmission is traveling in interstate commerce. See supra Part
Further, as explained above, RAWA’s amendments to the Wire Act’s prohibitions now cover interstate transmissions of “information assisting in the placing of any bet or wager” with no analogous exemption for transmissions of information between two jurisdictions where such wagering is legal (unless it is for sports related wagering).\(^\text{211}\) The fact that the transmissions are not related to sports wagering can now possibly make them subject to the authority of a post-RAWA Wire Act with no exemption to hide behind.\(^\text{212}\) However, the analysis does not end there. There is still the question of whether the transmissions are considered one of the “categories” of transmissions covered by the Wire Act.\(^\text{213}\)

The transmissions made by WAPs would not be considered the transmission of “any bet or wager,” because no real element of the actual gaming transaction is taking place through the transmissions.\(^\text{214}\) The entirety of the game is being played out inside the machine cabinet,\(^\text{215}\) in that the wager itself is not being transmitted, but rather only the information that advances the progressive meter.\(^\text{216}\) The question then is whether the meaning of a “transmission . . . of . . . information assisting in the placing of any bet or wager” is broad enough to capture this progressive meter information.\(^\text{217}\) If not,

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\(^{211}\) H.R. 707 § (2)(A) (emphasis added); see 18 U.S.C. § 1084(a)–(b); supra Part II.B.

\(^{212}\) See supra note 211.

\(^{213}\) By “categories” the author is referring to the different kinds of transmissions named in the Wire Act rather than the distinction between sports wagering and non-sports wagering that has been the focus of much of this note. Specifically, these include:

- “bets or wagers”;
- “information assisting in the placing of bets or wagers”;
- “transmission . . . which entitles the recipient to receive money or credit as a result of bets or wagers”;
- “transmission . . . which entitles the recipient to receive money or credit . . . for information assisting in the placing of bets or wagers”; and
- “information for use in news reporting.”

18 U.S.C. § 1084(a)–(b) (2013). The Department of Justice reconciled the repeat of the language “information assisting in the placing of bets or wagers” in § (a) by reading the second clause of § (a) as a one phrase that prohibits “the transmission of a wire communication which entitles the recipient to receive money or credit [either] as a result of bets or wagers[] or for information assisting in the placing of bets or wagers.” DOJ 2011 Opinion, supra note 2, at 4 n.5 (alteration in original).

\(^{214}\) See generally CHAMPION, JR. & ROSE, supra note 30, at 8–9 (describing the three traditional elements of “gambling”: prize, chance, and consideration).

\(^{215}\) See LUCAS & KILBY, supra note 77, at 198–99. This statement is of course notwithstanding the possibility of a Wide Area Progressive being implemented on games that are utilizing system based gaming. See supra Parts III.A.1–2. This fact is not relevant to analyzing the transmissions being sent by a Wide Area Progressive system however.

\(^{216}\) See LUCAS & KILBY, supra note 77, at 203; Interview with Jim Barbee, supra note 79.

\(^{217}\) See 18 U.S.C. § 1084(a); Restoration of America’s Wire Act, H.R. 707 §
there would be no concern about WAPs falling under the purview of a Wire Act expanded by RAWA. \(^{218}\) Unfortunately, as is par the course when it comes to interpreting the Wire Act, looking for something close to a clear answer may very well be a fool’s errand.

The guidance that is offered by the courts has done little to clarify exactly what is meant by “information assisting in the placing of bets or wagers on any sporting event or contest.” \(^{219}\) For example, in *United States v. Kelley*, prospective bettors would call a predetermined telephone number and merely indicate that they wished to place a bet, as well as how the operation could reach the bettor to actually receive the wager. \(^{220}\) At that moment, only the desire to place a wager (as indicated by making the call itself) and “how that person could be reached” was conveyed—no actual wager was made. \(^{221}\) However the 2nd Circuit Court of Appeals indicated that “this is certainly ‘information assisting in the placing of bets or wagers’ within the meaning of 18 U.S.C. § 1084.” \(^{222}\) The U.S. District Court for the Southern District of New York further liberalized the 2nd Circuit’s analysis a bit by stating that the “information” as applied to 18 U.S.C. § 1084 “would include knowledge that may influence whether, with whom, and on what terms to make a bet.” \(^{223}\) Thus transmissions reporting the results of sporting events, the odds placed on particular contests by odds-makers, or the identities of persons seeking to place bets would be examples of ‘information’ . . .” \(^{224}\) The *Lombardo* court also noted that the government need not allege or provide proof that an actual bet or wager arose from assisting information being transmitted in a Wire Act indictment. \(^{225}\)

\(^{218}\) See supra Part III.B.1.

\(^{219}\) 18 U.S.C. § 1084(a) (2013). Because RAWA is still only a bill, any judicial interpretation of “information assisting” has been made with regards to Wire Act as it is currently written. See H.R. 707; infra Part III.B.2. Also, it is worth reminding the reader that the cases cited in this section’s analysis were decided before the 2011 opinion rendered by the Department of Justice. See DOJ 2011 Opinion, supra note 2; infra Part III.B.2.

\(^{220}\) 395 F.2d 727, 729 (2d Cir. 1968). The method used by the customer to indicate a desire to place a wager involved “ask[ing] for the fictitious ‘Mr. Mellon.’ He would be told that Mr. Mellon was not in. The bettor would then give the operator a code name previously decided by both the bettor and Kelly. Kelly would then call back, since he had each customer’s home and business phone numbers, to receive the bet.” *Id.*

\(^{221}\) *Id.*

\(^{222}\) *Id.*


\(^{224}\) *Id.* Although the Court appeared to be talking about “information assisting” with respect to the § 1084(b) exemptions, it is a fair presumption that this analysis includes the parallel prohibitions in § 1084(a) that the language in § 1084(b) provides exemptions for. See *id.*; 18 U.S.C. § 1084(a)–(b).

Even though it seems like a stretch that progressive meter information that is transmitted between WAPs would be considered information that assists in the placing of bets or wagers, the aforementioned broad construction given by the courts does not make such conclusion as absolute as it would appear on first impression.\textsuperscript{226} If drawing on the analysis given by the Southern District of New York, which held that information that “influence[s] . . . on what terms to make a bet,” can be subject to the Wire Act, there is an argument to be made that jackpot information—information that is notoriously displayed in large flashing lights to \textit{entice} players to play—might be considered ‘information assisting’ for the purposes of 18 U.S.C. § 1084 as expanded by RAWA.\textsuperscript{227} It is possible that such jackpot information can be comparable to odds information in that both may be construed as a means to “price” a game. When it comes to odds, “[d]ifferences in odds . . . reflect differences in the price that players must pay to play the game.”\textsuperscript{228} One of the elements that factors into how a casino can affect this “pricing” is how it structures the payoffs on wagers.\textsuperscript{229} Considering the effort the casino makes to advertise the jackpot payout on a progressive—especially the very large ones offered in a Wide Area Progressive—to entice customers to play particular machines, it seems fair to say that the jackpot is “payoff” information that factors into the odds of the game,\textsuperscript{230} and may be similarly compared to odds that sometimes have been the subject of Wire Act cases.\textsuperscript{231} 

A counterpoint that may be argued is that the transmission of the information that entices the consumer to make a wager happens entirely on the casino floor—the transmission of the jackpot information is displayed on the gaming device to the consumer within the walls of that same casino, it is not communicated to him or her directly from a point across state lines.\textsuperscript{232} This would seem to be the one instance where the Section (3)(2)(C) provision exclusive to the most recent Senate version of the bill would have any teeth.\textsuperscript{233}

\textsuperscript{226} See supra Part III.B.2.

\textsuperscript{227} See Ross, 1999 WL 782749, at *5; 18 U.S.C. § 1084(a)–(b); Restoration of America’s Wire Act, H.R. 707 § (2)(1)(A); \textit{Photograph of Michael Shackleford Sitting at Megabucks Slot Machines}, supra note 183.


\textsuperscript{229} \textit{Hannum & Cabot}, supra note 31, at 187. For a breakdown of the mathematical theory of how payoffs affect the pricing of games, see \textit{id.} at 20.

\textsuperscript{230} See \textit{id.} at 20, 187; \textit{Photograph of Michael Shackleford Sitting at Megabucks Slot Machines}, supra note 183.

\textsuperscript{231} See Ross, 1999 WL 782749, at *5.

\textsuperscript{232} See \textit{Photograph of Michael Shackleford Sitting at Megabucks Slot Machines}, supra note 183; supra Part III.B.1.

\textsuperscript{233} This provision states that “Nothing in this Act, or the amendments made by this Act, shall be construed . . . to alter, limit, or extend—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
However, to what extent transmitted information actually influences a bettor and assists them in placing a bet or wager does not appear to be a prerequisite for a Wire Act violation. Therefore, even though the Senate version of the bill’s rule of construction states that it does not impact the transmission of “information assisting in the placing of a bet or wager on the physical premises of [an] establishment,” the fact that the progressive information was conveyed from a machine to the player exclusively on the premises is immaterial. RAWA will still be triggered by the mere fact that the information has crossed state lines to get to the aforementioned interstate WAP progressive meter from which such information will be potentially conveyed to patrons. Thus, this activity falls outside of the scope of the Section (3)(2)(C) safe harbor and goes unshielded by the rule of construction.

It is also worth noting that even though interstate Wide Area Progressives are a new feature in commercial casinos regulated by state gaming agencies, Native American tribes operating gaming on their reservations have long reaped the benefits of interstate WAP-type gaming. This might lend credence to the argument that the information transmitted by WAPs is not information that would be prohibited by the Wire Act because it provides a real life case scenario where interstate WAPs were in operation long before the Department of Justice issued its 2011 opinion. The Indian Gaming Regulatory Act (“IGRA”), explicitly provides that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law.” This would mean IGRA does not offer shelter to the tribes to conduct activity prohibited by the Wire Act. However there may be several reasons why tribes have been able to conduct interstate WAPs. The activity may: (1) in fact not be considered “information assisting in the placing of bets or wagers on any sporting event or contest,”

establishment, in accordance with applicable Federal and State laws.” Restoration of America’s Wire Act, S. 1668 § (3)(2)(C), 114th Cong. (2015). For more in depth analysis of the possible applications of this provision and the author’s arguments as to the lack of substantive impact it has on his analysis, see supra Part III.A.3.

235 S. 1668 § (3)(2)(C).
236 See supra Part III.B.2.
237 See S. 1668 § (3)(2)(C); supra Part III.B.2.
238 See supra Part III.B.1.
239 See New Mexico is Eighth State Added to Native American Quartermania and Megabucks Systems, THE FREE LIBRARY (May 31, 1995), http://www.thefreelibrary.com/NEW+MEXICO+IS+EIGHTH+STATE+ADDED+TO+NATIVE+AMERICAN+QUARTERMANIA+AND...-a016931577 [hereinafter New Mexico Tribal WAP].
240 See DOJ 2011 Opinion, supra note 2, at 1; New Mexico Tribal WAP, supra note 239.
(2) not be activity that the Department of Justice has chosen to enforce with the Wire Act, or (3) be considered “information assisting in the placing of bets or wagers on any sporting event or contest” under § (a) of the Wire Act, but fall under the exemption in § (b) if it is read to apply to such information.\textsuperscript{244}

Unlike System Based Gaming, arriving at a conclusion on the applicability of RAWA on interstate Wide Area Progressives is not as simple a task. Much of the analysis turns on whether such information would fall under any of the prohibited “categories.”\textsuperscript{245} Based on the history of WAPs, as well as a lack of a bright line for “information assisting in the placing of bets or wagers” established by case law, this part of the analysis leaves much room for argument.\textsuperscript{246} However, should WAP meter information be considered such a transmission, the changes to the Wire Act’s prohibitions to include transmissions related to “any bet or wager,” and a lack of change to the exemptions, leaving them only applicable to sports related wagering, would cause such interstate transmissions to fall under the purview of a RAWA amended Wire Act.\textsuperscript{247}

IV. CONCLUSIONS

Given the murky history of the Wire Act, the 2011 Department of Justice opinion can be seen as a breath of fresh air.\textsuperscript{248} Even though there are clearly those who disagree with its interpretation, be it on an interpretive, ideological, or policy level, it has stood as some of the clearest guidance offered on the statute in decades.\textsuperscript{249} Although this note has analyzed the impact RAWA would have upon server based gaming and interstate Wide Area Progressives, each of the author’s conclusions may of course be debated.\textsuperscript{250} Also, the author has only touched on two general realms of gaming that have seen technological advancements that might cause them to be caught under the RAWA.\textsuperscript{251} As this note demonstrates, gambling “over the internet” is not limited to the intuitive idea of an individual sitting at home on a PC playing poker, spinning slot reels, or purchasing lottery tickets. Much of casino gaming, games that at their core

\textsuperscript{244} See id. § 1084(a)–(b). This conclusion would assume that the exemption would apply to transmissions between tribal jurisdictions where such betting is legal. See id. § 1084(b).
\textsuperscript{245} See supra note 213.
\textsuperscript{246} See 18 U.S.C. § 1084(a); supra Parts III.B.1–2.
\textsuperscript{247} See 18 U.S.C. § 1084(a)–(b); Restoration of America’s Wire Act, H.R. 707 § (2)(1); supra Parts II.B, III.B.2.
\textsuperscript{248} See Minton, supra note 3. See generally DOJ Opinion 2011, supra note 2.
\textsuperscript{249} See RAWA Press Conference, supra note 4. See generally DOJ 2011 Opinion, supra note 2.
\textsuperscript{250} See supra Parts III.A.2, B.2.
\textsuperscript{251} Some activity that might potentially fall under RAWA’s purview could possibly include cashless wagering systems or social media gaming (should guidance on whether social media gaming constitutes actual gambling come out in the future). These analyses are beyond the scope of this note.
still are played in mostly the same fashion as they have been since the introduction of casinos and gambling houses—by visiting a gaming venue to engage in wagering activity—now utilize internet transmissions due to advancements in their underlying technology.\(^{252}\) The point of this note is not merely to make an argument, whether or not the reader agrees with it, as to why a specific type of gaming might unintentionally be caught under the purview of the Wire Act due to the RAWA amendments. It is also to emphasize that the world in which the Wire Act was born no longer exists, and haphazardly amending it to encompass activity and technology (and uses thereof) that was not even dreamt of in the 1960s can have wide ranging effects that RAWA’s drafters do not even perceive given how intertwined the Internet has and will become with standard gaming technology. If it is the goal of RAWA’s sponsors to “restore” the Wire Act to a state that it may never have even existed in, perhaps it is time to start over, repeal 18 U.S.C. § 1084, and start fresh rather than navigate a political, historical, and textual quagmire.

It is against that backdrop that the author also does not wish to play surgeon and recommend changes to RAWA. There are also several other reasons to not attempt a redrafting of RAWA. First and foremost is that Andy Abboud, Sheldon Adelson’s chief lobbyist has expressed “that Adelson would be ‘unlikely to accept exemptions for state lotteries and tribes in a bill to prohibit Internet gambling.’”\(^{253}\) An attempt to lobby for changes in the bill’s language beyond the minor differences between the House and Senate versions would likely be futile. Second, there does not seem to be much cause for alarm about an impending passage of the bill. Although the bill has been reintroduced in both houses of Congress, and does not show any particular signs of going away, it has not garnered much support from those on either end of the political spectrum.\(^{254}\) Finally, attempting to patch up a bill with drafting issues which was meant to amend a statute with its own drafting issues may create nothing more than a series of cascade effects that is more akin to playing a game of whack-a-mole. It is, as Professor I. Nelson Rose referring to the original Wire Act being applied to Internet poker puts it, “like trying to do brain surgery with stone tools—it might work, but it is very messy.”\(^{255}\)

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\(^{252}\) See supra Parts III.A.1, B.1.

\(^{253}\) Ruddock, supra note 50.


\(^{255}\) Roundtable, supra note 19 (statement of I. Nelson Rose).
EXHIBIT A

18 U.S.C. § 1084\textsuperscript{256}

(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 no 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 form 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.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(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.

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

IN THE HOUSE OF REPRESENTATIVES

February 4, 2015

Mr. CHAFFETZ (for himself, Ms. GABBARD, Mr. SMITH of Texas, Mr. FRANKS of Arizona, Mr. KING of Iowa, Mr. DENT, Mr. HOLDING, and Mr. FORBES) introduced the following bill; which was 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

SECTION 1. SHORT TITLE

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

SEC. 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 “results of bets or wagers” and inserting “result of any bet or wager”; and

(C) by striking “placing of bets or wagers” and inserting “placing of any bet or wager”; and

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

“(e) As used in this section—

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).”.

SEC. 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 the enactment of this Act;
   (B) the ability of a State licensed lottery retailer to make in-person, computer-generated retail lottery sales under applicable Federal and State laws in effect on the date of the enactment of this Act; or
   (C) the relationship between Federal laws and State charitable gaming laws in effect on the date of the enactment of this Act.
EXHIBIT C

18 U.S.C. § 1084 AS AMENDED BY H.R. 707 (RAWA)

(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, result of any bet or wager, or for information assisting in the placing of bets or wagers, placing of any bet or wager, shall be fined under this title or imprisoned no 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 form 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.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(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,

See 18 U.S.C. § 1084; H.R. 707; see also H.R. 4301; S. 2159.
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).

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 retailer to make in-person, computer-generated retail lottery sales under applicable Federal and State laws in effect on the date of the enactment of this Act; or

(C) the relationship between Federal laws and State charitable gaming laws in effect on the date of the enactment of this Act.
To restore long-standing United States policy that the Wire Act prohibits all forms of Internet gambling, and for other purposes.

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 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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(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 “results 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;
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(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 the 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.
EXHIBIT E

18 U.S.C. § 1084 AS AMENDED BY S. 1668 (RAWA)260

(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, result of any bet or wager, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned no 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 form 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.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(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 terms ‘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).

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.