

RESTORATION OF AMERICA'S WIRE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM,
HOMELAND SECURITY, AND INVESTIGATIONS
OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

H.R. 707

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Material submitted by the Honorable Jason Chaffetz, a Representative in Congress from the State of Utah, and Member, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103090>

Supplemental Material submitted by John Warren Kindt, Professor Emeritus of Business Administration, University of Illinois School of Law:

<http://docs.house.gov/meetings/JU/JU08/20150325/103090/HHRG-114-JU08-Wstate-KindtJ-20150325-SD001.pdf>

Additional Supplemental Material submitted by John Warren Kindt, Professor Emeritus of Business Administration, University of Illinois School of Law:

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Supplemental Statement submitted by Michael K. Fagan, Adjunct Professor of Law and Counsel-Consultant, Washington University School of Law:

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Extraneous Material submitted for the Hearing Record:

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RESTORATION OF AMERICA'S WIRE ACT

WEDNESDAY, MARCH 25, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM,
HOMELAND SECURITY, AND INVESTIGATIONS

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 4:56 p.m., in room 2237, Rayburn Office Building, the Honorable Jason Chaffetz presiding.

Present: Representatives Chaffetz, Goodlatte, Chabot, Poe, Buck, Bishop, Jackson Lee, Conyers, and Richmond.

Staff present: (Majority) Allison Halataei, Parliamentarian & General Counsel; Robert Parmiter, Counsel; Alicia Church, Clerk; (Minority) Joe Graupensperger, Counsel; Vanessa Chen, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. CHAFFETZ. The Committee will come to order. I thank you for being here, appreciate your patience as we have a hearing today on H.R. 707, the "Restoration of America's Wire Act." We appreciate your patience and understanding.

We have critical votes that are on the floor of the House. We will have another set of votes. We do hope to get through opening statements prior to the next set of votes, but we will have to recess again. It is the intention of the Committee to come back into order after this next series of votes.

This is an important issue. It is an important topic. I happen to be the one who had introduced H.R. 707. I know there are various thoughts and perspectives on that.

[The bill, H.R. 707, follows:]

114TH CONGRESS
1ST SESSION

H. R. 707

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restoration of Amer-
5 ica’s Wire Act”.

6 **SEC. 2. WIRE ACT CLARIFICATION.**

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

9 (1) in subsection (a)—

1 (A) by striking “bets or wagers or infor-
2 mation assisting in the placing of bets or wa-
3 gers on any sporting event or contest,” and in-
4 sserting “any bet or wager, or information as-
5 sisting in the placing of any bet or wager,”;

6 (B) by striking “result of bets or wagers”
7 and inserting “result of any bet or wager”; and

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

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

13 “(c) As used in this section—

14 “(1) the term ‘bet or wager’ does not include
15 any activities set forth in section 5362(1)(E) of title
16 31;

17 “(2) the term ‘State’ means a State of the
18 United States, the District of Columbia, the Com-
19 monwealth of Puerto Rico, or a commonwealth, ter-
20 ritory, or possession of the United States;

21 “(3) the term ‘uses a wire communication facil-
22 ity for the transmission in interstate or foreign com-
23 merce of any bet or wager’ includes any trans-
24 mission over the Internet carried interstate or in for-
25 eign commerce, incidentally or otherwise; and

1 “(4) the term ‘wire communication’ has the
2 meaning given the term in section 3 of the Commu-
3 nications Act of 1934 (47 U.S.C. 153).”.

4 **SEC. 3. RULE OF CONSTRUCTION.**

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

7 (1) to preempt any State law prohibiting gam-
8 bling; or

9 (2) to alter, limit, or extend—

10 (A) the relationship between the Interstate
11 Horseracing Act of 1978 (15 U.S.C. 3001 et
12 seq.) and other Federal laws in effect on the
13 date of enactment of this Act;

14 (B) the ability of a State licensed lottery
15 retailer to make in-person, computer-generated
16 retail lottery sales under applicable Federal and
17 State laws in effect on the date of the enact-
18 ment of this Act; or

19 (C) the relationship between Federal laws
20 and State charitable gaming laws in effect on
21 the date of the enactment of this Act.

○

Mr. CHAFFETZ. In the spirit of timeliness, I am going to first recognize the Ranking Member, Ms. Jackson Lee, for her statement.

Ms. JACKSON LEE. Mr. Chairman, thank you so very much, and thank you for your thoughtfulness in introducing a piece of legislation that will give us the opportunity to review some very important issues.

Let me also thank the Chairman of the Committee, Mr. Sensenbrenner, for calling this very timely hearing.

I want to add my appreciation to all of the witnesses for their patience as we try to do the people's business, and also for your astuteness on this issue, because obviously that is the case that we have called you as witnesses because we want to hear your testimony.

There are 143 million smartphones in operation in America, and at least 75 percent of all U.S. households have computers.

Again, I want to acknowledge, as I see both the Ranking and the Chairman in the Committee of the full Committee. Let me acknowledge our Ranking Member, Mr. Conyers, who is here, and Mr. Goodlatte, the Chairman of the full Committee, who is here as well.

Each of these Internet-connected devices is a potential slot machine or roulette wheel, and every home in America is potentially a casino. That is why it is critical today that we address important issues concerning Internet gaming, including not only statutory interpretation but also questions related to law enforcement and the appeal of online gaming to minors.

Traditional offline gaming revenues in the United States total \$35 billion annually. As the Internet continues to offer new possibilities for gaming online, it has been estimated that the American market for online casinos in total could be worth as much as \$12 billion per year. Gaming is big business, but we must ensure that our laws governing all forms of gaming reflect a careful weighing of the related costs and benefits.

Illegal gambling has long been a source of revenue for organized crime. In 1961, then-Attorney General Robert F. Kennedy's Justice Department worked with the 87th Congress to enact a series of laws targeting organized crime operations. One of these statutes, the Wire Act, was passed to prohibit the use of interstate telephone and telegraph wagering services which processed bets that provided substantial revenues for criminal organizations.

However, the advent of the Internet in the 1990's allowed greater remote interactions with bettors and expanded the types of games that could be played from a distance. These evolving circumstances led to increased focus on the scope of the prohibitions under the Wire Act.

Prior to 2011, the Department of Justice interpreted the Wire Act to prohibit wagering of any kind over interstate telecommunications. In 2011, the Department reexamined the text and legislative history of the statute and developed its current position, that the law was meant only to apply to bets placed on sporting events. Some fear that this change will lead to the proliferation of non-sports Internet gaming and possible related harms to our citizens, which all of us are concerned about.

Others assert that because Americans already spend an estimated \$2.6 billion on illegal offshore gambling websites per year, the better course is to encourage them instead to participate in legal, regulated Internet gaming in the states that allow it. So far Delaware, New Jersey and Nevada have amended their laws to allow either poker or casino-style gaming over the Internet, and several other states allow the online sales of lottery tickets.

We must take seriously the concerns that are raised about the expansion of Internet gaming, including worries that it may facilitate money laundering, prey on those who engage in problem gambling, and allow the participation of minors who would not be able to gamble in a casino. And I would add that all of us, no matter what side of the issue you are on, raise that as a concern.

In fact, the Adolescent Psychiatry Journal's review of studies concerning Internet gambling and children concluded that the potential for future problems among youth is high, especially among a generation of young people who have grown up with video games, computers, and the Internet.

We also must consider the arguments of those who assert that online gaming taking place under state regulation would better prevent those harms than unregulated offshore gaming. For instance, in 2011, former FBI Director Louis Freeh stated that these offshore gaming sites are run by shady operators, often outside the effective reach of U.S. law enforcement, an environment rife with opportunity to defraud players and launder money for much more dangerous operations.

There certainly are different perspectives on these questions, and the Committee will examine all of them as we evaluate H.R. 707, a bill which would provide that the Wire Act prohibits non-sports betting as well as betting on sporting events.

I look forward to the hearing, the insights and opinions of our witnesses concerning each of these issues, and I believe that we have gathered individuals with expertise and balance and a contribution that will help us move forward on a question that the underlying premise should be how do we serve the American public.

With that, Mr. Chairman, I yield back.

Mr. CHAFFETZ. I thank the gentle woman.

I will now recognize the Chairman of the full Committee, the gentleman from Virginia, Mr. Goodlatte, for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Internet gambling has been an issue of particular interest to me during my service in Congress. I am personally opposed to Internet gambling because it is used as a mechanism to launder money, because it causes bankruptcy and breaks up families, and because it can even lead to suicide, as it did for a constituent from my district. I have introduced multiple bills dealing with Internet gambling in the past, and I am looking forward to a frank and detailed discussion with our distinguished witnesses, and the Members of this Subcommittee, on the topic.

As the Chairman noted, the OLC opinion reinterpreting the Wire Act caused a dramatic shift in the way the Department of Justice views the laws proscribing Internet gambling. In the three-plus years since the opinion was issued, it has led to an increased push toward the availability of online gambling in this Nation. Many

participants in the gambling industry, from Indian tribes to state lottery commissions to casino operators, have been exploring ways to increase their involvement in remote gaming.

In this environment, we must explore ways to protect the rights of states to prevent unwanted Internet gambling from creeping across their borders and into their states. Updating the Wire Act can be a tool to protect states' rights to prohibit gambling activity. However, there is also another states' rights dynamic that we must acknowledge, and that is what to do about states that want to regulate and permit Internet gambling within their own borders. Some states have already legalized online gambling. Thus, any update to the Wire Act will need to address how to handle both the states that have already enacted laws allowing online gambling and any states that would want to do so in the future.

These are tough decisions, and we are having this hearing today to seek answers to these tough decisions.

While I am sympathetic to the argument that states are laboratories of democracy, I am also concerned about whether it is possible to keep this sort of gambling activity from crossing state lines and thus violating the rights of other states.

There is a role for Congress to play in upholding states' rights in this area. Wholly intrastate criminal conduct may nevertheless have an interstate nexus, or be facilitated utilizing an instrumentality of interstate commerce such as a highway, telephone network, or, yes, the Internet. It is therefore within Congress's purview to legislate this conduct. The question for the Members of this Committee, then, is whether Congress should act in this area, and if the approach taken by H.R. 707 is the appropriate way to do so.

I will be interested in our panel's take on that and many other questions. How would a state-by-state regulatory approach to Internet gambling affect the citizens of states who do not want legalized gambling within their borders? In other words, how would you ensure that online gambling, if legal in one state, wouldn't bleed over into a neighboring state where it is not legal, particularly since the Internet doesn't stop at state borders? Is geolocation technology sufficient to determine whether an individual who places a bet is physically present in a state where it is legal? Should all Internet gambling be prohibited? What should be done with states that have already passed laws to permit Internet gambling?

I look forward to discussing all these issues in detail with our witnesses. This is a complex issue and evokes strong opinions on all sides. Should we decide to move forward with legislation to address this issue, we need to do so deliberately and thoughtfully.

I thank the witnesses for their testimony and yield back the balance of my time.

Mr. CHAFFETZ. I thank the Chairman.

I will now recognize the Ranking Member of the Judiciary Committee, the former Chairman of the Judiciary Committee, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

First, I too join in in greeting five witnesses today.

In recent years, I have reviewed the discussion concerning the intended meaning of the Wire Act and have tried to determine the best course for public safety. As a result of legal analysis, I have

the following observations which lead me to oppose legislation to amend the Wire Act to prohibit non-state gaming.

Three points. I agree with the position of the Department of Justice based on a 2011 analysis that the Wire Act's prohibitions are limited to sports betting and not to other forms of betting facilitated by wire communications, now including the Internet.

Secondly, while unlawful gaming has long been associated with harms relating to criminal enterprises, banning online gaming is not the answer. That is why the Fraternal Order of Police wrote to myself and Chairman Goodlatte in May of last year in which they said we cannot ban our way out of this problem as this would simply drive online gaming further underground and put more people at risk. Not only does the black market for Internet gaming include no consumer protections, it also operates entirely offshore with unlicensed operators, drastically increasing the threat of identity theft, fraud, and other criminal acts.

And finally, considering the greater risk of harm from offshore gambling, the better option is to allow states, if they choose, to permit online gaming as they see fit, subject to regulation and monitoring, of course.

So that is why the Department of Justice's interpretation of the Wire Act and three states—New Jersey, Nevada, and Delaware—have already permitted online poker or some forms of online casino-style gaming in compliance with the law. Other states, including my own, Michigan, now allow online sales of lottery tickets. States should be allowed to decide this question for themselves, and we should not take any action that would overturn such state laws. But I anxiously await our discussions back and forth today.

I thank the Chairman and yield back the balance of my time.

Mr. CHAFFETZ. I thank the gentleman.

I will now recognize myself for 5 minutes.

I obviously am in favor of this bill, having introduced it. I believe it is a states' rights bill, and I think it is important that states have the ability, such as Utah and Hawaii, where we have no gaming, to protect ourselves from something that we would not like to see within our borders.

I personally am opposed to gambling but recognize the right of others and other states, if they so choose, our neighbors, good friends in Nevada if they so choose to have at it. But nevertheless, I do believe that, going back to December 23, 2011, the Wire Act had an interpretation for more than 50 years, and if there is going to be an alteration of such significance to the law, then that should be done through the regular congressional process, not simply a 13-page memo issued by the Office of Legal Counsel within the bowels of the Department of Justice.

Now, there are a number of people on both sides of this issue. It is something that people, as Chairman Goodlatte talked about, are passionate about. I would like to ask unanimous consent to enter into the record 42 different letters that we have received by and large in support of restoring America's Wire Act or are very concerned about the implications of the OLC's opinion.

These include letters from the African American Mayors Association, the Southern Baptist Convention; Senator Mark Warner; the Eagle Forum; the American Family Association; two letters from

the Family Research Council; a letter from the Concerned Women for America; a letter from Senator Lindsey Graham, Senator Dianne Feinstein, and Senator Kelly Ayotte; Attorneys General from 16 states that wrote to us that this is a problem; the National Association of Attorneys General. We have letters from Governor Rick Perry, Governor Nikki Haley, Governor Herbert of Utah, Governor Scott, Senator Reid, Senator Kyl, Governor Mike Pence; an op-ed by Governor Rick Perry; another op-ed from Governor Bobby Jindal; another letter from Senator Dianne Feinstein; a USA Today editorial from November 20, 2013; a New York Times editorial from November 25, 2013; a cover story on Newsweek of August 22, 2014; former Representative Spencer Bachus, a Member that was on this Committee; the Department of Justice; and the Federal Bureau of Investigation's Criminal Investigations. There are a host of letters and people who have opined that this is fraught with problems and challenges.*

But truly, we are here not to hear from the Members of Congress but to hear from our distinguished panel, so let me introduce them briefly. We will swear you in, and then we will start with the testimony from our panel. We do appreciate it. I know some of you have traveled from out of state.

Mr. John Kindt. Did I pronounce that properly?

Mr. KINDT. Yes, sir.

Mr. CHAFFETZ. Thank you.

Professor Kindt is the Professor Emeritus of Business Administration at the University of Illinois. He is a well-published academic author on issues in relationship to gambling. His academic research and publications contributed to the enactment of the 1996 U.S. National Gambling Impact Study Commission and the United States Unlawful Internet Gambling Enforcement Act of 2006, among other Federal and state statutes. Professor Kindt received his B.A. degree from William and Mary, earned his J.D. and MBA from the University of Georgia, and his LLM at SJD from the University of Virginia.

Mr. Les Bernal is the National Director to Stop Predatory Gambling Foundation. He has spoken and written extensively regarding the dangers of casinos and lotteries to the American public. He has testified before Congress and appeared on numerous television and radio outlets. Previously, Mr. Bernal served as the Chief of Staff in the Massachusetts State Senate. He earned his undergraduate degree from Ithaca College and his MPA from Suffolk University.

Mr. Michael Fagan is an attorney and adjunct professor at Washington University School of Law. He is also a special advisor to the Missouri Office of Homeland Security, as well as an advisory board member at Speartip LLC, where he is a consultant on cyber counter-intelligence issues. Previously, Mr. Fagan served as Assistant U.S. Attorney for the Eastern District of Missouri for 25 years, where he prosecuted several high-profile Federal cases involving illegal gambling activity. He received his Bachelor's degree from Southern Illinois University and his J.D. from Washington University School of Law.

***Note:** The submitted material is not included in this printed record but is on file with the Subcommittee and can be accessed at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103090>

We are also pleased to have Mr. Andrew Moylan. He serves as the Executive Director and Senior Fellow for the R Street Institute, where he is the organization's lead voice on tax issues. Prior to joining R Street, he was Vice President of Government Affairs for the National Taxpayers Union. He previously served with the Center for Educational Freedom at the Cato Institute and has written numerous articles for national publications. He is a graduate of the University of Michigan and somebody we have seen frequently up here in the halls of Congress.

And Ms. Parry Aftab—did I pronounce that properly?—is the Founder and Executive Director for Wired Safety, an organization that provides information and education to cyberspace users on a myriad of Internet and interactive technology safety, privacy, and security issues. In 1999, she was appointed the head of Online Child Protection Project for the United States by the United Nations' Educational, Scientific, and Cultural Organization, a specialized agency within the United Nations. She received her B.A. degree as valedictorian at Hunter College and her J.D. degree from the New York School of Law.

We have a diverse group of people who have come to testify. Again, we thank you for your time and effort to be here.

It is the tradition of the Committee to have people sworn in. So if you will please rise and raise your right hand?

Do you solemnly swear that the testimony you are about to give this Committee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Thank you. You may be seated.

Let the record reflect that all witnesses answered in the affirmative.

It is a busy, crowded schedule. I will assure you that your full testimony will be inserted into the record, but we would appreciate it if you would keep your verbal comments to 5 minutes or less.

Professor Kindt, we will start with you.

TESTIMONY OF JOHN WARREN KINDT, PROFESSOR EMERITUS OF BUSINESS ADMINISTRATION, UNIVERSITY OF ILLINOIS

Mr. KINDT. Mr. Chairman, Ranking Member, Members of the Committee, participants and guests from the U.S. House of Representatives and the U.S. Senate, thank you for your kind invitation to testify.

As a University of Illinois professor since 1978, I believe that a large majority of not only Illinois academic experts but also other U.S. academics would and should urge President Barack Obama and Obama Administration colleagues to support the restoration of the Wire Act.

Internet gambling is an issue of strategic financial stability and Wall Street regulation. It is not an issue of electronic poker, daily fantasy sports gambling, and other fun and games methodologies, which are actually deceptive proposals to leverage gateways for legalizing various gambling activities throughout international cyberspace.

Alarmed by gambling, U.S. Senator Paul Simon and House Judiciary Chair Henry Hyde sponsored the bipartisan U.S. National Gambling Impact Study Commission. Reporting to Congress in

1999, the Commission concluded that Internet gambling was impossible to regulate and that Internet gambling must continue to be prohibited, including by the Wire Act initiated by U.S. Attorney General Robert F. Kennedy to combat organized crime, and via even stronger prosecutorial enforcement mechanisms.

Accordingly, upon the urging of 49 state Attorney Generals, the 2006 UIGEA was enacted into law. At the time, there was concern about a UIGEA fantasy sports loophole, which has since been dangerously exploited by disreputable organizations and needs to be closed.

Internet gambling's destabilization of Wall Street and international financial systems becomes apparent in the investigative news video, "The Bet That Blew Up Wall Street," which Warren Buffett titled "financial WMDs" and which members are respectfully but strongly urged to watch at the 60 Minutes website or on YouTube under "Credit Default Swaps." Wall Street is dangerously flirting again with trillions in unregulated derivatives; that is, financial side bets. In this context, vacuous Internet gambling financials predicated on gambling activities are in development, and Internet gambling stocks would cannibalize a series of speculative bubbles, which can only lead to another Great Recession, or worse.

Killing personal, business, and institutional finances, Internet gambling is widely known as the "killer application" of the Internet. Internet gambling places real-time gambling on every cell phone, at every school desk, at every work desk, and in every living room. With ease, people can "click your phone, lose your home" or "click your mouse, lose your house."

Internet gambling destabilizes U.S. national security and the strategic economic base.

Titles of some of the United States International Gambling Report series produced at the University of Illinois speak directly to these dangers. Volume I, *The Gambling Threat to Economies and Financial Systems: Internet Gambling*. Volume II, *The Gambling Threat to National and Homeland Security: Internet Gambling*. Volume III, *The Gambling Threat to World Public Order and Stability: Internet Gambling*. The over 3,700 pages in these three volumes alone include reprints of 97 original congressional documents detailing the dangers of Internet gambling.

Citing the threat to national security, in 2006/2007 Vladimir Putin recriminalized 2,230 electronic gambling casinos. What do the Russian economists know that still eludes the Federal Reserve Board and Washington decision-makers?

Internet gambling is big government interstate gambling promoted and abused by big government.

Like Illinois, the U.S. needs the "New Untouchables."

Gambling lobbyists now dominate the economic policies of 28 states, giving away at least \$35 to \$100 billion to gambling's insiders since 1990. Illinois is now the most bankrupt state in the country, with over \$110 billion in unfunded liabilities, including being branded by the SEC in 2013 for pension and securities fraud, and placing teachers, public employees, pensions and social programs in extreme jeopardy.

For example, in 1990, 10 casino licenses worth \$5 to \$10 billion were given away to political insiders in Illinois for only \$25,000

each, including one insider convicted in the Governor Rodney Blagojevich scandals. The 2011 reinterpretation of the Wire Act was initiated by Illinois officials.

Similarly, lobbyists callously use the 9/11 tragedy to slip into Federal law billions of dollars in tax breaks for slot machine electronic gambling. These breaks should be ferreted out and eliminated.

Big government gambling cheats consumers. Are the electronic games and slots fair?

Conclusion: The U.S. should reinstate the ban on Internet gambling and encourage other countries to emulate the U.S. ban.

Thank you, Mr. Chairman and Members of the Committee.
Thank you.

[The prepared statement of Mr. Kindt follows:]**

****Note:** Supplemental material submitted with this prepared statement is not included in this printed record but is on file with the Subcommittee and can be accessed at:

<http://docs.house.gov/meetings/JU/JU08/20150325/103090/HHRG-114-JU08-Wstate-KindtJ-20150325-SD001.pdf>

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Prepared Statement
Before the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
U.S. House of Representatives Committee on the Judiciary
Legislative Hearing on H.R. 707: The "Restoration of America's Wire Act"
March 25, 2015

PREPARED STATEMENT OF PROF. JOHN WARREN KINDT¹

Mr. Chairman, Members of the Committee, participants and guests from the U.S. House of Representatives and the U.S. Senate, thank you for your kind invitation to testify before the Committee.

As a University of Illinois professor since 1978, I believe that a large majority of not only Illinois academic experts, but also other U.S. academics, would and should urge President Barack Obama and Obama Administration colleagues to support H.R. 707, the “Restoration of America’s Wire Act.”

Internet gambling is an issue of strategic financial stability and Wall Street regulation. It is not an issue of electronic poker, daily fantasy sports gambling, and other gambling methodologies—which are actually proposals to leverage gateways for legalizing various gambling activities throughout international cyberspace.

Alarmed by the spread of U.S. gambling in the early 1990s, U.S. Senator Paul M. Simon (D-IL) and House Judiciary Chair Henry J. Hyde (R-IL) sponsored the U.S. National Gambling Impact Study Commission (U.S. 1999 Gambling Commission), which passed the House with an overwhelming bipartisan vote. National Gambling Impact Study Commission, Pub. L. No. 104-169, 110 Stat. 1482 (signed into law Aug. 3, 1996).

Reporting to Congress, the U.S. 1999 Gambling Commission concluded and strongly recommended that the Wire Act restrictions on Internet gambling should be strengthened and expanded. NAT’L GAMBLING IMPACT STUDY COMMISSION, FINAL REPORT, chap. 5 & recs. 5-1 to 5-4 (June 1999) [hereinafter NGISC FINAL REPORT], at <http://govinfo.library.unt.edu/ngisc>; see also, Wire Act, 18 U.S.C. § 1084 (sponsored by U.S. Att’y Gen. Robert F. Kennedy, 1961).

Upon the strong urging of 49 State Attorneys General (see Attached Nat’l Ass’n Att’y’s Gen., Letter to Congress, Mar. 21, 2006), the Unlawful Internet Gambling Enforcement Act (UIGEA) was signed into law after passing the House with an over 80 percent bipartisan vote. UIGEA strengthened the Wire Act’s goals. Unlawful Internet Gambling Enforcement Act, 31

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Professor Kindt has taught at the University of Illinois from 1978-2014, and he has published over 80 academic articles in law reviews, public policy journals, and economics journals. Over 20 of these articles have dealt with gambling issues, and many of these articles are available in PDF format at the online archives of the University of Illinois Library at www.ideals.illinois.edu. The Committee has permission to reprint and distribute any and all Kindt publications relating to gambling. In this Congressional statement, cites to publications of Professor Kindt serve only as introductions to the hundreds of source materials cited in the footnotes. Professor Kindt is research active, and he is still teaching and publishing.

To avoid conflicts of interest, Professor Kindt and several academic colleagues do not accept consultant fees or honoraria for work in gambling research areas. This statement should be interpreted as representing only the individual views of the author. For historical continuity, portions of this statement mirror *Internet Gambling Prohibition Act of 2006: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. 20-27 (2006) (prepared statement of Prof. John W. Kindt, Univ. Ill.). Beth Kindt, James Kindt and John Kindt Jr. provided editorial assistance.

U.S.C. §§ 5301, 5361 *et seq.* (2006). At the time, there was concern about a UIGEA fantasy sports loophole which has since been dangerously exploited by disreputable organizations and should be closed.

Internet gambling's destabilization of Wall Street and international financial systems becomes apparent in the investigative news video, "The Bet That Blew Up Wall Street," which Warren Buffett titled "Financial WMDs" and which is still available at the *60 Minutes* website.

Killing personal, business, and institutional finances, Internet gambling is widely known as the "killer application" (a.k.a. "killer app") of the Internet. *See, e.g.*, William H. Bulkeley, *Feeling Lucky? Electronics is Bringing Gambling into Homes, Restaurants and Planes*, WALL ST. J., Aug. 16, 1995, at A1.

Internet gambling places real-time gambling on every cell phone, at every school desk, at every work desk, and in every living room. With ease people can "click your phone, lose your home" or "click your mouse, lose your house."

A. Internet Gambling Destabilizes U.S. National Security and the Strategic Economic Base

During the 1990s, the international financial and economic threats posed to the United States by the spread of U.S. gambling were outlined in a law journal article written at the suggestion and under the auspices of former Secretary of State Dean Rusk. The article was: John W. Kindt, *U.S. National Security and the Strategic Economic Base: The Business/Economic Impacts of the Legalization of Gambling Activities*, 33 ST. LOUIS U.L.J. 567-584 (1995), reprinted in *National Gambling Impact and Policy Comm'n Act: Hearing on H.R. 497 before the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 519-27, 528-45 (1995).

Containing numerous reprints of original academic studies and Congressional documents and including acknowledgments to legal and entrepreneurial icons such as U.S. Attorney General Robert F. Kennedy, U.S. Senator Richard Lugar, Howard Buffett, Warren Buffett, and Dr. John M. Templeton, Jr., the titles of some of the **United States International Gambling® Report** series (produced at the University of Illinois) speak directly to the dangers of Internet gambling.

1. **The Gambling Threat to Economies and Financial Systems: Internet Gambling** (Wm. S. Hein Pub. 2010).
2. **The Gambling Threat to National and Homeland Security: Internet Gambling** (Wm. S. Hein Pub. 2012).
3. **The Gambling Threat to World Public Order and Stability: Internet Gambling** (Wm. S. Hein Pub. 2013).

The over 3,700 pages in these three volumes include reprints of 97 original Congressional documents detailing the dangers of Internet gambling via a decade of Congressional hearings (*see, e.g.*, Attachments to Prof. Kindt Statement).

The titles of other volumes of the **United States International Gambling® Report** are self-explanatory.

1. **Gambling with National Security, Terrorism, and Military Readiness** (Wm. S. Hein Pub. 2009).
2. **Gambling with Crime, Destabilized Economies, and Financial Systems** (Wm. S. Hein Pub. 2009).

As highlighted by *60 Minutes*, the 2007-2008 Wall Street gambling debacle utilizing “credit default swaps” (a.k.a. “financial side bets”) as unregulated financials has not been adequately addressed by new regulations. U.S. banks and Wall Street again have ballooned to a crisis point via U.S.-linked unregulated derivatives gambling on market trends and increasing from \$12.4 trillion in 1994 to \$50 trillion after the 2008 Great Recession to over \$700 trillion in unregulated derivatives today. U.S. Office of the Comptroller of the Currency, *as reported in, Gambling on the Future*, PERSPECTIVES, Spring 2014 (Bus. College, Univ. Ill.).

In this context, the DOJ’s 2011 interpretation of the Wire Act will now allow the creation of vacuous gambling stocks. In 2006 the London Stock Exchange lost billions of dollars in a crash of Internet gambling stocks as investors recognized these stocks were predicated on illusory gambling activities. Fortunately for Wall Street, the U.S. ban on Internet gambling in place in 2006 meant that similar gambling stocks were prohibited—saving U.S. investors. The DOJ’s 2011 interpretation is now allowing a speculative bubble of gambling-based financial instruments which will emulate the Great Recession and will catalyze another destabilization of U.S. and international stock exchanges. *See, e.g., John W. Kindt, Internet Gambling Will Cripple World’s Economic and Financial Systems*, ROLL CALL, Jan. 7, 2013.

In 2006-2007, Russian President Vladimir Putin sanguinely noted the economic and crime costs of government-sanctioned gambling and he recriminalized 2,230 electronic gambling casinos—virtually wiping the economy clean. Associated leaders such as Chechen President Ramzan Kadyrov confirmed that “the gambling business is ... [a threat to] national security.” Itar-Tass, Moscow, *Another 315 gambling places to continue to be closed in Moscow*, Oct. 9, 2006, at <http://www.itar-tass.com/eng/level2.html?NewsID=10869516&PageNum=0>. What do the Russian economists know that is still eluding Washington politicians?

See, John W. Kindt, “Gambling with Terrorism: Gambling’s Strategic Socio-Economic Threat to National Security,” Address at Harvard Univ., Int’l Bus. Conf., Feb. 10-11, 2007 (sponsored by Harvard Bus. School, Harvard Law School & Kennedy School of Gov’t).

B. Internet Gambling is Big Government Interstate Gambling Promoted and Abused by Big Government

1. Internet gambling destabilizes U.S. and international economies.

John W. Kindt & Stephen W. Joy, *Internet Gambling and the Destabilization of National and International Economies: Time for a Comprehensive Ban on Gambling Over the World Wide Web*, 80 DENV. U.L. REV. 111-153 (2002).

2. Internet gambling destabilizes and threatens the financial systems of the United States and the International Economic System.

See, e.g., John W. Kindt & John K. Palchak, *Legalized Gambling's Destabilization of U.S. Financial Institutions and the Banking Industry: Issues in Bankruptcy, Credit, and Social Norm Production*, 9 EMORY U. BANKRUPTCY DEV. J. 21-69 (2002) (lead article). *See also*, John W. Kindt, *The Business-Economic Impacts of Licensed Casino Gambling in West Virginia*, 13 W. VA. U. INST. PUB. AFF. 22-26 (1996) (invited article), updated and reprinted from, *The National Impact of Casino Gambling Proliferation: Hearing Before the House Comm. on Small Business*, 103d Cong., 2d Sess. 77-81 (1994) (statement of Prof. John W. Kindt).

3. Internet gambling destabilizes U.S. national security in the fight against terrorism.

John W. Kindt & Anne E.C. Brynn, *Destructive Economic Policies in the Age of Terrorism: Government-Sanctioned Gambling as Encouraging Transboundary Economic Raiding and Destabilizing National and International Economies*, 16 TEMPLE INT'L & COMP. L.J. 243-277 (2002- 03) (lead article).

4. Internet gambling destabilizes military readiness.

See, e.g., John W. Kindt, *Gambling with Terrorism and U.S. Military Readiness: Time to Ban Video Gambling Devices on U.S. Military Bases and Facilities?*, 24 N. ILL. L. REV. 1-39 (2003) (lead article).

5. Internet gambling creates and facilitates new criminal activity.

See generally, John W. Kindt, *Increased Crime and Legalizing Gambling Operations: The Impacts on the Socio-Economics of Business and Government*, 30 CRIM. L. BULL. 538-555 (1994); John W. Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 S. ILL. U.L.J. 221-262 (2002) (lead article) [hereinafter *The Failure to Regulate Gambling*].

6. Internet gambling fuels the fastest growing addiction among young people – gambling addiction.

See John W. Kindt & Thomas Asmar, *College and Amateur Sports Gambling: Gambling Away Our Youth?*, 8 VILLANOVA SPORTS & ENTERTAINMENT L.J. 221-252 (2002) (lead article).

7. Internet gambling creates enormous socio-economic costs of \$3 for every \$1 in benefits.

John W. Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, 22 *MANAGERIAL & DECISION ECON.* 17-63 (invited article).

8. Internet gambling creates and facilitates government corruption in the United States and throughout the world.

See generally, John W. Kindt, *Follow the Money: Gambling, Ethics, and Subpoenas*, 556 *ANNALS OF THE AM. ACADEMY OF POLITICAL & SOC. SCI.*, 85-97 (1998) (invited article) [hereinafter *Follow the Money*].

Callously capitalizing on the 9-11 tragedy, U.S. gambling lobbyists slipped into the 2002 Economic Stimulus Act what the Nevada press termed a \$40-billion federal tax break (reduced from the initial \$133-billion solicited) for slot machines and other electronic gambling devices. Tony Batt, *Tax Break for Slots OK'd*, *LAS VEGAS REV. J.*, Oct. 16, 2001, at 1.

These types of tax write-offs should be eliminated. John W. Kindt, *Internationally, the 21st Century Is No Time for the United States to Be Gambling With the Economy: Taxpayers Subsidizing the Gambling Industry and the De Facto Elimination of All Casino Tax Revenues via the 2002 Economic Stimulus Act*, 29 *OHIO N. UNIV. L. REV.* 363-394 (2003) (lead article).

C. The Perceived UIGEA Loophole in 31 U.S.C. § 5362 for Daily Fantasy Sports Needs to be Closed

Daily sports gamblers exploiting the arguable UIGEA loophole may have totaled 30-100 million gamblers in 2014 according to sportscaster Bryant Gumbel, who queries whether these gamblers are “doing the same thing as a day trader, but in a different kind of stock market.” *Real Sports with Bryant Gumbel*, Home Box Office Network, Sept. 24, 2014 (original airdate). HBO investigative news commentator Carl Quintanilla concluded fantasy sports is a stock market. According to Carl Quintanilla, fantasy sports gamblers

talk about athletes like commodities. They’re able to track past performance, see how ... [the athletes] operate or perform in various patterns, and ... [the sports gamblers] know if I want to sell ... or buy That’s how you trade a stock. *Id.*

The trend is to “[i]nvest in a sort of hedge fund that trades fantasy sports.” *Id.*

Ignoring long-term profitability, as well as the long-term essential need to protect the integrity of sports and future generations, some professional sports teams are beginning to leverage themselves into daily fantasy sports. The perceived UIGEA loophole needs to be quickly closed.

D. Like Illinois, the U.S. Needs the “New Untouchables”

One of the first states to embrace the lottery, riverboat casinos, and neighborhood electronic gambling, Illinois has given away at least \$35-\$100 billion to gambling’s insiders since 1990. For example, the first 10 casino licenses worth a fair market value of at least \$500 million each were granted to political insiders for \$25,000 per license—including one insider convicted in the Governor Rod Blagojevich scandals. In 2015 dollars, these gambling licenses would be worth over \$10 billion.

In this giveaway context, the 2015 Illinois budget had over \$110 billion in unfunded liabilities, and the state was over 6 months behind in paying many of its bills.

In 2013, the U.S. Securities and Exchange Commission (SEC) branded Illinois with pension and securities fraud. U.S. Securities & Exchange Comm’n v. State of Illinois, Order Instituting Cease-and-Desist, Admin. Proc. File No. 3-15237 (Mar. 11, 2013). According to a March 13, 2013 editorial in the *Wall Street Journal*, “it’s now official: The Land of Lincoln has the nation’s most reckless and dishonest state government when it comes to pension liabilities”; the state’s “accounting practices would get private market participants thrown in jail.” Editorial, *SEC v. Illinois*, WALL ST. J., Mar. 13, 2013, at A14.

Critics can argue that Illinois is the most philosophically and fiscally bankrupt state in the United States. Four of the last seven Illinois governors have gone to prison.

The national media have raised serious questions regarding the Illinois interface and the rationales involving the challenges to and the reinterpretation of the Wire Act. Illinois officials initiated the DOJ’s reconsideration of the Wire Act’s interpretation. *See, e.g.*, Editorial Board, *Obama’s New Tax on the Poor: Internet Gambling by States*, CHRISTIAN SCI. MONITOR, Dec. 27, 2011; Dave Bohon, *Obama DOJ Helping to Facilitate Expansion of Online Gambling*, NEW AMERICAN, Jan. 3, 2012. In 2014, Judicial Watch filed a Freedom of Information (FOI) request with the DOJ for all records relating to the new interpretation. *JW Probes How DOJ Quietly Reversed Online Gambling Law*, JUDICIAL WATCH, Nov. 11, 2014, at www.judicialwatch.org.

E. The Socio-Economic Impacts of Gambling Activities via the Internet, Cell Phones, Social Media, and Cyberspace Constitute “Immediate and Irreparable Harm”

Internet gambling causes “immediate harm” and “irreparable harm” to the entire U.S. public. For examples of sworn testimony by professors/academics documenting the “immediate and irreparable harm” caused by Internet gambling and the advertising of such activities, see Expert Opinions of Earl Grinols, John Warren Kindt, and Nancy Petry *Cisneros v. Yahoo* (Case No. 04433518, Calif. Superior Ct. San Fran., filed Aug. 3, 2004) [hereinafter *Cisneros*].

However, U.S. businesses continued to provide venues for advertising illegal internet gambling in the United States. *See* 18 U.S.C. § 1084 (the “Wire Act”); Matt Richtel, *Wall St. Bets On Gambling On the Web*, N.Y. TIMES, Dec. 25, 2005, at A1 (The U.S. Justice Department reaffirmed that “online gambling [is] illegal.”).

In one California example, a private attorney general action on behalf of the public was brought as a class action “against the major Internet search engine websites which advertise

illegal Internet gambling in California.” *Cisneros, infra*, Complaint, at 1. (The *Cisneros* case was settled 2006-07.)

The primary irreparable harm resulting from advertising gambling activities and the resulting gambling consists of pathological gambling, which is comparable to drug addiction. Pathological gambling is recognized as an addictive behavior, specifically an “impulse control disorder.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, § 312.21, at 615-18 (4th ed. 1994) [hereinafter DSM IV]; *see also*, AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2013) [hereinafter DSM V]. Highlighting the academic debate with pro-gambling lobbyists during the 1990s, the American Psychiatric Association (APA) listed 10 diagnostic criteria for pathological gambling. By definition, a “pathological gambler” evidenced “[p]ersistent and recurrent maladaptive gambling behavior as indicated by five (or more)” of the 10 criteria. DSM IV, *infra*, at 618. By definition, a “problem gambler” evidenced up to four of the criteria.

During the 1995-1999 tenure of the U.S. National Gambling Impact Study Commission, pro-gambling lobbyists tried to manipulate the APA definitions and criteria for a “pathological (addicted) gambler” and for a “problem gambler.” If even partially successful, the definitional confusion surrounding extant and even definitive studies would be jeopardized by the lack of an “apples to apples” comparison. *See, e.g.*, John W. Kindt, *The Gambling Industry vs. Academic Research: Have Gambling Monies Tainted the Research Environment?*, 13 UNIV. S. CALIF. INTERDISCIPLINARY L.J. 1-47 (2003) (lead article) (documenting threats against researchers).

Like drug addiction, the harms to the public (commonly referred to as “the ABCs” of legalized gambling’s socio-economic impacts) caused by gambling activities via cyberspace and particularly via the Internet include:

- (a) new addicted gamblers,
- (b) new bankruptcies, and
- (c) new crime

For the most authoritative analysis of new crime costs (averaging 9 percent increases each year) linked to the accessibility and acceptability of gambling, *see* Earl L. Grinols & David Mustard, *The Curious Case of Casinos and Crime*, 88 REV. ECON. & STAT. 28-45 (2006). A table of the authoritative academic studies highlights that the socio-economic public costs of legalized gambling activities are at least \$3 for every \$1 in benefits. Earl L. Grinols & David B. Mustard, *Business Profitability versus Social Profitability: Evaluating Industries with Externalities, The Case of Casinos*, 22 MANAGERIAL & DEC. ECON. 143, 153 (2001) [hereinafter *The Case of Casinos*]. This 3:1 ratio has been the ratio for many years. *See, e.g.*, *The National Impact of Casino Gambling Proliferation: Hearing before the House Comm. on Small Business*, 103d Cong., 2d Sess. 77-81 & nn. 9, 12 (1994).

For the definitive book in these issue areas, *see* EARL L. GRINOLS, *GAMBLING IN AMERICA: COSTS AND BENEFITS* (Cambridge Univ. Press 2004). For summaries and tables of the major studies of the socio-economic harms, *see* John W. Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, 22 MANAGERIAL & DEC. ECON. 17, 44-63, App. Tables A1-A14 (2001) [hereinafter *Mega-Lawsuits*]. *See also*, NGISC FINAL REPORT, *infra*, chap. 4. For a summary of the socio-economic costs of gambling activities as presented to Congress, *see* Testimony and Prepared Statement of Professor John

Warren Kindt, *Before the U.S. House of Representatives Comm. on Resources*, 109th Cong., 1st Sess., Apr. 27, 2005 (App. Tables).

In the case of concentrated and multiple electronic gambling devices (EGDs), such as in casinos and racinos (*i.e.*, EGDs at racetracks), the “accessibility” and new “acceptability” (*i.e.*, legalization) to the public dictates that the new pathological (*i.e.*, addicted) gamblers will double from approximately 1.0 percent of the public, increasing to 2 percent. Similarly, the new problem gamblers will double from approximately 2 percent of the public, increasing to 4 percent. When the category is specifically focused on teens and young adults, these rates are virtually doubled again to between 4 percent to 8 percent combined pathological and problem gamblers. *See e.g.*, Durand F. Jacobs, *Illegal and Undocumented: A Review of Teenage Gambling and the Plight of Children of Problem Gamblers in America*, in *COMPULSIVE GAMBLING: THEORY, RESEARCH, AND PRACTICE* 249 (1989).

These “doubling increases” have reportedly occurred within the gambling facilities’ “feeder markets.” NGISC FINAL REPORT, *infra*, at 4-4 (50-mile feeder markets); John W. Kindt, *Diminishing or Negating the Multiplier Effect: The Transfer of Consumer Dollars to Legalized Gambling: Should a Negative Socio-Economic “Crime Multiplier” be Included in Gambling Cost/Benefit Analyses?*, 2003 MICH. STATE DCL.L. REV. 281, 312-13 App. (2003) (35-mile feeder markets) [hereinafter *Crime Multiplier*]; John Welte, St. Univ. N.Y. at Buffalo, 2004 Study (10-mile feeder markets).

Gambling activities via cyberspace and particularly via the Internet eliminate the radial feeder markets around the casino EGDs and maximize the accessibility and acceptability factors for gambling (and concomitant social negatives) by placing EGDs on every cell phone, at every social media site, and at every school desk. Children, teens, and young adults conditioned by the Nintendo phenomenon are already demonstrating double the pathological and problem gambling rates of the older adult populations who matured without video games and without the accessible legalized gambling venues. Jacobs, *infra*.

Accordingly, the 1999 U.S. National Gambling Impact Study Commission recommended that there be no legalization of Internet gambling and that the U.S. laws criminalizing gambling over the wires be strengthened (*see* 18 U.S.C. § 1084, the “Wire Act”). The Commission also de facto recommended that the laws criminalizing Internet gambling be redrafted to eliminate any ambiguities and to establish a virtual ban on gambling in cyberspace. NGISC FINAL REPORT, *infra*, reccs. 5.1-5.4. The U.S. 1999 Gambling Commission also highlighted that EGDs were commonly referenced by the psychological community as the crack cocaine of creating new addicted gamblers. *See, e.g.*, NGISC FINAL REPORT, *infra*, at 5-5; V. Novak, *They Call it Video Crack*, TIME, June 1, 1998, at 58. The Commission reported testimony that Internet gambling magnifies gambling addiction.

Irreparable harm as a result of advertising Internet gambling devolves from the phenomenon that there are large increases in the numbers of pathological and problem gamblers once EGD gambling becomes accessible and acceptable. The legalization of new gambling venues since 1990 and the addictive nature of gambling have led to substantial increases in the numbers of Gamblers Anonymous groups, which are modeled after Alcoholics Anonymous groups.

Gambling industry spokespersons have frequently referred to Internet gambling as the “killer application” (a.k.a. “killer app”) of Internet technology because Internet gambling is crack

cocaine to addicting new gamblers and because the feeder market is every living room, work station, and school desk. For a summary table showing the various studies reporting the disproportionate revenues which various types of legalized gambling take from pathological and problem gamblers, see *Mega-Lawsuits, infra*, at 25, Table 1 (compiled by Professor Henry Lesieur).

Increasing numbers of experts and clinicians studying pathological gambling have reported that when a new person is “once hooked” they are “hooked for life.” See, e.g., *Mindsort, Colorado Lottery 1996*. The salient points are that: (1) these are new pathological gamblers, and (2) these gamblers may be addicted for life (although in remission in many cases). A fortiori, gambling via cyberspace and particularly via the Internet intensifies these problems—a substantial number of which will be irreparable, especially when interfaced with children, teens, and young adults. See, e.g., David P. Phillips, et al., *Elevated Suicide Levels Associated with Legalized Gambling*, 27 *SUICIDE & LIFE-THREATENING BEHAV.* 373, 376-77, & Table 3 (1997).

F. Big Government Gambling Cheats Consumers: Are Electronic Games and Slots “Fair”?

1. Issues have arisen involving how “electronic gambling machines” (e.g., electronic slots) are programmed and whether the astronomical odds are “fair” to patrons.

John W. Kindt, “*The Insiders” for Gambling Lawsuits: Are the Games “Fair” and Will Casinos and Gambling Facilities be Easy Targets for Blueprints for RICO and Other Causes of Action?*, 55 *MERCER L. REV.* 529-593 (2004) (lead article). See also, John W. Kindt, *Subpoenaing Information from the Gambling Industry: Will the Discovery Process in Civil Lawsuits Reveal Hidden Violations Including the Racketeer Influenced and Corrupt Organizations Act?*, 82 *OREGON L. REV.* 221-294 (2003) (lead article).

2. Coupled with pandemic regulatory failures, these issues of “fairness” are increasingly problematic for the public’s perceptions of gambling.

See, e.g., *The Failure to Regulate Gambling, infra*; *Follow the Money, infra*.

G. The Feeder Market Impacts of Internet Gambling Are Substantial

The FINAL REPORT of the Congressional 1999 National Gambling Impact Study Commission called for a moratorium on the expansion of any type of gambling anywhere in the United States. Although tactfully worded, the National Gambling Commission also called for the continued prohibition of Internet gambling and the re-criminalization of various types of gambling, particularly slot machines convenient to the public.

Some of the negative impacts of casinos, electronic slot machines, and Internet gambling are detailed in the appendix to the article, *Diminishing Or Negating The Multiplier Effect: The*

Transfer of Consumer Dollars to Legalized Gambling: Should a Negative Socio-Economic "Crime Multiplier" be Included in Gambling Cost/Benefit Analyses?, 2003 MICH ST. DCL.L. REV. 281-313 (lead article).

In his classic book entitled *ECONOMICS*, Nobel-Prize laureate Paul Samuelson summarized the economics involved in gambling activities as follows:

There is ... a substantial economic case to be made against gambling. First, it involves simply *sterile transfers of money or goods* between individuals, creating no new money or goods. Although it creates no output, gambling does nevertheless absorb time and resources. When pursued beyond the limits of recreation, where the main purpose is after all to "kill" time, gambling subtracts from the national income. PAUL SAMUELSON, *ECONOMICS* 425 (10th ed. 1976) (emphasis original). *See also, id.*, subsequent editions, *et seq.*

The second economic disadvantage of gambling is the fact that it tends to promote *inequality and instability of incomes.*" *Id.* at 425 (emphasis original). Furthermore, Professor Samuelson observed that "[j]ust as Malthus saw the law of diminishing returns as underlying his theory of population, so is the 'law of diminishing marginal utility' used by many economists to condemn professional gambling." *Id.* at 425.

H. Strategic Solution to Eliminate Internet Gambling Problems and Other Gambling Problems: Transform Gambling Facilities into Educational and Practical Technology Facilities: Stabilizing International Financial Institutions

Instead of legalizing a casino/slot machine establishment at a failing racetrack in 1997, the Nebraska legislature bulldozed the racetrack and made it into an extension of the University of Nebraska at Omaha (UNO) and a high-tech office park. Ironically, the proposed casino site is now the home of the new UNO College of Business and has attracted close to \$5 billion in commercial developments. *See, e.g.,* John W. Kindt, *Would Re-Criminalizing U.S. Gambling Pump-Prime the Economy and Could U.S. Gambling Facilities Be Transformed into Educational and High-Tech Facilities? Will the Legal Discovery of Gambling Companies' Secrets Confirm Research Issues?* 8 STANFORD J.L., BUS. & FIN. 169-212 (2003) (lead article).

As pro-gambling interests have courted Nebraska they have been repeatedly rebuffed by the academic community, which was exemplified in one instance by 40 economists publicly rejecting new gambling proposals that would "cannibalize" the consumer economy. Robert Dorr, *40 Economists Side Against More Gambling, Signers: Costs Likely Higher than Benefits*, OMAHA WORLD-HERALD, Sept. 22, 1996, at B1.

In 2000-2001 the efforts of S.C. Governor David Beasley resulted in the de facto re-criminalization of electronic slot machines throughout South Carolina. This re-criminalization produced a noticeable decrease in crime and social problems—as well as an upswing in the consumer economy and the economic multiplier effect.

On October 27, 2005, the Illinois House of Representatives voted 67 to 42 (with 7 voting "present") for the Senator Paul Simon memorial bill (as it is popularly referenced) to re-criminalize the Illinois casinos via H.B. 1920, sponsored by Representative John Bradley.

However, the companion Senate bill was procedurally killed by Governor Rod Blagojevich (who is currently in prison for corruption).

Similarly, suggestions have been made to re-criminalize gambling facilities in other states and transform the gambling facilities into educational and high-tech assets—instead of giving the gambling owners tax breaks. On December 6, 2005, Pennsylvania Representative Paul Clymer (with 32 cosponsors) introduced H.B. 2298 to re-criminalize the Pennsylvania casinos.

In another example during February 2015, the Idaho Senate voted to re-criminalize instant electronic racing machines.

Casinos and gambling parlors would generally be compatible with transformations into educational and high-tech resources. For example, the hotels and dining facilities could be natural dormitory facilities. Historically, facilities built for short-term events, such as various World's Fair Expositions, the 1996 Olympic Village (converted to facilities for the Georgia University system), and other public events have been transformed into educational and research facilities.

Socio-economic history demonstrates that the eventual strategic solution to U.S. and international gambling problems is to re-criminalize gambling for economic security and to transform gambling facilities into educational and practical technology facilities.

1. Conclusion: The U.S. Should Reinstate the Ban on Internet Gambling and Encourage Other Countries to Emulate the U.S. Ban

The immediate strategic solution to eliminate or curtail many of the problems caused by gambling activities is a total U.S. ban on Internet gambling activities.

Internet gambling shrinks the consumer economy and destroys consumer confidence by promoting a ubiquitous gambling philosophy.

If the U.S. permits Internet gambling to expand, dubious parties will tout the U.S. imprimatur—empowering those parties to create a queue of speculative bubbles that could collapse already fragile financial systems and destabilize essential international economic security.

Governments cannot gamble their way to prosperity. However, via financial instruments predicated on vacuous gambling activities, governments can destabilize and depress their economies and budgets.

Mr. CHAFFETZ. Thank you.

Mr. Bernal, you are recognized for 5 minutes.

**TESTIMONY OF LES BERNAL, NATIONAL DIRECTOR,
STOP PREDATORY GAMBLING (SPG)**

Mr. BERNAL. Hello. My name is Les Bernal, and I am the National Director of Stop Predatory Gambling. Our focus is government-sponsored gambling, whether it is casinos, state lotteries, tribal casinos, or the topic of today's hearing, which is Internet gambling.

Government-sponsored gambling is playing a major role in the rising unfairness and inequality in American life, and it is directly impacting the lives of your constituents in your district.

Up until about 10 years ago, for me, government-sponsored gambling was like the paint on the wall. It was just there. I never questioned it. But when you finally stop to look at it, you can't avoid the obvious evidence that this public policy is contributing to the unfairness and inequality in our country, which has been considered one of the defining issues of our time by leaders from across the political spectrum.

Banning the practice of states sponsoring Internet gambling, which the bill before you would do, is part of the foundation of any serious effort toward reversing this rising inequality in our country.

One important job of the Federal Government is to ensure that every state gives every citizen equal protections under the law. Yet, at this moment in history, state governments across the United States are blatantly, blatantly cheating and exploiting their own citizens, infringing on the rights of millions of Americans through the extreme forms of gambling they sponsor and market to our communities. Many of these state-sponsored games, especially electronic gambling machines, are designed mathematically so users are certain to lose their money the longer they play. At the same time, these games are literally designed so citizens can't stop using them. They are exploiting aspects of human psychology and inducing irrational behavior.

Citizens, your constituents, aren't demanding these extreme forms of gambling. No one is pounding the table for this in your district. In partnership with commercial gambling operators, states are forcing these gambling games onto the public. The most recent poll of New Jersey voters found that 57 percent, 57 percent opposed online gambling, and only 32 percent approved. This is after, after their state government began sponsoring online gambling in 2013.

So if not for the Federal Government, who will step in to protect the rights of individuals, your constituents, against these blatantly dishonest practices that are contributing to inequality and being done by an active predatory state?

People are and should remain free to wager money and to play games of chance for money. But while citizens have every right to engage in a financially damaging activity, the government has no business encouraging them to do it.

In most of your congressional districts, 5 percent of your district, 5 percent of your district, about 35,000 of your constituents have been turned upside-down by gambling, most of which was spon-

sored by state government. This figure does not account for the reality that each of these citizens has at least one or two people close to them whose lives are also upended because of this public policy.

There is no debate that the financial losses of these individuals, these people being harmed by this public policy, they make up the majority of the revenue taken by state-sponsored casinos and lotteries. Millions of men and women and their families have sacrificed and hurt so much to provide these needed revenues to American government. But no one has ever thanked them for their service. There are no parades with fluttering American flags in the breeze, no yellow ribbons. Our country simply renders these people as failures.

Banning state-sponsored Internet gambling also creates more fairness for the two-thirds of your constituents who almost never use government-sponsored gambling. Because of this public policy, they are paying higher taxes for less services. State-sponsored casinos and lotteries have proven to be a failed source of government revenue, and they haven't delivered on their famous promises to fund education, lower taxes, or to pay for needed public services.

The evidence is clear that state-run gambling operations add to rather than ease long-term budget problems for states. Internet gambling sponsored by government will only make it worse. That is why state-sponsored gambling is the symbol of anti-reform politicians across the United States, regardless of party.

"No taxation without representation" was one of America's founding principles. After 40 years of state governments using lotteries and casinos to prey on their own citizens, to extract as much money as possible, the time has come to add the principle of "no taxation by exploitation" beneath it.

Thank you.

[The prepared statement of Mr. Bernal follows:]



Testimony of Les Bernal, National Director, Stop Predatory Gambling

**Before the House Judiciary Subcommittee on Crime, Terrorism and
Homeland Security**

March 25, 2015

Thank you Mr. Chairman and members of the Subcommittee on Crime, Terrorism and Homeland Security for the invitation to testify about H.R. 707 which would ban the recent practice by some state governments of sponsoring internet gambling.

My name is Les Bernal and I am the National Director of Stop Predatory Gambling. Stop Predatory Gambling (SPG) is a movement more than an organization. We have dedicated ourselves to a major national reform: ending government-sponsored gambling because it is dishonest, financially damaging to citizens and contributes to the rising unfairness and inequality in our country.

A 501c3 non-profit based in Washington, DC, we are a transpartisan, government reform network of individuals, family members and organizations who hail from diverse backgrounds, political convictions and religious faiths.

We, the Losers

I stopped looking away at the issue of government-sponsored gambling about ten years ago. I had been to casinos, I had bought lottery tickets, and I had played and coached sports my whole life, where sometimes gambling was part of the culture. Maybe like many of you, I had never really considered the issue. Government-sponsored gambling was like the paint on the wall - it was just there, and I never questioned it.

At the time, I was serving as a Chief of Staff in the Massachusetts Senate. I read a cover story about the design of slot machines in *The Sunday New York Times Magazine* and the reporter described his tour of the headquarters of International Gaming Technology (I.G.T.), America's biggest maker of electronic slot machines. As he walked through the building, the *Times* reporter asked the employees if they ever used the machines they built. He wrote: "Most of the people I met inside I.G.T. told me they never played slot machines on their own time. When I asked one

I.G.T. artist if he ever plays, he acted as if I had insulted him. "Slots are for losers," he spat, and then, coming to his senses, begged me to consider that an off-the-record comment."¹

"Slots are for losers." The key issue here is this is something *sponsored by state governments*. States sometimes conduct casino border wars, positioning new facilities to poach revenue from their neighbors. This has little to do with limited government or free markets This is a *government program*.

Then as I started digging deeper into this public policy, I realized that slot maker's harsh but revealing candor about the "losers" could easily be said about most other forms of government-sponsored gambling like lottery scratch tickets and now, internet gambling, a practice that H.R. 707 would help to stop.

Who are these "losers?" They are *your* constituents.

What This Issue Is *Not*

Before talking about how this bill helps the "losers" in your district, I want to discuss what the issue of government-sponsored internet gambling is *not* about.

The national discussion should be fueled by facts about this public policy, as opposed to the tired stereotypes sold by those groups with their own financial self-interest. I will briefly focus on two of the stereotypes pushed by those who lobby for America's casino and lottery operators. The first is the notion that the practice of government-sponsored internet gambling is a "states rights" issue. The second is the manufactured line that "prohibition never works," an attempt to cast the ban on internet gambling in the shadow of the Prohibition era when people could not drink alcohol legally.

"States Rights:" State governments should be allowed to force casino gambling and lottery games into every bedroom, dorm room and smart phone in their communities, with the sole purpose of extracting more money, even though a strong majority of individuals in states don't want it.

One can only crack a smile at the recent approach of America's gambling interests who are now claiming internet gambling is "a states rights" issue. For most of the last decade, many of these same gambling interests have been lobbying to get the federal government *to sponsor and promote* internet gambling.²

One important job of the federal government is to ensure that every state gives every citizen equal protections under the law. Yet at this moment in history, state governments across the United States are blatantly cheating and exploiting their own citizens, infringing on the rights of millions of Americans through the extreme forms of gambling they sponsor and market.

Many of these state-sponsored gambling games, especially electronic gambling machines, are designed mathematically so users are certain to lose their money the longer they play.³ At the same time, these games are literally designed so citizens cannot stop using them, exploiting aspects of human psychology and inducing irrational and irresponsible behavior.⁴

Citizens are not demanding these extreme forms of gambling. States, in partnership with commercial gambling operators, are forcing these gambling games onto the public. The most recent statewide survey of New Jersey registered voters from Fairleigh Dickinson University's PublicMind found that 57 percent opposed legalized online gambling, and only 32 percent approved. (New Jersey state government began sponsoring online gambling in 2013.) According to the summary of the survey:

The university's research group has asked this question repeatedly over the years, and the current findings represent a decline in favor from those in March 2013. At that time, 41 percent favored online gambling and 46 percent said they were opposed.

“The public's attitude was, for several years, warming up to online gambling,” said Krista Jenkins, director of PublicMind and professor of political science. “But there has been a clear change in direction, now that the practice has actually been legalized. Part of the public has always shown deep reluctance to make gambling so accessible in their own homes. Now that it is in fact legal, they may be more concerned than ever.”⁵

If not the federal government, who will step in to protect the rights of individuals against these practices by an active, predatory state?

“No taxation without representation” was one of America's founding principles. After 40 years of state governments using lotteries and casinos to prey on their own citizens to extract as much money as possible, the time has come to add the principle of “No taxation by exploitation” beneath it.

“Prohibition doesn’t work”....except when it does

With the zeal of a teetotaler, there is one memorable and telling trait that those gambling operators who employ the “Prohibition doesn’t work” message have in common: they don’t gamble. Despite reaping billions of dollars from the have-nots in America, nearly every major casino operator, including Steve Wynn⁶, Jim Murren⁷, CEO of MGM, Sheldon Adelson of Las Vegas Sands,⁸ and Gary Loveman⁹ of Caesars, *hardly ever gamble themselves*.¹⁰

Why have for-profit gambling operations traditionally been illegal in states? They were illegal because states had strict laws and often constitutional prohibitions against the cheating and exploitation of their own citizens. For-profit gambling, *doing it as a business*, fits this category because the games are controlled by a self-interested party whose only incentives are to entice players to bet and to cause them to lose.

“The issue is *partiality*,” the public intellectual David Blankenhorn succinctly described it. “The house is not impartial in the matter of whether or how I gamble. Quite the contrary. Because its goal is profit, not disinterested sponsorship of recreation, the house’s only interest in the matter is causing me, in whatever ways it can, to place as many bets as possible and to lose as much money as possible. And because that’s exactly and solely what the house wants, that’s typically what the house gets.”¹¹

The serious problem here is “the house” *is state government*. In their desire to extract more and more money, the evidence is colossal and undeniable that state governments are willfully injuring their own people, infringing on the individual rights of citizens.

The criminalization of for-profit lotteries and casino-style gambling was successfully practiced for a large portion of American history. This does not mean illegal gambling was absent from society, but public institutions did their best *to contain it*. Gambling was mostly private and local. Gambling operators were not continually advertising on all the major forms of media of the day. No one was sending “\$50 of free slot machine play” coupons to the homes of citizens. Tens of millions of low income Americans were not deceived into believing the best way to accumulate wealth was to spend their money on rigged lottery games, like they do today, thanks to government-sponsored gambling.¹²

Is it the government's job to prohibit whether people want to gamble?

People are, and should remain, free to wager money and to play games of chance for money. While citizens have every right to engage in a financially damaging activity, the government has no business encouraging them. Government, in this case, is not merely permitting private, consensual behavior. It is granting monopolies and awarding regulatory advantages to favored firms.

The willfully misleading cry for “regulation” by those who would gain the privilege of such a monopoly begs this question: if the illegal online gambling operators supposedly cannot be controlled, how can you control and regulate the ones you license? If you can't shut out the illegal operators, how would you possibly shut down licensed operators who don't follow the rules?

That is why for anyone thinking that illegal internet gambling will be reduced if states sponsor it, think again. Whether it is lotteries, casinos or internet gambling, *there is no evidence from any jurisdiction* that illegal gambling has gone down after states began sponsoring gambling.

How H.R. 707 Helps the “Losers” in Your District

Banning the practice of government-sponsored internet gambling helps your constituents in at least three important ways. It:

- 1) Reduces unfairness and inequality in the communities you represent
- 2) Helps the youth in your district
- 3) Improves your state's financial condition, reducing pressure to raise taxes

1) Stopping states from sponsoring internet gambling reduces unfairness and inequality in the communities you represent

Any serious effort to improve fairness and equality for every American must include addressing the policies and practices that cripple such efforts. Government-sponsorship of casinos and lotteries is one of these policies. A mounting pile of independent evidence confirms that it is harming health, draining wealth from people in the lower ranks of the income distribution, and contributing to economic inequality.¹³ The policy exists only because policy makers want it to exist.

In most of your congressional districts, about 35,000 of your constituents- 5% of your district – have been turned upside down by gambling, *most of which was sponsored by state government*.¹⁴ This figure does not account for the reality that each gambling addict has at least 1-2 people close to them whose lives are also upended because of this policy.

Millions of men and women and their families have sacrificed and hurt so much to provide needed revenues to American government, but no one has ever thanked them for their “service.” There are no parades with fluttering American flags in the breeze. No yellow ribbons. Our country simply renders them failures. Or in the words of the IGT employee, “the losers.”

The majority of the revenue stream for state-sponsored casinos and lotteries hinges on the financial losses from the individuals being harmed by this policy

Over the last decade *there are 11 different independent studies* that show 40%-60% of electronic gambling machine profits come from citizens who have become addicted to using the machines.¹⁵ Despite all the public relations by gambling interests to the contrary, the percentage of gambling revenue that comes from people who follow “responsible gambling codes of conduct” – people who can be described as casual gamblers - is *virtually irrelevant to their profits*. A Canadian study, reported in MIT Professor Natasha Schull’s book *Addiction By Design*, found that people who follow responsible gambling guidelines made up 75% of the players but contribute a mere 4% of gambling profits.¹⁶ “They only bring in 4% of our revenues, the responsible gamblers,” said Tracy Schrans, an author of that Canadian study, in a 2006 radio interview. “If responsible gambling were successful then the industry would probably shut down for lack of income.”¹⁷

The same predatory business model is true for state lotteries. According to *The New York Times*, 10 percent to 15 percent of all players account for up to 80 percent of sales.¹⁸ Allowing state governments to continue this blatant exploitation by allowing them to sponsor internet gambling into people’s homes and smart phones dramatically intensifies the financial damage they are inflicting on citizens.

“But aren’t we at least helping Native Americans?”

Tribal casinos have contributed to the rising unfairness and inequality in our country. For more than 25 years, the casino lobby has told the American people that casinos are the engine to help Native American tribes prosper. It was an act of Congress, the Indian Gaming Regulatory Act passed in 1988, that kicked the practice of predatory gambling into high gear across the country. Yet recently *The Economist*, the world’s leading international magazine, spotlighted the latest evidence how casinos have been a failed experiment. Casinos have actually made tribal members poorer, according to a new study in the *American Indian Law Journal* showing that growing tribal gambling revenues can make poverty worse.¹⁹ The study looked at two dozen tribes in the Pacific Northwest between 2000 and 2010. During that time, casinos owned by those tribes doubled their total annual take in real terms, to \$2.7 billion. Yet the tribes’ poverty rate rose from 25% to 29%.²⁰ Some tribes did worse: among the Siletz poverty jumped from 21% to 37%.

2) Stopping states from sponsoring internet gambling helps the youth in your district

The future of lotteries and casinos sponsored by state governments hinges on luring kids to develop a gambling habit. No demographic is a bigger target for the gambling operators lobbying for internet gambling than America’s youth. It’s well-established that the younger children start gambling, the more likely it is they will become habitual gamblers and also problem gamblers.²¹ Internet gambling is especially addictive for youth who have grown up playing video games, spending hours on their devices. By government sponsoring online gambling, it sets up an entire generation of young people to become problem gamblers by making it omnipresent in everyday life, *even in their own homes*.

Equally disturbing, there have been hundreds of reports in recent years of children who have been abandoned while their parents gamble inside regional casinos. *The Chicago Sun-Times* reported that within a two-year period in Illinois alone, 85 kids were left neglected in casino parking lots.²² They are not simply the victims of “bad parents.” Often, these parents have had no prior issues with state child protection service programs. The lure of the extreme forms of gambling promoted by state government is so powerful that it leads many parents and other guardians of children to act so irrationally that they leave their kids behind, alone, for hours in casino parking lots, hotel rooms and homes. How often does a local movie cinema in your district have incidences of children being left behind in the cinema parking lot while the mother or father is inside the theater watching a movie? Very rarely, if ever. If this is commonly happening with brick-and-mortar casinos, what happens to all these kids, and thousands more like them, if we allow state government to run casinos on the internet inside people’s homes, 24 hours a day?

3) Stopping states from sponsoring internet gambling improves your state's financial condition, reducing pressure to raise taxes

State sponsored gambling is the symbol of anti-reform politicians across the United States. Instead of providing solutions to their state's problems, these politicians passed the buck on difficult fiscal choices by promoting the biggest budget gimmick there is: government-sponsored gambling.

Casinos and lotteries have proven to be a failed source of government revenue and have not delivered on their promises to fund education, lower taxes, or pay for needed public services. States generally expand gambling operations when tax revenues are depressed by a weak economy, or to pay for new spending programs. Yet income from casinos and lotteries does not tend to grow over time as rapidly as general tax revenue. Expenditures on education and other programs will generally grow more rapidly than gambling revenue over time. Thus, new gambling operations that are intended to pay for normal increases in general state spending add to, rather than ease, long-term budget imbalances.²³

More troubling for taxpayers, gambling operators are not allowed to fail by the state. For example, when casinos come up short, states usually provide new infusions of money, reduced taxes, reduced funding for gambling addiction measures, or other concessions such as lifting smoking bans and loss limits, in order to sustain revenues and profitability.²⁴ Rhode Island, Delaware, and New Jersey, to just name a few, have all recently taken special steps to help casinos that might otherwise fail. Public tax dollars too often prop up gambling operators.

The push for more subsidies from taxpayers is going to intensify moving forward: of the 47 states with gambling revenue, 27 states reported declines over fiscal 2014 with nine states reporting declines of more than 5 percent.²⁵ Allowing states to sponsor internet gambling will only deepen this irreversible downward spiral.

Conclusion

No strong nation has ever built prosperity on the foundations of personal debt, addiction, and the steady expansion of "businesses" that produce no new wealth.

State governments have transformed gambling from a private and local activity into the public voice of American government, such that ever-increasing appeals to gamble, and ever-expanding opportunities to gamble, now constitute the main ways that our government communicates with us on a daily basis.

The evidence is undeniable that this public policy is contributing to the rising unfairness and inequality in our country, which has been cast as one of the defining issues of our times by leaders from across the political spectrum. Banning the practice of states sponsoring internet gambling is an integral step toward reversing this trend.

No citizen of America should be rendered a "loser" by his or her own government.

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Mr. CHAFFETZ. I thank the gentleman.
Mr. Fagan, you are now recognized for 5 minutes.

**TESTIMONY OF MICHAEL K. FAGAN, ADJUNCT PROFESSOR OF
LAW AND COUNSEL-CONSULTANT, WASHINGTON UNIVER-
SITY SCHOOL OF LAW**

Mr. FAGAN. We need to update and restore the Wire Act, and particularly to undo the misinterpretation recently given to it by the Department of Justice's Office of Legal Counsel. The need for a legislative fix I prefer to set out in the written testimony submitted to the Subcommittee. It is not greatly different from the language in H.R. 707 and returns the Act to its proper scope, with a few less exceptions and a bit more First Amendment protection.

Also in my written submission is an analysis of how and why the Office of Legal Counsel's December 2011 strained interpretation of the Wire Act to preclude its application to non-sports gambling communications is wrong substantively and was achieved via a closed legislation-by-fiat process neither democratic nor sensible given the change it portends for daily life in the United States.

Indeed, the 50-year understanding that the Wire Act applies to both sports and non-sports wagering interstate communication was the understanding that even the gambling industry had during that largely pre-Internet period, as industry behavior shows. So when the Office of Legal Counsel's 2011 reinterpretation of the Act became public, many wondered whether the opinion was either careless or corrupt.

No matter. For present purposes, as a result, it was wrong both as a matter of law and as a matter of policy. A restored, repaired Wire Act will help states enforce their gambling laws whether the state prohibits or authorizes intrastate gambling activities. This kind of help is just as needed today as in 1961.

Organized crime, both traditional and non-traditional, and now increasingly transnational, has long exploited and continues to exploit the evasive opportunities presented by conducting cross-border gambling operations. By unwisely cutting in half the utility of the Wire Act as a tool in the prosecutor's toolbox, the Office of Legal Counsel opened a window for organized crime and others intent on impoverishing Americans through illicit, commercially operated gambling enterprises, whether via the numbers racket, lotteries, bolita virtual card games, slots, or any of the myriad creative ways con men and sharp operators use non-sports gambling to generate revenue from gangs designed to exploit and even addict.

The money laundering utility of gambling enterprises, long known but hard to investigate in brick-and-mortar settings, becomes all the more difficult to defeat when Internet-based gambling moves funds and obfuscates records at the speed of light. Of even more serious concern, law enforcement and intelligence analysts have seen online gambling sites, sites which by their nature are interstate and international in scope, being used as terrorist financing vehicles, places to clandestinely store and transmit funds.

Terrorism-related convictions in the United Kingdom of Tariq ad Daour and two associates who used Internet gambling to facilitate terrorism conduct and planning a few years ago only hint at the

dozens of classified and non-classified investigations that U.S., U.K., and Canadian authorities have made under the exploitation of gambling websites to finance terrorism.

More recently, terrorists in Afghanistan have been using illegal gambling sites to move their money as well, reports Janes Advisory Services. It is no wonder that the Federal Criminal Investigators Association supports legislation to return the Wire Act to its original scope and opposes any carve-out that would weaken its protections and further enable criminal and terrorist activity. Without a restored Wire Act, there is not adequate legal framework for law enforcement to shut down substantial illegal interstate gambling activities.

Relatedly, the present inability to use the Wire Act in cases of non-sports gambling further denies millions of Americans the efficient recourse of sentencing-based restitution when they become victims of fraud or other gambling-based criminal conduct conducted by illegal cross-border enterprises.

Those who dream that it's possible to regulate and tax this supposedly well-monitored interstate system of online gambling are just that, dreamers. I can tell you with the certainty of a person who has been there, done that, that there is no way the Federal Government or any individual or combination of state governments can expand to the degree necessary to effectively police and regulate the scale of Internet gambling, multiple millions of transactions involving billions of lines of code in malleable, disguisable formats with anonymizing and proxy tools readily available with easily disguised traditional and evolving collusive behaviors. For example, Meerkat-type video streaming over Twitter service will always give collusion teams a leg up.

Remote access and control of computers in a jurisdiction where intrastate gambling is allowed will defeat geolocation and geo-fencing, and it is fairly trivial to leverage the Tor network to obfuscate the original IP address of a client, whether it is a laptop, a phone, a tablet, et cetera.

All this means no police force or regulatory body will be big enough, trained enough, or funded enough to keep criminals and terrorists from using institutionalized online interstate gambling to their advantage.

I see my time has run out.

[The prepared statement of Mr. Fagan follows:]

Written Statement of Michael K. Fagan
Adjunct Professor of Law and Counsel-Consultant

March 25, 2015

The Committee on the Judiciary's Subcommittee
on
Crime, Terrorism, Homeland Security, and Investigations
Hearing on H.R. 707,
the
Restoration of America's Wire Act

To the Honorable Bob Goodlatte, Chairman, U.S. House Committee on the Judiciary,
the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations,
and the Honorable Members and staff of the Subcommittee:

As a private citizen having probably-unique and specialized experience, background, and training concerning the issues raised by Internet gambling, I am pleased to submit testimony in this Subcommittee's hearing entitled "H.R. 707, the Restoration of America's Wire Act." The Subcommittee's time constraints may limit the details I might otherwise be able to provide on this issue; however, via the contact information on the letterhead of this document I remain available to the Subcommittee for further consultation and/or expansion of these remarks. By way of my background, I have attached at the end of this document a "biographic blurb" which at times has been used when I have given speeches or conducted training.

In sum, I served my state and nation for approximately thirty years as a prosecutor of felons, including money-launderers and racketeers, with the greatest portion (25 years) of that time being an Assistant U.S. Attorney for the Eastern District of Missouri. Post-9/11, I was selected to head our District's anti-terrorism efforts and did so for six-and-a-half years, learning about and overseeing investigations concerning terrorist financing methods. Presently, I do consulting/advisory work for, and train, governmental bodies and corporations on a wide variety of topics, as described on my letterhead, above. I am neither a Democrat nor a Republican, but an apolitical independent (with a small "i").

As the career federal prosecutor once responsible, with more-talented others, for the most, and the most successful, enterprise-based prosecutions and forfeitures of illegal unregulated commercial Internet gambling enterprises, their operators, and their facilitators, I have thought long and hard about the costs and benefits associated with Internet gambling.

Business applications of the Internet have been both positive and negative. On the negative side, Internet commerce has often been characterized as destroying or, at least, significantly and adversely changing previously well-established trades (look what's happened to, e.g., newspapers, bookstores, broadcast radio, CD stores, the postal service). Bricks-and-mortar casino and poker room operators vary on whether they'll survive, shrink, or prosper if online gambling expands in the U.S. Facing the efficiencies and 24/7/365 availability of expanded Internet gambling, would these offline casino and poker room operators fare the same as, worse

than, or better than newspapers/bookstores/radio/CD stores/the postal service? Should we care about the real-world casino operators and their employees versus Internet-based gambling enterprises' far fewer and boilerroom-type low-paid employees? If maximizing the number of jobs for persons employed in the commercial gambling industry is the sole criterion, any legislation that increases Internet gambling's availability would seem extremely unwise. Some predict that Internet gambling may initially help drive a small segment (8-10%) of Internet gamblers to visit and use actual casinos, but ten or so years ago people thought access to information on the Internet would drive people to increased reliance on newspapers, too—and look how that's turned out.

Of course, the more important question is how would "We, The People" fare? What is the likely answer to *that* question, informed by independent (non-industry-funded, non-religious-affiliated) academic studies? At least at the state level, why do legislators frequently seem to ignore, disregard, or unrealistically discount the costs imposed by commercial gambling and accept pro-commercial gambling advocates' rosy estimates of revenue? (These studies consistently show that for every dollar of tax revenue generated by legal commercial gambling, approximately three dollars are incurred in direct and indirect economic costs—not to mention the largely non-quantifiable human costs.) And, apart from the academic studies, what does experience and history tell us about the likelihood of crime flowing from or being facilitated by an Internet-fueled increase in online gambling?

As one of the few persons who've been as deep as one can be in monitoring, investigating, and prosecuting Internet gambling, I know there is no way that the federal government, or any individual or combination of state governments, can expand to the degree necessary to effectively police and regulate the likely scale of legalized Internet casino, poker, and/or sportsbook gambling (*i.e.*, there will be millions of data transactions—informational and financial—involving billions of lines of code in malleable, disguisable formats with anonymizing and proxy tools readily available, use of manipulative techniques and subliminal messages, as well as easily-disguised traditional and electronic collusive and corrupting behaviors). Realistically: No police force/regulatory body will be big enough/skilled enough/funded enough.

Despite this truth, in December 2011, an opinion issued by the U.S. Department of Justice's Office of Legal Counsel (OLC) gutted a major aspect of a federal statute, 18 U.S.C. §1084 (commonly known as the "Wire Act," or the "Wire Wager Act"). In a lengthy addendum to this written testimony (*see*, Addendum, at p. 14, *infra*), a detailed analysis of that OLC memorandum establishes (i) that its' conclusion (that the Wire Act applies only to sports gambling) is as likely mistaken, or worse, than correct, and (ii) that the OLC memo seemingly is the product of someone trying to find a reason to allow online gambling's expansion rather than to discern and implement Congress' sensible and comprehensive scheme from 1961 to preclude organized crime from all types of illegal gambling-generated funds, not just funds generated from illegal sports bookmaking.

Passing a law to restore (“fix”) the Wire Act, which was broken by the DOJ reinterpretation, would help fight crime and limit economically non-productive and personally-destructive behavior; yet, today Internet gambling proponents seek to use H.R. 707 and this legislative process to fix something not broken, by adding a legislative carve-out to authorize online poker-based gambling. Of course, no one presently is barred in the United States from playing poker online—they just can’t legally gamble on it for money or other assets of value through a gambling business—or couldn’t, under the historic and correct interpretation of Wire Act. People could always, however, play poker online without wagering assets or, if wager they must, they can wager valueless points, for example, and still entertain themselves, compete, sharpen skills, and gain prestige as superior players. Thus, any online poker carve-out language sought to be included in the present version of the bill is, in truth, *not* to enable online poker but to enable online *gambling*.

This is a strategic purpose of the commercial gambling industry, and it underlies this push for legalized online poker. That becomes clear when the effort is examined in light of the industry’s behavior over time. In 1988, Congress passed the Indian Gaming “Regulatory” Act – in the lame duck year of President Reagan’s second term – and by which many members of Congress were led to believe they were supporting small tribal bingo parlors and card clubs in rural areas of the country. In reality, IGRA was the starting gun for the massive and unrelenting wave of casino gambling that has spread across most states.

Because of the purposely vague way the proponents of IGRA defined the various forms of gambling permitted under the law, casino interests pushed the scope of the law to proportions never intended by Congress. While nearly every state has its own story about the failure of IGRA, Connecticut’s may be Exhibit A. Anxious to take advantage of the state’s position between the metro New York and Boston population centers, gambling interests used IGRA to build two of the biggest casinos in the world, hijacking the state’s “Las Vegas Night” law which had allowed charities to conduct occasional social, small stakes gambling nights for fundraising purposes. *Boston Globe Magazine*, Charlie Pierce. “High Stakes.” July 30, 2006, http://www.boston.com/news/globe/magazine/articles/2006/07/30/high_stakes/

Another highly-relevant historical example of the casino gambling lobby’s playbook in action is “bingo.” Like “poker,” most would consider bingo a less extreme form of gambling. Yet in a deliberate effort to circumvent gambling laws, casino interests designed “electronic bingo machines” which are virtually indistinguishable from casino-style slot machines and forced them into states across the U.S. that permitted traditional bingo games. “Is It Bingo, Or A Slot Machine?” *Gambling and the Law*, Prof. I. Nelson Rose, Whittier Law School, 2002. <http://www.gamblingandthelaw.com/columns/90-82nigcregulations.html>

Similar “slotification” of online poker is entirely predictable. This is especially concerning, given that a line of studies found that “individuals who regularly played video gambling devices became addicted three to four times more rapidly than other gamblers (in one year, versus three

and a half years), even if they had regularly engaged in other forms of gambling in the past without problems.” Natasha Dow Schull, in Addiction by Design, *infra*.

Internet poker casinos presently represent a minor portion of the casino business, largely because the house collects a small part (the “rake”) of each pot. For example, live poker in Nevada makes only a tiny piece of overall gambling revenue. The major profits to be had are in online slots which make up 65%-80% of all gambling traffic. *Card Player*, December 3, 2012. <http://www.cardplayer.com/poker-news/14556-commercial-casinos-in-full-court-press-to-legalize-online-poker-during-lame-duck>; *Casino City Times*, June 8, 2011. Legalizing internet poker casinos is simply to build the framework for casino interests to bring in online slots. This Trojan Horse strategy must be seen for what it is—the commercial gambling industry’s historically-proven device for undermining informed majority rule.

In the single classic, comprehensive work studying electronic machine gambling, Addiction by Design (Princeton U. Press 2012), MIT Professor Natasha Dow observed, at p. 296, that “It has become commonplace in public discussions to hear that purveyors of commercial gambling, along with the governments that draw taxes from them, have themselves become “addicted” to gambling revenue. . . . Some have gone so far as to enumerate the classic defense mechanisms of addiction by which industry stakeholders, caught in the maximizing momentum of a drive for revenues, rationalize their actions: “blaming others, belittling contrary viewpoints, disavowing responsibility for negative outcomes, preferring to avoid conflict, and not tolerating straight talk, honesty, or directness.” “[Governments] start chasing their losses just like the addict does.” (citations omitted) That a deliberative body of the central government of the greatest nation on earth would even consider stooping to so put its citizens at risk reflects a public-relations-firm-driven acute misunderstanding of commercial gambling’s harms.

“[P]roblem gambling often presents as an acute disorder. Problems can emerge within a relatively short period of time and the effects are often thought to extend to as many as, ‘10 to 15 people who have contact with the gambler, including spouse, children, parents, and fellow gamblers, people stolen from, employers and employees.’” Johnson, *infra*, citing Lesieur and Custer, “Pathological Gambling: Roots, Phases, and Treatment,” 148. Thus, it is evident that gambling industry-supplied statistics (which already are known to significantly misrepresent and understate the prevalence of problem and pathological gambling) typically fail to report the true scope of harmful impact the industry causes: industry statistics fail to take into account these “networks of misery” resulting from addicted gamblers’ behaviors—in that 10 to 15 people, beyond the gambler himself, are negatively impacted by industry-fostered addictive behaviors (e.g., thefts, embezzlements, robberies, frauds, bankruptcies, suicides). “As an independent governmental commission in Australia recently reported, ‘problem gambling prevalence rates expressed as shares of the adult population are misleading measures of the real risks when most of the adult population do not gamble regularly, or do not gamble at all.’ Schull, Natasha Dow, Addiction by Design, p.320, fn.58 (Princeton U. Press 2012).

“[B]ehavioral research case studies...have indicated that a relationship exists between insiders conducting fraud and embezzlement, and addiction to gambling or pain prescription medication.” Johnson, Paul R., “Trusted Insiders are Committing Fraud and Embezzlement within Organizations: Is There a Connection to Addiction, as the Motivating Factor for Their Illegal Activities?,” Naval Post-Graduate School published thesis (July 2014), p. 5, *citing* Jay Albanese, “White Collar Crimes and Casino Gambling: Looking for Empirical Links to Forgery, Embezzlement, and Fraud,” *Crime, Law & Social Change* 49, no. 5 (June 2008): 333–47; Virgil W. Peterson, “Why Honest People Steal,” *Journal of Criminal Law and Criminology* 38, no. 2, art. 2 (1947): 94–103. Perhaps most

alarming is the frequency of trusted insiders conducting fraud and embezzlement within government agencies to finance and support their addiction. Many of these trusted government employees who have committed illegal activities have had access to sensitive information concerning their particular municipalities, and in some cases, have had access to some of this nation’s most guarded secrets and intelligence programs, which when revealed compromises the reputation and integrity of their oaths of office, and potentially, national security.

Johnson, *id.*, at 5-6 (internal footnotes omitted). Examples Johnson’s study cites, at p.6, include: Nolan Clay, “Ex-FBI Agent in Oklahoma Gets Six Months in Prison for Embezzling,” *NewsOK.com*, accessed March 14, 2014, <http://newsok.com/ex-fbi-agent-in-oklahoma-gets-six-months-inprison-for-embezzling/article/3738422>; Larry Lebowitz, “Ex-FBI Agent Sentenced to Five Years in Prison,” *Sun Sentinel*, November 24, 1998, http://articles.sun-sentinel.com/1998-11-24/news/9811240441_1_sentence-sullivan-s-role-gambling-debts; Associated Press in Washington, “U.S. Nuclear Commander Tim Giardina Fired Amid Gambling Investigation,” *The Guardian*, October 9, 2013, <http://www.theguardian.com/world/2013/oct/09/us-nuclear-commander-tim-giardina-fired-amid-gambling-investigation>. These shocking examples would only become more frequent should Government give its imprimatur to online gambling, including online poker.

Of course, these days prosecutors and criminal defense lawyers typically can tell multiple tales of cases they’ve handled involving less newsworthy, but more frequent, crimes traceable to problem and pathological gamblers. Rates of thefts, frauds, embezzlements, tax cheats, burglaries, robberies (armed, some resulting in murder, and some otherwise), failures to provide child support and alimony-type payments—all are boosted in varying ways by commercial gambling-driven desperation and the gambling industry’s ethically-numb marketing. The increase in the above-listed street-type crimes combines, of course, with Internet gambling’s established utility for money launderers and, now, terrorist financiers. These are not fanciful concerns. FinCen recently had to send land-based casinos stern warnings about their repeated

failures to comply with anti-money laundering measures (such as Bank Secrecy Act provisions and regulatory reporting requirements). Even the biggest and well-funded U.S. gambling operating companies have failed to develop effective compliance mechanisms, leading to their being used to launder *huge* amounts of illegal proceeds, primarily from illegal narcotics trafficking.

Nothing suggests that Internet gambling operators would “do compliance” better and, indeed, recent history suggests they would do worse—especially as some propose, as cost-saving measures, to outsource to offshore operators various financial and bookkeeping functions. Lesser amounts of funds than are generated by illegal drug trafficking, of course, are needed by terrorists to conduct their operations, typically. These smaller amounts are easily conveyed and disguised via online gambling accounts. Convictions have already occurred in the UK for terrorists’ use of online gambling as a vehicle for funding, and multiple investigations in many parts of the world continue, often in a classified setting, to find further evidence of terrorist financiers’ reliance on online gambling. (That the Federal Criminal Investigators Association recently endorsed passage of H.R. 707 (so long as it is without any provision which would permit a carve-out for, say, online poker) is strong evidence that the experienced investigators who develop evidence of money laundering and terrorist financing recognize the dangers posed by online gambling and the need for the Wire Act’s restoration. (See, *infra*, the attached Feb. 27, 2015, letter from Richard Zehme, president of the Federal Criminal Investigators Association.)

It’s worth recognizing that online poker, like all forms of online gambling, necessarily takes the form of “machine gambling” which, academic study has established, results in much faster descent into pathological addiction (1.08 years, as compared to 3.58 years for non-machine gambling). Breen & Zimmerman, Brown U. School of Medicine, Rapid Onset of Pathological Gambling in Machine Gamblers, *Journal of Gambling Studies*, Vol. 18, No. 1, Spring 2002. Indeed, practical experience bears out what independent academic studies establish:

Internet wagering is—or has the potential to be—the most concentrated, most habit-engendering gambling environment known to humankind. I speak from experience....[Apart from losing “roughly \$50,000...”], I bore the additional expense of lost time, lost pride, of disorientation and fear. Beginning—as addictions will—casually, poker changed me, and before I dropped the first 10k I was dependent on the feelings it delivered. I felt alive only when I was in action.”

Josh Axelrad, “Online gambling may be too powerful for regulation,” guardian.co.uk/commentisfree/2011/apr/21/. Axelrad, a noted author, continues,

Regulations can’t make gambling safe. The people of Nevada—the American state with the longest history of casino regulation—suffer from gambling-related pathologies at nearly double the national rate....There’s no escaping the potential for harm. The peril is

intrinsic to the pastime... Perhaps regulating and licensing casinos sends entirely the wrong message. If gambling is inherently unsafe—and unsafe in unpredictable ways, causing harm to some but not to others—perhaps the illusion of protection is the last thing players need.

Id. Others' experiences mirror Axelrad's:

[P]eople don't write about the ugly side of gambling... I had sat around enough poker tables to realize that none of the people you play with are really happy about it, especially these guys who have been playing for a long period of time... [Y]ou see them slowly deteriorate... By year two or three or four, you can see that if they somehow *could* stop, they probably would. There's no worse way to make several thousand dollars than playing poker all the time... You start to become numb to everything else that's happening in your life... My job became meaningless. Ultimately, the relationship I was in that time became kind of meaningless, too, because it didn't compare to the fast life that playing cards seemed to offer...

Jay Caspian Kang, writer, in interview published on Nieman Storyboard, Nov. 12, 2010 <http://niemanstoryboard.org/stories/jay-caspian-kang-gambling-narratives-interview/> (See, also, Kang's essay, *The High Is Always the Pain and the Pain Is Always the High*, at <http://www.themorningnews.org/article/the-high-is-always-the-pain-and-the-pain-is-always-the-high>) (revealing the disturbing ease with which even literate, educated people succumb to gambling addictions). And Kang was writing about in-person poker in bricks-and-mortar settings; the risks of harm would only metastasize if legislation makes even more available the astonishing speed, multiplicity of games, and ubiquity of online poker. Passing laws to further enable commercial gambling's already-rapid spread would ignore the import of recent published research reflecting that compulsive gambling is already more common in the United States than alcoholism. Welte, et al., *Journal of Gambling Studies*, April 2011, Research Institute on Addictions, University of Buffalo.

Additionally, entwined with and driving increased gambling behavioral changes would be a concurrent adverse environmental, quality-of-daily-life change in America: online poker enterprises inevitably would heavily market their brands over TV and radio, in online and print ads, on billboards and public buses, and on mobile devices, further shaping American behavior toward unproductive economic activity. No Congressperson was elected to diminish the quality of life in America, but that is precisely what would result from passing H.R. 707 with its present online poker "carve out" language intact.

To paraphrase the writer, Mark Slouka, a Guggenheim Fellowship awardee:

If we lack the awareness to right the imbalance between the crassly commercial and the civic;

If government's role, in America and in its' states, is no longer the business of producing the kind of statesmen-and-women and the quality of civic life promoting traditional values of work and dedication—*not* luck and chance—as the primary determinants of success and reward,

It's in large part because the time-honored *civic* function of our governmental system has been ground up, as if into a radioactive paste and called off-limits, a surrender to bankers and investment managers and gambling syndicates, at the expense of quality of life and family stability.

Is it any wonder then, that our governmental priorities should be determined more by business leaders than by *values* leaders, or that the relationship between commercial gambling and government should increasingly resemble the relationship between a company and its' suppliers? Or that the "suppliers" (governments' delivering citizens to an expanded commercial gambling market) should seek to please commercial gambling management in any way possible, in order to make the payroll?

But, perhaps, there's still time to invest our capital in what makes us human, rather than as commodities to be manipulated toward "maximum time on device," toward "playing to extinction."

---that manipulation is the unstated goal of commercial gambling operators planning new machine gambling via the Internet, with online poker serving as an entrée, as a "teaser;"

--It is beyond time to end the corrosive relationship by which government is in symbiosis with commercial gambling. Social gambling, charity gambling, and tribal gambling are *plenty*: after all, there's no shortage of outlets for people to gamble; passing laws to expand commercial gambling fills no shortage. Despite what the commercial gambling interests will tell you, increasing efficiency in gambling need *not* be the end game: **enabling more efficient exploitation of citizens is *not* why governments exist. It's the *antithesis* of the civic function of government.**

Prove wrong the cynical view that many people have of Congress: promote and protect the public welfare by passing H.R. 707 in a form that simply restores and clarifies the Wire Act's reach to that which was commonly understood for the fifty years before December 2011. This can be readily accomplished by modifying H.R. 707 to follow the below suggestion. It's that simple.

18 U.S.C. §1084 presently reads:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit

as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

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

(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.

Amending the above statute, minimally, to (1) correct the misinterpretation recently given subparagraph (a) by the DOJ's OLC; (2) to ensure the amendment does not impair First Amendment reporting freedoms; and (3) to update the helpful remedial notice provision in subparagraph (d), would result in the revised Wire Wager Act reading as follows (proposed changes in **bold** typeface):

(a) Whoever, being engaged in the business of betting or wagering, knowingly uses a wire communication facility **(i)** 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 **or non-sporting** event or contest, or **(ii)** for the transmission **in interstate or foreign commerce** of a wire communication which entitles the recipient to receive money or credit as a result of bets or

wagers **on any sporting or non-sporting event or contest**, or **(iii) for the transmission in interstate or foreign commerce** of information assisting in the placing of bets or wagers **on any sporting or non-sporting event or contest**, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of **any** events or contests, or for the transmission of information assisting in the placing of bets or wagers on a **sporting or non-sporting** event or contest from a State or foreign country where betting on that [...] 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 **or communications service provider doing business in interstate or foreign commerce and operating, in whole or in part, in the United States, [...]** is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by **the common carrier or communications service provider** 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, **the common carrier or communications service provider** shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility **or service**, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier **or communications service provider** for any act done in compliance with any **such** 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 **or service** 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.

This suggested language entirely obviates the decades-long but largely irrelevant and misleading argument over whether poker, for example, is predominantly a game of skill. Interstate betting on *any* games, skill or non-skill, is essentially what the Wire Act outlawed and should continue to outlaw. Organized crime, money launderers, terrorist financiers, tax evaders, and fraud artists really don't care whether they use gambling on skill or non-skill games to move funds

clandestinely—they're just looking for vehicles to do so, and Internet gambling provides them with a near-perfect vehicle.

Gambling on the internet, of course, is where almost ALL commercial gambling is trying to go, in some large measure, whether we're talking about commercial poker or other commercial gambling operations. Because of my background, experience, and present consulting work involves counterterrorism and anti-money laundering, anti-terrorism financing, law enforcement, and privacy issues, and because I'm also on the board of a cyber counterintelligence firm, let me make some additional observations, based on a Department of Defense study out of Sandia Labs:

1. The Internet contains *intrinsic* features which

--support anonymity, and

--inhibit or defeat forensic attribution of (a) fraud, (b) use of aliases, (c) underage access/use, and (d) cyberattacks.

Our best minds, using the most sophisticated forensic tools can only sometimes—and, often, never—determine, after the fact, a sophisticated intrusion or attack from, say, China, Romania, India-based hackers into the Defense Department's *most secure computers*.

--What makes you think a state, local, or even a federal regulatory/investigative agency would consistently do better? What's an acceptable level of loss of private data? Of gambler's funds? Of corporate/state revenue?

--You *can't* hire/train/retain enough investigators/regulators to limit or eliminate the losses/risks. (The expenses of adequate security would entirely "eat" the expected revenue to the states, and then some.)

Moreover:

2. The technical evolution of anonymizing services is accelerating (in part, due to recent events in copyright enforcement).

3. Few, if any, plausible ways exist, or are anticipated, to overcome the barriers to forensic-based attribution by these features and services (Tor/"onion" router; proxy servers, etc.).

4. We cannot state with confidence that future versions of Internet Protocol (IP) addressing will have any significant effect on the ability to attribute misuse of Internet services and cyberattacks.

5. In the limited number of cases where forensic-based technical attribution *is* possible, it is most likely to be achieved in the reconnaissance phase of an attack—which is resource-intensive and best achieved through mass surveillance, which many people find offensive to privacy values.

6. Alternatives to forensic-based attribution exist, but are often considered illegal (such as “hack-back”-type counterattacks) or costly, and, perhaps, raising ethical/Constitutional concerns, such as aggressive covert intelligence-gathering on potential attackers and fraudsters. These non-technical obstacles *are* obstacles, nonetheless.

7. Even if perfect technical attribution becomes achievable, in only a minority of cases would there be a significant deterrent effect, at least where significant disruptive cyberattacks, and thefts of information, of funds, and of services are contemplated by parties hostile to a state’s authorized gambling concerns (or to the interests of the US government).

8. At least with respect to cyberattacks against the US government or privately-owned but critical infrastructure (e.g., utility power grids, water plants, etc.), experts assess that pre-emptive covert operations *may* have a significant deterrent effect, by raising uncertainty of success, owing to the possibility that facilities controlling an attack may contain latent subversions; *however*, it is regarded as extremely unlikely that a state’s intra-net-based gambling enterprise (or even multi-state enterprises linked by gambling compacts) will *ever* be considered critical infrastructure or key assets meriting preemptive covert operations and implanting latent subversions in potential attackers’/unauthorized users’ machines.

As troubling as these observations should be about online gambling, it’s even more troubling that some lawmakers really believe there’s a pot of gold, for example, in online poker tax revenue. I hate to burst their bubble, but if gamblers can figure out the odds on a football game, or how to count cards, or when to hold or fold, they certainly can figure out that they’ll save a bundle in taxes by gambling with offshore online entities. That, of course, will simply put us back to the enforcement issues that started in the 1990s, only now we’ll be calling it revenue protection instead of illegal gambling enforcement, and we will have created a vastly-larger (indeed, an impossible-to-adequately-oversee-larger) market of gamblers’ transactions—which, of course, is the true strategic aim of the commercial gambling industry. (The shortfall in gambling revenue that was projected for the states which have legalized some form of Internet-based gambling versus what they have actually realized already bears this theory out.) There is no reason to believe that legalizing online poker will, somehow, set boundaries that will remain unchanged and immune from erosion. Given the history of commercial gambling’s post-legalized-lottery growth in America, such boundaries (*e.g.*, ones designed to protect youth, student-athletes, the elderly, the needy, the cognitively-impaired) will necessarily evaporate over time. Greed corrodes. People who fall back on the weariness argument (“We don’t really approve of gambling, and recognize that it’s clearly classified as a vice for good reason, but it’s already here”) are simply surrendering their good judgment. After all, **lots of harmful conduct is “already here,” but that is no excuse for purposefully creating more of it.**

Of course, an argument can be made that *some* segment of the public wants Internet poker or other online gambling and that providing it would somehow allow law enforcement to direct its resources elsewhere; but legalization requires regulation, and politicians will tax the

industry. Regulation and taxes means more enforcement costs, not less. It's a myth to argue legalization will reduce the need for law enforcement. Requiring the already-overburdened law enforcement and regulatory communities to do more simply creates more opportunities for criminals and for cheats to succeed, on the Internet and off it, and whether in the world of gambling-related crime or non-gambling-related crime.

I appreciate your consideration of my testimony.

ADDENDUM TO WRITTEN TESTIMONY OF MICHAEL K. FAGAN

The Muffy Opinion: Wrong on Multiple Levels

[The following examines the December 2011 Department of Justice, Office of Legal Counsel, opinion that controversially--and without public input or notice--re-interpreted a key portion of the Wire Act, 18 U.S.C. §1084(a). The opinion can, and should, first be read. It is accessible at <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>]

Soon after taking her perch high in the U.S. Department of Justice (DOJ), Assistant Attorney General Virginia A. Seitz issued a gambling-related Office of Legal Counsel (OLC) opinion (dated September 20, 2011, but inexplicably not made public until December 23, 2011). Her opinion was that the federal Wire Act's prohibitions did not reach non-sports gambling conduct on the Internet.

Coincidentally, Ms. Seitz' publicly-stated nickname is "Muffy," (see <http://www.judiciary.senate.gov/nominations/112thCongressExecutiveNominations/upload/VirginiaSeitz-PublicQuestionnaire.pdf>) and, now, it is deservedly so, since she "muffed" this Internet gambling opinion (much as a football punt or pass receiver "muffs" a catch by dropping the ball). For ease of reference, then, this memorandum will call the December 2011 OLC opinion "the Muffy opinion."

Born to privilege, academically gifted, a multi-millionaire, and never a legislator, prosecutor, nor an attorney working in a setting likely to regularly encounter individuals or small businesses harmed by pathological gambling (whether on the Internet or otherwise), see *id.*, it is unsurprising that Muffy Seitz' interpretation of the Wire Act varied from the previous, decades-old understanding of this 1961 law enacted to protect people from organized crime and the serious pathologies of essentially-unrestricted commercial gambling. Her opinion doesn't protect the vulnerable or reflect the will of the majority; instead, it favors moneyed corporate interests. Indeed, at the time she issued her opinion on behalf of the OLC, Muffy was a newcomer to the DOJ. She had only been confirmed for her AAG position on June 28, 2011; yet, fewer than 90

days later (and as an entirely unelected official with no direct responsibilities to U.S. voters, unlike the accountability of a congressperson to an electorate), Muffy took it upon herself to upset both the DOJ's and several federal judges' contrary and reasoned interpretation of the statute—the Wire Act, 18 U.S.C. §1984, particularly subsection (a). Moreover, according to her written opinion, she evidently upset the prior interpretation without seeking any input beyond that of letters from two states' lottery officials and a governor and the two DOJ Criminal Division transmittal memoranda accompanying them (*see* Sept., 20, 2011, OLC opinion, p. 1). The states' letters seeking DOJ guidance on the point were dated in 2009 and 2010 and had not been directed to the OLC. Rather, one (from New York) had gone to DOJ's Office of Intergovernmental Affairs in 2009 and two (from Illinois) had gone, respectively, to Attorney General Eric Holder in 2009 and to DOJ Organized Crime and Racketeering Chief Bruce Ohr in 2010. The September 20, 2011, Muffy opinion never clearly explains how these letters came to settle on the desk of the DOJ Criminal Division's then-boss, Lanny Breuer, nor how or why he felt it his obligation to defer to the OLC when his Division had long had a written interpretation of the Wire Act, Title 18, U.S.C. Section 1084—one which did recognize the illegality of online gambling via interstate facilities.

This context at least raises concerns, especially in light of unstated, undisclosed experiences of the three highest-ranking DOJ officials—political appointees, all--involved in events leading to the Muffy opinion. After all, before their recent forays into government service, Attorney General Holder, Assistant Attorney General Breuer, and Muffy Seitz all represented—and, presumably, earned substantial fees from—huge clients, either to advocate for increased Internet gambling or to avoid liability for the client's role in facilitating and promoting Internet gambling (i.e., in recent years, Muffy Seitz represented the State of Delaware in its unsuccessful litigation efforts to expand into Internet gambling against federal law, whereas Msrs. Holder and Breuer represented a major Internet search engine firm seeking to minimize its federal forfeiture liability and avoid criminal prosecution for promoting, for profit, illegal Internet gambling). Thus, none of the three came at the question of the scope of the Wire Act without, at least, a past personal financial interest in the topic, generally, nor likely without an eye to the day when they might again return to the large fees they commanded in civil practice from clients such as these. Should these past interests have been disclosed? Should the three have recused themselves from the issue to avoid an appearance of impropriety? Whatever the conclusion, the lack of transparency on the point does not auger well for the matter of public confidence in the Muffy opinion.

Of course, given the multiple duties the head of the OLC has, it seems unlikely that the Muffy opinion flew entirely alone from one person's mind. The legal staff of the OLC largely consists of bright young attorneys, some of likely worked on what became the Muffy opinion. Which ones did so having previously played (or while still playing) online poker or engaged in other online gambling behavior seems relevant. Given the huge participation of youth in online

gambling, this issue is no idle speculation. Having engaged in or enabled behavior that, under the traditional interpretation of the Wire Act, has been illegal for decades, a natural bias would exist, as well as a temptation to, with a stroke of the pen—or, more modernly, with the pounding of a computer keyboard—to make legal that which had been prohibited. Thus, disclosure remains appropriate, both (i) of who else worked on, and reviewed, what became the Muffy opinion and (ii) of what each of those persons' experience has been in engaging in Internet gambling. If, so to speak, there were foxes guarding the chicken coop, the American public would seem to have a right to know.

Likewise, with Ms. Seitz having joined the DOJ from the law firm Sidley & Austin, it is not an untoward request to require disclosure of which of that huge law firm's many clients stood to benefit from the Muffy opinion. The same can be said of Messrs. Holder's and Breuer's pre-DOJ employer, Covington & Burling, a law firm which stands to benefit (via its lobbying efforts on behalf of the NFL and NCAA) from the maintenance of Wire Act applicability to sports gambling while removing the restriction of the Act's applicability to the conduct of other, non-sports clients. This is not to impute chicanery or allege conspiratorial misconduct on the part of any of these three DOJ officials, but only to note that they, too, are human and, as such, are prone to favors and biases, unconscious and otherwise, as well as to understandably looking down the road to the day when they return to private practice (which, in fact, Ms. Seitz and Mr. Brewer have done, and Mr. Holder will soon be able to, as well). Good judgment and an effort to build respect for the Muffy opinion would have resulted in these disclosures long ago, prior to or concurrently with the release of the opinion. Non-disclosure of this information, combined with the delay in the *public* release of the opinion, in these clouded circumstances, certainly does little to inspire confidence in the independence which should have undergirded it.

Apart from the above, the Muffy opinion reads reasonably-enough—until a closer look and consideration both of what federal judges having decades of decisional experience have said about the Wire Act's reach, as well as more the timely-issued DOJ interpretation of the Wire Act (timely, in the sense that the prior interpretation came at a time closer to the 1961 enactment of the statute). No one contends that Section 1984 was a model of clarity. And, as noted in the Muffy opinion, more recent enactments can be read (if one is of a mind so to read) to conflict at some level with the Wire Act.

For example, the Unlawful Internet Gambling Enforcement Act (UIGEA) defines unlawful Internet gambling by reference to what state or federal law prohibits, 31 U.S.C. §5362(10)(A), and it explicitly points out that this does not include "bets...made exclusively within a single State," *id.* §5362(10)(B), and that the electronic data of a bet's "intermediate routing...shall not determine the location..." where the bet was made, *id.* §5362(10)(E). The new-era formerly-Breuer-led Criminal Division and the OLC view this UIGEA language as creating some tension, supposedly suggesting that some electronic transmission of gambling

information is legal, whereas the Wire Act says otherwise (as previously-interpreted). Yet the tension is ephemeral. Fairly read, the UIGEA language simply allows that technologically necessary or interstate transmission of data shall not be determinative, alone, of the location of a bet; plainly, the UIGEA language does not *prohibit* consideration of this factor, along with other factors, in making that determination. Hence, early-on in the Muffy opinion, one can see that a predilection exists to find, rather than resolve or avoid, statutory conflict. As the opinion continues, the further predilection to misconstrue or ignore relevant sources further undercuts the Muffy opinion's persuasiveness.

An example of misreading precedent (i.e., prior cases supposedly supporting the Muffy opinion's conclusion) comes early-on in part II of the opinion. There, the OLC refers to the "sparse case law on this issue [being] divided." First, a reference to "sparse" case law is wholly unpersuasive, for the important factor in interpretation is the *logic* of the case law (rather than the mere number of cases interpreting a statute). More important, the "divided" nature of the case law, upon review, is hardly that. The sole case cited in the OLC opinion to support its "divided" conclusion is *In re Mastercard Int'l, Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002). In that case, the Fifth Circuit merely agreed with a district court's analysis of the Wire Act. That lower court had found that Section 1084 concerns sports gambling and, as the Internet gambling at issue was not sports gambling, the RICO plaintiffs, an unsympathetic bunch seeking to evade gambling debts, had no case; however, the Muffy opinion fails to note that *the district court only considered the first clause of Section 1084 and did not make any distinction between the different subparts of the Wire Act*. Further, the district court relied upon the existence of unenacted legislation (that would have amended Section 1084 to more clearly include casino-style gambling), speculating that the proposal's existence tended to show that the Wire Act did not extend to non-sports gambling. The Muffy opinion, however, entirely failed to consider, much less credit, the at least equally-likely speculation that the reason the unenacted legislation did not pass was that the majority of Congress felt that the Wire Act, in light of the statute's then-prevailing interpretation, did not need further clarification: it already prohibited wire communications involving casino-style gambling, as well as sports gambling. (While a DOJ witness commenting, in 1999, on the proposed amendment to Section 1984 noted that the Department supported the clarification (given the development of the Internet), he did not say that the unamended Wire Act failed to extend beyond sports gambling; rather, he simply supported clarification that the act did apply to interactive casino betting. Testimony of Kevin V. DiGregory, Deputy Asst. Attorney General, Department of Justice, addressing Internet Gambling and Indian gaming Before the Senate Committee on Indian Affairs, June 9, 1999.)

In the Mastercard case, the district court did not consider the statutory phrase "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers," which is a part of Section 1084(a); thus, the OLC over-reaches to say

that the Fifth Circuit's rote acceptance of the district court's reasoning somehow can be relied upon as if it created a split of opinion with cases that did consider that phrase. Additionally, the term "bets or wagers" is not defined in Section 1084 or elsewhere. This provision of the statute (i.e., the second clause of Section 1084) does not include the limiting words "sporting event or contest." Under any accepted plain-language definitions of the term "bets or wagers," casino-style gambling falls within the prohibition. Hence, Mastercard's, and by extension, the Muffy opinion's reliance on unenacted legislation that might have been helpful, but which was not necessary, is ill-advised.

This is particularly so in that the two cases, U.S. v. Lombardo, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) and U.S. v. Kaplan, No. 06-CR-337CEJ (E.D. Mo. Mar. 20, 2007)(R&R of U.S. Magistrate Judge Medler, adopted by District Judge Jackson) that the Muffy opinion cited as the opinions conflicting with Mastercard, actually did consider the disjunctive language of the Wire Act, language which describes the second distinct offense created by Section 1084. In other words, Lombardo and Kaplan were more on-point than Mastercard.

Curiously, after noting what it termed a divide in the case law, the Muffy opinion never again mentions these on-point cases. One would expect the OLC to directly point out where each opinion had gone wrong. The Muffy opinion not only does not do this, it also fails to defer to the collective experience of federal judges having decades of experience who decided the Lombardo and Kaplan cases. Nothing, of course, requires a newly-minted AAG, heading the OLC without any practical experience in organized crime-fighting, investigation, or prosecution, to so defer; but, again, one would have thought that at least directly addressing the supposed shortcomings of these judges' opinions would help meet the need to garner confidence in an opinion 180 degrees from the considered rulings of long-time judges and of career, non-political DOJ personnel. Rookie mistake? If so, it was compounded by the fact that the Muffy opinion also failed to delve into the parties' arguments in the Lombardo and Kaplan cases which led to the rulings disregarded by the OLC. These pleadings were available to the OLC, but appear not to have been considered.

Similarly unaddressed was the fact that, for over many decades, DOJ had used Section 1084 to prosecute non-sports wagering, with evident federal court approval. *See, e.g., U.S. v. Vinaithong*, 1999 U.S. App. LEXIS 6527 (10 Cir. April 9, 1999) (upheld sentencing of individuals who pled guilty to information charging section 1084 violation for operation of a "mirror lottery" based upon the numbers drawn in the Illinois state lottery); U.S. v. Chase, 372 F.2d 453, 457 (4th Cir. 1967); and U.S. v. Manetti, 323 F. Supp. 683, 687 (D. Del. 1971). Also ignored were the observations in U.S. v. Corrar, 512 F. Supp. 2d 1280 (N.D. Ga. 2007), *citing Martin v. U.S.*, 389 F.2d 895, 898 (5th Cir. 1968), (i) that the Wire Act is to be broadly interpreted, especially given that assistance to the states in enforcing their gambling laws was only part of the reason for the federal statute; and (ii) that the Wire Act was a part of an omnibus

crime bill that recognized the need for federal action to combat interstate gambling operations and did so as part of an independent federal policy aimed at those who would, in furtherance of any gambling activity, employ means within direct federal control.

Less controlling, but nonetheless worthy of consideration, is the fact that no known federal circuits' pattern jury instructions for criminal cases (typically crafted by teams of federal judges and experienced criminal law practitioners within each circuit) found that Section 1084 was limited to sports gambling. *Lombardo, id.* (noting, at 1281, that "the Tenth Circuit's Criminal Pattern Instructions...do not attach the "sporting event or contest" qualifier to either providing information assisting in the placing of bets or wagers or informing someone of his entitlement to money or credit resulting from bets or wagers). In the face of all this precedent, the Muffy opinion's deviation from reasonably-settled departmental, bar, and court interpretation puzzles the bench and bar, save for those advocates paid handsomely by the gambling industry to advance strained and theoretical arguments against plain but imperfect phrasing.

The structure of the Muffy opinion is itself curious. Rather than first demonstrating that the Criminal Division's long-held interpretation was based on an incorrect premise, the OLC begins by assuming a faulty premise exists in that earlier interpretation and only then puts forth support for its preconceived conclusion. OLC next spends effort arguing that §1084's two broad clauses are both modified by the term "on any sporting event or contest," despite the fact that the phrase only appears in the first clause. Part of the reason the Muffy opinion concludes that the phrase modifies both clauses is the lack of a comma after the first reference to "bets or wagers." Yet it seems the height of inconsistency—or, at least, of pre-ordained, result-oriented reasoning—to credit the lack of a comma with persuasive meaning while not crediting the likelihood that the lack of the phrase "on any sporting event or contest" has the plain meaning that judges and the DOJ have long ascribed to it. That the latter meaning most likely comports with Congress' intent is decidedly not "counterintuitive," despite the Muffy opinion's repeated use of that conclusory descriptive.

At p. 6 of the Muffy opinion, a quote from the Senate Judiciary Report is cited. The quote helps explain the purpose of the amendment of the bill which became the Wire Act. Nothing in the quote ties the amendment to sports gambling or limits the reach of the amendment only to sports gambling. Ignoring this obvious point, the Muffy opinion states that "Nothing in the legislative history of this amendment suggests that, in...adding subsection 1084(a)'s second clause, Congress intended to expand dramatically the scope of prohibited transmissions...to *all* bets or wagers..." (emphasis in original) Drawing sweeping pronouncements from silence hardly constitutes strong reasoning. After all, by the same token, nothing, of course, suggests Congress *didn't* intend to reach non-sports gambling—and, indeed, some legislative history does indicate a broader reach was intended by the amendment. Further, not only is it not "counterintuitive" that Congress would do so (i.e., extend the reach of the Wire Act to non-sports

gambling), it would be counterintuitive for Congress not to do so. Why would Congress have enacted a ban solely on sports gambling via interstate facilities, leaving legal other gambling avenues for organized crime to use to fund itself and to defeat local and state laws? More likely, and entirely rationally, the statute's second clause serves as a catch-all of sorts, enabling law enforcement to fight organized crime and racketeering enterprises no matter how the criminals chose to use illegal gambling to fund themselves. Limiting the ability of law enforcement to fight only the then-most prevalent type of illegal gambling (sports gambling) gives too little credit to Congress and its obvious purpose to provide a broadly useful tool to fight organized crime.

Later in the Muffy opinion, the OLC notes that on the same day that Congress passed the Wire Act it also passed the Interstate Transportation of Wagering Paraphernalia Act (ITWPA), 18 U.S.A. 1953. The opinion cites the latter act as some evidence that Congress knew how to explicitly make an act apply to non-sports forms of gambling. Yet the ITWPA can equally be cited as proving that Congress sometimes uses catch-all provisions in criminal statutes, for that act prohibits (among other things) interstate shipments of physical items used in a "numbers, policy, bolita, or similar game...." The catch-all ("or similar game") expands the type of lottery-type gambling games affected by that statute. Likewise, the unrestricted language in the second clause of 1084(a) expands the type of interstate wagering information in catch-all fashion, a sensible legislative response to the common-sense realization that, by restricting organized crime's abilities via the Wire Act's primary sports gambling thrust, non-sports illegal gambling efforts were likely to rise to fill the void. This conclusion not only is *not* "counterintuitive," it is the one which comports with the duty to interpret federal statutes in a common-sense manner.

Relatedly, it merits noting that the ITWPA, as amended, regulates physical items useful in sports and non-sports betting, not electronic communications over wires (otherwise it would be redundant with the Wire Act). As a parallel provision in purpose, why wouldn't a similarly-broad, if differently-worded, reach exist in Section 1084(a)? Congress should hardly be assumed to have intended that one statute had a broader reach than the other, given the similar goals of the legislative effort.

The Muffy opinion also argues that since the jurisdictional phrase "in interstate and foreign commerce" was left out of the second clause of §1084(a), that's some evidence that "Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause." Of course, what the OLC doesn't say is that Congress had to have jurisdiction to act, and citing that Commerce Clause-based language cements that jurisdiction, so it is easier and obvious to infer that the jurisdictional clause applies to the second clause of §1084(a); but no such obviousness nor necessity applies to the "sporting event or contest" language of the first clause—especially given (i) the breadth of Congress' anti-organized crime goal and (ii) there would be no reason to *allow* non-sports illegal gambling via interstate or foreign facilities, whether by organized crime (or anyone else). Hence, OLC misreads the

“suggestion” it imagines and blatantly ignores the legislative history that does not serve its purpose.

For example, the Muffy opinion cites H.R. Rpt. No. 87-967, at 1-2, reprinted in 1961 U.S.C.C.A.N. at 2631, as supporting the truism that the bill reached acts “in interstate or foreign commerce,” but the opinion fails to credit that the same language in the House Report plainly states that “the purpose of the bill is to... aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information....” This legislative report plainly does not state the Wire Act is limited to sports wagering; it does not include a qualifier that the bill’s purpose is to suppress only organized sports-gambling activities; and it does not say that the bill only reaches the transmission of sports bets or wagers. Rather, the report’s language says what Congress must have sensibly meant in the circumstances, which is hardly a “dramatic” expansion. It would have been more dramatic, in a tragedian sense, for Congress to not have broadly aimed to restrict organized crime’s illegal gambling income (i.e., by allowing criminals to freely utilize interstate and foreign commerce facilities for non-sports gambling). That result would have been “absurd,” *Cf., Corley v. United States*, 129 U.S. 1558, 1567 n.5 (2009), yet that is the absurd result left America by the Muffy opinion, if it is allowed to stand.

Oddly, the opinion’s fn. 6 observes that the Department of Justice played a significant role in drafting S. 1656 as part of the Attorney General’s program to fight organized crime and syndicated gambling. Why, then, does today’s OLC not credit the Department’s older, more-contemporary interpretation of the law that Congress eventually passed, rather than reject the Criminal Division’s long-held interpretation? Instead, the Muffy opinion selectively credits earlier DOJ statements about the bill before Congress in 1961, when doing so helps achieve what seems a pre-conceived conclusion. The Muffy opinion’s fn. 7 reveals this.

There, a colloquy between Senator Kefauver and then-AAG Herbert Miller is excerpted, showing that the Department’s representative saw the bill—which had been earlier sent to Congress without the amendments adding the broad second clause to 1084(a)—as limited to “sporting events or contests.” But the Justice Department’s then-understanding of a bill yet in process can provide little support to the OLC’s present conclusion, especially since the OLC glosses over the fact that, *in that very colloquy*, Senator Kefauver plainly expresses concern that telephones would be used “quite substantially in the numbers game, too... and laying off bets in bigtime gambling[.]” The Attorney General’s Program to Curb Organized Crime and Racketeering, Hearings before the Committee on the judiciary, U.S. Senate, 87th Cong., 1st Sess. 277-279 (June 20, 1961).

The new OLC opinion also inexplicably and selectively edits out additional specific observations in that same legislative history by Senator Kefauver about a 1951 New York and

New Jersey investigation with which he was familiar, in which “a lot of telephones were used across state lines in connection with policy and the numbers game up there” and that he evidently could see no reason “Why should not S. 1656 be expanded to include the transmission of money? Money is frequently sent by Western Union, is it not?” *Id.* In other words, the Senator (widely acknowledged as the then-leader in the fight against organized crime) recognized that non-sports gambling seemed to be reached by the legislative proposal and, at least, *needed* to be reached. By the time the amended bill was enacted into law, it was reached.

OLC stands the concept of legislative history on its head to ignore what the *legislator* said (about the law he and his colleagues would ultimately pass) in favor of what the *bureaucrat* said about a mere bill his department had presented, knowing it could be modified in the legislative process—which it was! In any event, AAG Miller responded, on behalf of the DOJ, that “I do not believe that we would have any objection to that, Senator,” referring to Senator Kefauver’s expressed intention to expand the bill beyond sports gambling. *Id.* (This response, too, was not included in the Muffy opinion, apparently because it would have undercut the pre-ordained conclusion.)

The Muffy opinion, of course, cites (at p. 10) other instances of testimony during the legislative hearings which led to the Wire Act’s passage, observing that this testimony sensibly focused on sports-related betting as “the principal gambling activity for which crime syndicates were using wire communications at the time,”—but the observation sets up a straw-man. The true question is not whether Congress, in 1961, recognized and sought to limit the obvious (i.e., illegal sports gambling); rather, did it make sense for Congress to reach in its legislation *beyond* sports wagers? As noted, above, it would make little sense for Congress *not* to have extended the Wire Act to non-sports illegal gambling transmissions and, instead, to have left open a loophole for criminals to exploit. The fact that multiple references to sports gambling exist in the legislative history is unsurprising, because the statute unquestionably includes sports betting—but observing that to be the primary goal of the statute does not diminish the logical conclusion that Congress then used catch-all-type broad language, unrestricted to sports wagering, in the statute to ensure that organized crime could not profit from operating *other* types of gambling by using interstate communication facilities.

After all, the “Purpose of the Bill” section of the relevant committee report, H.R. 967, 87th Cong., 1st Sess. (1961), broadly refers to gambling and betting, and contains no specific limiting reference to sports betting. Likewise, the “Sectional Analysis” states that certain sports betting is prohibited and then states, again without limiting language, that the statute “also prohibits the transmission of a wire communication which entitles the recipient to receive money or credit as a result of a bet or wager or for information assisting in the placing of bets or wagers.” 2 1961 U.S.C.A.A.N. at 2632. Entirely overlooked by the OLC is that Attorney General Robert F. Kennedy’s statements at the time did not limit the bill to sports gambling

alone—his April 6, 1961, press release explained that the proposal that was enacted as Section 1084 “would make the interstate use of telephones and telegraph for bookmaking or other gambling a criminal offense” (emphasis supplied), and his transmittal letter accompanying the forwarded bill to the House of Representatives stated that “[t]he purpose of this legislation is to assist the various states, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized [illegal] gambling activities...” Letter dated April 6, 1961, from Attorney General Robert F. Kennedy to the Speaker of the House of Representatives. “[T]heir laws,” largely meaning the states’ anti-gambling laws, both then and now, were and are not limited to prohibitions of sports gambling—in other words, Attorney General Kennedy explained that §1084 helps states enforce their non-sports and sports gambling laws. With the present-day DOJ chiefly housed in a building now named after Robert F. Kennedy, the present OLC’s wholesale disregard of his input, contemporaneously made with the legislative effort, most charitably could be termed embarrassing. (Likewise embarrassing, at least academically, is a Sept. 2014 UNLV Center for Gaming [sic] Research “occasional paper,” titled “The Original Intent of the Wire Act and Its Implications for State-Based Legalization of Internet Gambling,” which tries to defend the OLC opinion, but does so making numerous obvious errors and assumptions; for example, claiming that DOJ’s Criminal Division’s interpretation that the Wire Act is not limited to sports gambling “only dates back to 2002.” The author of the memorandum you are reading knows from personal experience and employment in the DOJ that the Criminal Division’s interpretation dates further back than that—which also should have been evident to the UNLV researcher from the mere fact of the multiple non-sports gambling cases DOJ attorneys have prosecuted using §1084. Other flaws in the UNLV document can be pointed out, upon request.)

The Muffy opinion appears rushed, biased, and flawed by reliance on intuition rather than careful analysis. Keeping with this theme, the opinion fails to draw upon recent legislation which perhaps provides guidance as to how Congress understands the law it passed in 1961. For example, if Congress wanted to expand the ability of people to use the Internet or wire communications to lawfully gamble, it certainly knows how to do so, for it apparently did so in amending the Interstate Horseracing Act in 2000 (by adding language to the definition of “off-track wager”). No such amendment to the Wire Act has been made, however. Instead, Congress passed the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) to further inhibit efforts to evade the prohibitions of the Wire Act. Critics of that statute complain that UIGEA fails to clarify what type of internet gambling is unlawful—but they ignore that what they see as a “failure” reflects that the majority of Congress thought that the predominate interpretation of the Wire Act was correct: it reaches sports *and* non-sports gambling communications. UIGEA allows for Wire Act-permitted wholly intra-state gambling to have payments processed, if the gambling is authorized by that state’s law, but nothing about UIGEA reflects any intent by

Congress that the Wire Act's proscriptions were to be changed. Yet, by decree, the Muffy opinion did just that.

Rather than give Congressional activity a chance to develop citizen-driven responses to American social desires to expand or restrict Internet gambling, the Muffy opinion overreaches and, so, erodes democratic values. It may be that Congress moves more slowly than warring interest groups prefer when it comes to Internet gambling legislation, but to ignore the Constitutional process in favor of expediting an opinion, especially one so clearly flawed and so clearly benefitting wealthy interest groups and business concerns associated with recent major clients of present DOJ leadership, reflects poorly on the OLC and, more broadly, the DOJ. Virginia A. Seitz, like Eric Holder and Lanny Breuer, are or were bright and hard-working public servants juggling scores of sensitive and difficult issues at any one time, but they are also human and prone to occasional error. Here, they muffed their chance at accurately ascertaining the will of Congress.

In effect legislating by fiat, the Muffy opinion these officials created or allowed unleashes pathological effects across America, no matter what a particular state's or locality's laws that ban or restrict non-sports gambling. If allowed to have continuing effect, the Muffy opinion's encouragement to expand Internet-based non-sports gambling will soon provide a sonic boom of problem and pathological gambling, underage gambling, increased fraud, money laundering, and terrorist financing opportunities, uncollectable debts, bankruptcies, suicides, all compounded by government's inability to provide resources even remotely approaching those needed to enforce laws, administer regulations, and preclude collusion in supposedly-regulable non-sports gambling. Millions of state border-crossing electronic bets per day simply cannot be policed effectively without a massive, expensive, unprecedented, and unrealistic expansion of federal authority—hence, no better recipe for fraud and corruption could be proposed than that subsumed in the Muffy opinion.

Unleashing or increasing such risks on the American public, one would think, is a matter for legislative judgment—a political question, if you will. Why the OLC did not recognize this and decline the invitation to express an opinion remains a key avenue for inquiry. Merely asserting that OLC would not shy away from difficult questions of statutory interpretation may be its answer, but that truly answers nothing, in the circumstances. Given the consequences of the new interpretation of the Wire Act, it is certain that careful public inquiry should determine which pro-Internet-gambling lobbyists (or attorneys associated, for example, with past law firm employers of DOJ officials involved in this interpretation) informally or otherwise spoke to or communicated with OLC or DOJ leadership and staff on these issues during the period between the two states' letters to DOJ and the eventual, publicly-released Muffy opinion. Every American, and both pro- and anti-Internet gambling advocates, deserved a better process than the one which resulted in the substantially-flawed Muffy opinion.

[Below: electronic reproduction of text of Feb. 27, 2015, letter of Richard Zehme, president of the Federal Criminal Investigators Association]

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February 27, 2015

Hon. Bob Goodlatte
Chairman and U.S. Representative
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-3951

Re: H.R.707, the "Restoration of America's Wire Act"

Dear Chairman Goodlatte and Members of the Subcommittee,

As President of the Federal Criminal Investigators Association, I head the premier nationwide organization of Federal Law Enforcement Professionals—a highly-trained membership who must constantly adjust to changing technologies, new enforcement strategies, and a criminal element that is increasingly sophisticated, violent, well-funded, and often international in scope. The nature of our membership's work give us, more so than many of our law enforcement brother and sisters, opportunities to engage in complex, long-term investigations and to consider social implications of policies incorporated by our nation's criminal laws.

Because of this vantage point, I am confident that our experience and training provides our membership with a valuable, informed insight regarding H.R. 707, the "Restoration of America's Wire Act," a bill which is presently under consideration by the subcommittee's membership and staff.

H.R. 707 seeks to re-implement the long-standing federal prohibition on illegal gambling businesses' use of communication facilities affecting interstate and foreign commerce. Since the Wire Act (18 U.S.C. §1084) was enacted in 1961, federal courts, federal law enforcement agencies, and the U.S. Department of Justice (DOJ) had understood that law to prohibit both sports and non-sports

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wagering over interstate and foreign-commerce affecting communications systems. This fifty-year history was upended when, in December 2011, the DOJ's Office of Legal Counsel issued an opinion that the Wire Act suddenly, somehow, did not reach non-sports gambling. History, tradition, legislative intent, and precedent mattered less than the placement of a comma, apparently, to the author of the new interpretation who, apparently, assumed that Congress in 1961 would ban organized crime from making money from illegal sports bookmaking yet allow the same criminals to continue operating numbers rackets and bolita and other lottery-like illegal enterprises. The illogic of such an approach evidently escaped the attention of the author of the revisionist interpretation of the Wire Act.

Fortunately, members of this Congress have seen through the policy weakness of the DOJ's recent opinion regarding the Wire Act and have introduced H.R. 707, which seeks to both clarify Congressional intent and return the law to its original and comprehensive purpose as a key tool in the fight against organized crime and today's intertwined concerns of fighting money laundering and terrorist financing. Thus, our organization fully supports H.R. 707's intent and endorses the passage of this important provision, but with an important amendment or modification: the so-called carve-out, which would permit online poker wagering via usage of interstate and foreign communication facilities, needs to be removed from the bill before its final passage.

No good policy reason supports the carve-out. People can, and have long been able to, play poker online for fun and entertainment, without wagering money or other assets of value. Indeed, advocacy groups who seek legalization of online wagering merely use poker as a façade: their real interest is not in playing poker but in promoting the corporate profits to be made by wagering, yet these gambling industry profits will only serve to further divide the haves from the have-nots in our society. Nothing about legalizing online gambling, whether involving poker or any other game, is designed to mitigate the growing income inequality that worries Americans.

Experience with investigating wide varieties of existing illegal online gambling, whether centered in offshore or onshore operations, has shown us that, whether the game is poker, blackjack, roulette, other casino games, or sports bookmaking, these enterprises invariably attract organized crime figures; serve as convenient vehicles for money laundering, tax fraud, and terrorist financing schemes; and lure thousands of Americans into wholly non-productive losses of vast sums which could have been better saved, invested, or spent on real goods and services rather than, effectively, thrown away. Simply re-drawing a legislative line to say that such illegal enterprises are now legal would be a naïve and ineffectual decision, doing nothing to eliminate or mitigate the societal harms long known to stem from commercial gambling—indeed, the carve-out for online poker in H.R. 707, if allowed to stand, simply would be step one in a slow surrender of the public interest to corrupting, mercenary, greed-driven forces.

Importantly, our experience and knowledge of the time- and resource-intensive nature of investigations of commercial gambling-based crimes conclusively shows us that no realistic level of increases in law enforcement resources, staffing, IT capability, and training would be sufficient to effectively police or regulate the millions of rapid electronic transactions by which expanded online gambling would operate. The costs of expansion of the law enforcement and regulatory workforce to a level needed to provide even minimally-acceptable levels of protection from criminal misuse of legalized online gambling is beyond that which the American taxpayer will, or should, bear. The carveout in H.R. 707 does not begin to address this concern and, for that reason alone, should be stripped from the bill before its passage.

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To be clear, our organization decries the recent gutting of the Wire Act and wholeheartedly endorses its restoration, this time using clearer language than was used in 1961, so that no one can misapply its terms—i.e., the Act reaches sports and non-sports betting activities using interstate and foreign wire communications, including the Internet. This solution fully protects the values of federalism by recognizing individual states' rights to choose to legalize, or not, such intra-state gambling activities as their citizens may choose. It precludes interstate compacts or other measures some might seek to use to evade the Wire Act's standards. It further advances the federal interest in protecting the integrity of interstate and foreign communications systems from misuse for tax evasion, fraud, money laundering, and terrorist financing, while assisting states who resist the corrupting influence of the commercial gambling industry.

I trust the Subcommittee will take this endorsement to heart and, as always, we stand ready to provide you and the American people with further our service and informed views.

Respectfully submitted,

< e-signature on original >

Richard Zehme
President, FCIA

Cc: Robert Parmiter,
Counsel, House Committee
on the Judiciary

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Mr. CHAFFETZ. Thank you.

Mr. Moylan, you are now recognized for 5 minutes.

**TESTIMONY OF ANDREW MOYLAN, EXECUTIVE DIRECTOR
AND SENIOR FELLOW, R STREET INSTITUTE**

Mr. MOYLAN. Thank you, Mr. Chairman and Madam Ranking Member, Members of the Subcommittee, for the invitation to testify today.

My name is Andrew Moylan. I am Executive Director and Senior Fellow of the R Street Institute. We are a pragmatic, non-profit, non-partisan think tank that strives for free markets and limited, effective government, and it is in pursuit of those goals that I testify before you today regarding concerns that we have about H.R. 707, the "Restoring America's Wire Act," and what questions it raises about the appropriate scope of Federal law.

My testimony today is focused not on the propriety of gambling per se, as is some of the other witnesses, but instead on articulating a conception of limited government and Federalism as it relates to gambling legislation. In such a Federalist system, states carry most of the responsibility to exercise powers that are rightfully theirs under the Constitution, and Federal power is appropriately constrained to genuinely national or interstate matters.

So while my conservative and Libertarian brethren hold a wide range of views on the social implications of gambling, we share a broad consensus that the Federal Government is too large and too powerful, in no small part due to a decades-long trend of ever-expanding assertions of power by Congress and a compliant Judiciary that has validated most of those assertions, and it is this troubling trend rather than the activity of gambling itself which motivates my comments today.

Much of my professional work has been devoted to protecting limited government in the Internet age, including matters on which I have previously testified to the Judiciary Committee, like Internet sales tax law.

The Internet is indeed unlimited in its scope, but government power, even in this modern age, ought to be limited and respectful of borders, both the tangible geographic borders that delineate one sovereign state from the next, and the conceptual borders that delineate truly national interstate issues from state and local ones, and it is in that vein that I note potential concerns with the bill before you today.

While ostensibly expanding the 1961 Wire Act such that it covers all forms of gambling, as opposed to just sports betting, and specifying the inclusion of Internet transmission as prohibited, it appears also to go a step further than that; and also in the plain language of the Wire Act itself and the closely related Unlawful Internet Gambling Enforcement Act, or UIGEA. Specifically, its prohibition on all wire or Internet gambling transmissions, including those conducted over the Internet, in states that may have chosen to license and regulate gambling, is at odds with the basic principles of Federalism and the more narrowly targeted language of the original Wire Act and UIGEA.

While there are valid policy-based criticisms of each, both the Wire Act and UIGEA were written to help states in their own law

enforcement pursuits and more carefully circumscribed to cover only genuinely international or interstate activity, and they did this by effectively exempting intrastate gambling and transmissions between entities and states where that behavior was legal.

By appearing to extend to wholly intrastate conduct, the Restoring America's Wire Act may well empower the Federal Government in a way that we think is unwise, and it is problematic for two reasons. First is that it impedes upon an area of law that is traditionally reserved for the states, the general police power to regulate conduct within their own borders. And second, it potentially establishes a dangerous precedent in suggesting that mere use of a communication platform like the Internet subjects all users and all activity to the reach of the Federal Government no matter its location or its nature.

So given decades, even centuries of eroding limits on Commerce Clause power, it is incumbent upon Congress to exercise restraint in its application, and I think this could be readily achieved by modifying the language of Restoring America's Wire Act to more closely resemble that in UIGEA, which carefully exempted intrastate payments and those between states with legal gambling. It even went so far as to exempt so-called intermediate routing from qualifying as intrastate, since the path of an electronic signal is incidental to the conduct in question.

There are indeed areas where Congress is properly within its rights to legislate under the Commerce Clause. In my written testimony I refer to several examples of Federal bills that would prevent states from exercising cross-border authority in such a way as to cannibalize interstate commerce, the very problem that led to the downfall of the Articles of Confederation and the drafting of the Constitution.

But there are innumerable instances where the Commerce Clause is cited as granting Federal authority to regulate conduct which is entirely intrastate and even non-commercial in nature. And as written, the Restoring America's Wire Act we think is a problematic use of Commerce Clause power that threatens to substitute the judgment of the Federal Government for that of states, which are the rightful holders of power to regulate intrastate activity.

And so if limited government is to have any meaning in the 21st century and beyond, we believe that Congress must exercise restraint in those claims of power and that in its current form the bill is problematic in that regard.

Thank you.

[The prepared statement of Mr. Moylan follows:]



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March 25, 2015

Testimony of Andrew Moylan, Executive Director, R Street Institute

**"H.R. 707, the Restoration of America's Wire Act"
Hearing of the U.S. House Committee on the Judiciary
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations**

Introduction

Chairman Sensenbrenner, Ranking Member Jackson Lee and distinguished members of the subcommittee, thank you for the opportunity to submit testimony regarding H.R. 707, a bill titled "Restoring America's Wire Act" (RAWA). This measure would expand the 1961 Wire Act to prohibit all gambling conducted by wire or over the Internet.

My name is Andrew Moylan and I am senior fellow and executive director of the R Street Institute, a non-profit, non-partisan think tank with headquarters in Washington and offices in Tallahassee, Fla.; Austin, Texas; Columbus, Ohio; Sacramento, Calif.; and Birmingham, Ala. R Street is a pragmatic institution that strives to advance policy solutions to secure free markets and limited, effective government. It is in pursuit of those goals that I testify before you today regarding concerns that RAWA raises about the appropriate scope of federal law.

My testimony is focused not on the propriety of gambling, per se, but instead on articulating a reasonable conception of limited government and federalism. In such a system, states carry most of the responsibility to exercise powers which are rightfully theirs under the U.S. Constitution. Federal power is appropriately constrained to genuinely national or interstate matters. While my conservative and libertarian brethren hold a wide range of views on the social implications of gambling, we share a broad consensus that the federal government is too large and too powerful. This is in no small part due to a decades-long trend of ever-expanding assertions of federal power by Congress and a compliant judiciary that has validated those assertions. It is this troubling trend, rather than the activity of gambling itself, which motivates my comments to you.

In short, my concern is protecting limited government in the Internet age. While the Internet has proven downright miraculous in its ability to help Americans connect more easily with one another, it must not be used as a pretext for ever-expanding federal or state power. The Internet is unlimited in its scope and borderless. Government power, even in this modern age, ought to be limited and respectful of borders – both geographic borders that delineate one sovereign state from the next, and conceptual borders that delineate truly national, interstate issues from state and local matters. The rise of the Internet need not and should not correspond with and countenance the rise of an all-powerful federal government.

R Street's previous work outlining principles of limited government in the Internet age

R Street's approach to RAWA and the particular questions it raises is heavily informed by years of work articulating limited government and federalist principles on the matter of taxation of Internet sales. That policy debate has been dominated by legislation known in the 113th Congress as the Marketplace Fairness Act, or MFA.

The MFA would – unwisely, in my view – empower state governments to require businesses outside their borders to comply with their sales tax laws. Some supporters have justified such a bill by claiming it would protect "states' rights" in the realm of taxation. But as I testified to the full committee last March, this type of legislation would have two distinct negative impacts.¹

First, it would grant states a power that stands in contravention to federalist principles and that they generally lack in tax law: the ability to impose their laws on entities with no physical presence inside their borders. For decades, states have aggressively attempted to expand their tax power to ensnare non-resident businesses and individuals. The MFA would explicitly *allow* them to do so for remote sales and implicitly *encourage* them to seek such authority in other areas of taxation, like business and individual income.

Second, by using "destination sourcing," whereby tax is collected based on the residence of the consumer, the bill would create an unlevel playing field between remote and in-person sales. The MFA would force Internet retailers to jump through the hoops associated with complying with the tax rules of 46 states and as many as 9,998 taxing jurisdictions with sales taxes, including attendant audit and enforcement action.² Meanwhile, in-person sales, which constitute some 93 percent of retail sales today, would continue to be governed by a simple collection standard that effectively uses "origin sourcing," whereby tax is collected based on the physical location of the

¹ Andrew Moylan, Hearing on Internet Sales Taxation, U.S. House Committee on the Judiciary, March 12, 2014. <http://www.rstreet.org/wp-content/uploads/2014/03/Andrew-Moylan-Internet-Sales-Tax-Testimony-3-12-14.pdf>

² Joseph Henchman and Richard Borean, "State Sales Tax Jurisdictions Approach 10,000," Tax Foundation, March 24, 2014. <http://taxfoundation.org/blog/state-sales-tax-jurisdictions-approach-10000>

business.³ The burdens placed on Internet sellers by a destination-sourcing rule could prove enormous, given the staggering complexity of sales-tax codes nationwide.

Preventing damage to interstate commerce through the 'dormant' Commerce Clause

In the MFA debate, the risk to federalism is one of federal "underreach," in which state power is not appropriately constrained. Similar concerns led to the downfall of the Articles of Confederation and the drafting of our Constitution's federalist system, to prevent states from exercising cross-border authority in ways that cannibalize interstate commerce. Known by legal theorists as the "dormant" Commerce Clause, this well-established realm of law contemplates the necessity of federal action to prohibit state actions that would unduly impede the flow of goods and services across state lines.

A number of recent bills have proposed proper use of this form of federal Commerce Clause power to regulate conduct between the states in other areas of tax law. Two pieces of legislation from the 113th Congress come to mind as exemplifying the appropriate exercise of Commerce Clause authority to restrain cross-border state action in defense of the free flow of interstate commerce.

The first is a bill introduced by Chairman Sensenbrenner, H.R. 2992, known as the Business Activity Tax Simplification Act, or BATSA.⁴ BATSA would strengthen so-called "physical presence" requirements for the purposes of business-income taxation. The legislation was intended to address overly aggressive states forcing businesses only tangentially connected to the state to comply with their business-income tax laws. By specifying the conditions that constitute physical presence in a state, BATSA would have established appropriate limits on cross-border tax-enforcement actions that could impede interstate commerce.

The second is H.R. 3724, the Digital Goods Tax Fairness Act, introduced by Rep. Lamar Smith, R-Texas.⁵ This bill would clarify that no discriminatory tax rates shall be applied to the sale of digital goods and, importantly, that only one jurisdiction may impose tax for the sale of a given digital good. This was intended to address growing concerns that multiple jurisdictions in several states might attempt to impose tax on the sale of a single digital good, or that digital goods might be targeted for higher tax rates than ordinary goods. By specifying that only one jurisdiction may impose tax, and may not do so discriminatorily, the Digital Goods Tax Fairness Act would have

³ U.S. Census Bureau, "Quarterly Retail E-Commerce Sales, 4th Quarter 2014," Retrieved March 24, 2015. http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf

⁴ H.R. 2992, House Business Activity Tax Simplification Act of 2013, Aug. 2, 2013. <https://www.congress.gov/bill/113th-congress/house-bill/2992>

⁵ H.R. 3724, Digital Goods and Services Tax Fairness Act of 2013, Dec. 21, 2013. <https://www.congress.gov/bill/113th-congress/house-bill/3724>

established appropriate limits on state tax-enforcement actions that could impede interstate commerce.

Both of these bills rest their constitutional authority on proper utilization of the Commerce Clause in pursuit of the principles of federalism. Absent their passage, states and localities would be free to exercise *too much* power outside their borders, to the detriment of interstate commerce. These bills recognized that there is, indeed, an appropriate role for Congress in mediating such matters, because failure to do so would lead to potentially significant negative impacts. The Commerce Clause was drafted precisely so that Congress would be empowered to mitigate those sorts of impacts.

The long history of and risk associated with Commerce Clause overreach

While there is indeed a proper role for use of the Commerce Clause to address issues between the states, it's more common for Congress to justify their own overreach by citing Commerce Clause authority.

In his treatise on "constitutional irony," University of Tulsa College of Law Professor Steven K. Balman notes that "states cannot serve as laboratories of innovation unless they are afforded a sphere of action that is protected from federal encroachment."⁶ He draws upon the famous quote from former Chief Justice John Marshall in the 1824 case of *Gibbons v. Ogden*. In attempting to describe the limits of Commerce Clause power, Marshall said,

The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the state itself.⁷

In the nearly two centuries that have passed since Marshall penned those words, Congress and the courts have conspired to make mincemeat of the limits he set forth. There is, unfortunately, a sordid, decades-long history of expansive interpretations of the Commerce Clause, each building upon the last, to the point where there are serious questions about whether *any* effective limits to Commerce Clause power still remain.

⁶ Steven J. Balman, "Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause," *Tulsa Law Review*, Vol. 40 Issue 2, 2005.
<http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2799&context=tlr>

⁷ *Ibid.*

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The Supreme Court has been almost uniformly permissive of Commerce Clause overreach for going on 75 years. As Professor Balman writes, the broad sweep of Commerce Clause decisions after the court-packing scandal of 1937 found essentially no articulable limit to Congress' power.⁸ The World War II-era nadir of this judicial acquiescence to unlimited congressional power came in *Wickard v. Filburn*, a case in which fining a farmer for personal use of wheat in excess of his allotment was found to be a valid exercise of the Commerce Clause, despite the facts that the wheat never crossed state lines and was never sold.⁹

As Chief Judge Alice M. Batchelder of the U.S. Sixth Circuit Court of Appeals suggested in a 2012 lecture, this reasoning could be summed up as, "if we had some ham, we could have a ham sandwich, if we had some bread."¹⁰ She later described it as "building upstairs over a vacant lot," drawing upon the works of Brutus, the anonymous anti-federalist writer of the 1780s. Brutus wrote of his fear that "one adjudication will form a precedent to the next, and this to a following one," a prescient prediction about the course the judiciary would take some 150 years after his writings were published.

There was a brief respite from this trend in the mid-1990s and early 2000s, as the Supreme Court under Chief Justice William Rehnquist filed several decisions heralded as a "new federalism" for articulating limits to Congress' Commerce Clause power.¹¹ Most notably, the decisions in *United States v. Lopez*¹² and *United States v. Morrison*¹³ struck down parts of two federal statutes, on the basis that gun and domestic violence, respectively, did not have sufficient nexus with interstate commerce to justify federal intervention.

While these developments were welcome for devotees of federalist principles, the excitement was short-lived. The 2005 case *Gonzales v. Raich* once again saw the court authorize a Commerce Clause-based intervention, despite the fact that the items in question never crossed state lines and were never sold.¹⁴ *Raich* drew from and reaffirmed much of *Wickard* and thus significantly degraded hopes that federalism may be on the rise in the judiciary.

⁸ Ibid.

⁹ U.S. Supreme Court, *Wickard v. Filburn*, Nov. 9, 1942. <https://www.law.cornell.edu/supremecourt/text/317/111>

¹⁰ Alice M. Batchelder, "Suppose Joseph Story Had Been Right and Brutus II Had Been Wrong," The Heritage Foundation, Oct. 10, 2012. <http://www.heritage.org/research/lecture/2012/10/suppose-joseph-story-had-been-right-and-brutus-had-been-wrong>

¹¹ Steven J. Balman, "Constitutional Irony: *Gonzales v. Raich*, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause," *Tulsa Law Review*, Vol. 40 Issue 2, 2005. <http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2799&context=tlr>

¹² U.S. Supreme Court, *United States v. Lopez*, April 26, 1995. http://www.oyez.org/cases/1990-1999/1994/1994_93_1260

¹³ U.S. Supreme Court, *United States v. Morrison*, May 15, 2000. http://www.oyez.org/cases/1990-1999/1999/1999_99_5

¹⁴ U.S. Supreme Court, *Gonzales v. Raich*, June 6, 2005. http://www.oyez.org/cases/2000-2009/2004/2004_03_1454/

Subsequent court decisions have built upon the *Raich* precedent, yielding some astonishing statements. In a 2011 Widener University Law Review piece about the U.S. First Circuit Court of Appeals' decision in *United States v. Nascimento*, Kristina A. Miller observed the contortions courts now routinely perform with respect to the English language in Commerce Clause jurisprudence. When discussing the "class of activity" subject to regulation under the Commerce Clause, the *Nascimento* court stated that "the intrastate or noneconomic character of individual instances within that class is of no consequence."¹⁵ In other words, the Commerce Clause is essentially without limit.

As close as the modern Supreme Court has come to defining limits to Commerce Clause authority is in its decision on the so-called Patient Protection and Affordable Care Act, colloquially known as Obamacare. The legislation raised serious questions about the nature of federal power since it had, at its core, a requirement that all individuals purchase health insurance or face financial penalties. Make what you will of the court's creativity in the initial case that tested that law's constitutional authority, *National Federation of Independent Business v. Sebelius*, which upheld the law as a valid exercise of Congress' tax power, but the ultimate decision at least made clear that compelling participation in commerce was not a valid use of Commerce Clause power.¹⁶ This provides precious little comfort for supporters of federalism, but at least offers something of a foothold for constraining the Commerce Clause into the future.

Principles of federalism in the Internet age

Conservatives and libertarians rightly have criticized both Congress and the judiciary for complicity in this vast expansion of Commerce Clause power, which has been used to justify all manner of laws and regulations more properly reserved to the states. Given deep uncertainty about what restraint, if any, the courts are willing to place on such assertions of power, it is incumbent upon Congress to think more deeply about such matters and exercise additional restraint, lest the delicate balance of powers laid out in the Constitution be upset even further.

Congress should indeed be proactive in legislating on matters that genuinely threaten to impact interstate commerce. States should be sovereign within their own borders, generally free to legislate subject to the limits established by the U.S. Constitution, the bounds of their own constitutions and common sense. But when it comes to cross-border actions that threaten to negatively impact interstate commerce and the functional "free-trade zone" that is the United States, Congress might see fit to use its dormant Commerce Clause authority to set out clear rules by which states must operate.

¹⁵ Kristina Miller, "After *Gonzales v. Raich*: Can RICO be used to prosecute intrastate noneconomic street gang violence?," *Widener Law Review*, Vol. 16, 2010. http://widenerlawreview.org/files/2011/02/06-MILLER_final.pdf

¹⁶ U.S. Supreme Court, *National Federation of Independent Business v. Sebelius*, June 28, 2012. <https://www.law.cornell.edu/supremecourt/text/11-393> >.

In addition to the aforementioned business income and digital goods concerns, Congress could establish guidelines for tax treatment of mobile workers (addressed by the Mobile Workforce Income Tax Simplification Act, H.R. 1129 from the 113th Congress¹⁷) and tax treatment of telecommuters (addressed by the Multi-State Worker Tax Fairness Act, H.R. 4085 from the 113th Congress¹⁸), among other issues.

More straightforward exercises of Commerce Clause power should be limited to matters of genuine national scope or those involving multiple states. Professor Balman's treatise quotes Alexander Hamilton, who wrote in Federalist No. 17 that "[t]he administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a [national] jurisdiction."¹⁹

In colloquial form, Hamilton's admonition is translated in the modern age by conservatives and libertarians to say that Congress should respect so-called "states' rights." But states don't have "rights," exactly; they have powers granted to them by the people in order to achieve certain goals. In turn, states have ceded some of that power to the federal government to achieve certain national goals. The essence of our federalist system is a balance in exercising those powers such that the federal government legislates on truly national and interstate matters, and state governments retain the power to legislate on the rest, including the general police power associated with prohibiting conduct like gambling.

Principles of federalism as applied to gambling legislation

Though subsequent jurisprudence has raised questions in this regard, the plain language of the two statutes most directly relevant to RAWA – the 1961 Wire Act that it seeks to amend and the related 2006 Unlawful Internet Gambling Enforcement Act (UIGEA) – were written in such a way as to respect basic principles of federalism.

The 1961 Wire Act was established to help states in their ongoing efforts to combat organized crime and their interstate betting rackets. The matter of interstate betting is, of course, interstate by its very nature and thus beyond the reach of any single state government. While one might object to the law from a policy perspective, it at least met the first threshold federalism test of involving a genuinely national or interstate matter.

¹⁷ H.R. 1129, Mobile Workforce State Income Tax Simplification Act of 2013, March 13, 2013. <https://www.govtrack.us/congress/bills/113/hr1129>

¹⁸ H.R. 4085, Multi-State Worker Tax Fairness Act of 2014, Feb. 25, 2014. <https://www.govtrack.us/congress/bills/113/hr4085>

¹⁹ Alexander Hamilton, "The Same Subject Continued: The Insufficiency of the Present Confederation to Preserve the Union," *The Federalist Papers*, No. 17, Dec. 4, 1787. http://thomas.loc.gov/home/histdox/fed_17.html

Furthermore, the plain language of the Wire Act's prohibitions apply only to interstate betting and not wholly intrastate activity. The legislation denotes "interstate or foreign" commerce as the focus of its restrictions. It also specifically exempts transmissions relating to "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."²⁰ As drafted, the Wire Act was quite deferential to states to enforce their own general police powers. It reserves the exercise of federal power only to activity conducted across state or national borders and only where the behavior was illegal in at least one of the jurisdictions in question.

In 2006, Congress passed UIGEA to make it unlawful to process gambling payments over the Internet if the betting was illegal under either federal or state law. In other words, UIGEA also helps states in their ongoing efforts to address the perceived ills of Internet gambling. Interstate payment processing is, of course, interstate by its very nature and thus beyond the reach of any single state government. While there were and are valid policy-based objections to the law, UIGEA also met the first threshold federalism test of involving a genuinely national or interstate matter.

UIGEA was *also* written so that its prohibitions apply only to interstate activity. The bill specifically carves out intrastate transactions and even denotes that so-called "intermediate routing" of electronic data would not be considered relevant to testing whether a transaction crossed state lines.²¹ If both sides of a given transaction are located in a state where betting is legal, mere *electronic* transmission across state lines is insufficient to establish an interstate nexus for exercising federal power.

However, subsequent Wire Act jurisprudence and stated policy from Justice Department officials across several presidential administrations have raised important questions about whether the bill's prohibitions apply only to sports-related betting, as the language seems to suggest, or to all gambling activities. Questions also have been raised as to whether intrastate bets that use communications networks are *inherently* interstate even if they serve only to connect two entities in the same state.

In 2011, the Justice Department Office of Legal Counsel was asked by the states of New York and Illinois to clarify these questions in light of their attempts to begin offering state lottery products via the Internet. In the opinion, OLC stated that "[i]nterstate transmissions of wire communications that do not relate to a 'sporting event or contest' fall outside the reach of the

²⁰ 18 US Code, §1084, "Transmission of wagering information; penalties," Retrieved Mar. 24, 2015
<https://www.law.cornell.edu/uscode/text/18/1084>

²¹ Security and Accountability for Every Port Act of 2006, Pub. L. no. 109-347, 73, Stat. 129, Oct. 13, 2006.
<http://www.gpo.gov/fdsys/pkg/STATUTE-120/pdf/STATUTE-120-Pg1884.pdf>

Wire Act," clarifying their view that only sports betting, and not the broad range of gambling and games of chance, qualified for coverage under the act.²²

OLC also provided some clarity regarding the interstate/intrastate question. Since the New York and Illinois lotteries proposed using intermediate transaction routing that might cross state lines incidentally, there was a potential risk that the Justice Department would assert the transactions were *interstate* in nature, despite involving buyers and sellers in a single state in which the conduct was legal under state law. By stating their view that the New York and Illinois lotteries would be compliant with the Wire Act, OLC cleared up a potential discrepancy between that law and UIGEA. Absent OLC clarification, such routing might have been considered interstate under the Wire Act and intrastate under UIGEA.

In one 13-page memo, OLC provided a great deal of needed clarity on interpretation of federal gambling law. While the sports/non-sports question has received the most press coverage, the more impactful portion of the memo, from the perspective of federalism, is its treatment of intermediate routing. By confining federal enforcement actions to activities that genuinely involve multiple states, OLC reaffirmed the important principle that federal power must abide by the reasonable limits of the Commerce Clause.

RAWA appears to regulate wholly intrastate activity

Along those lines, RAWA contains potentially problematic language that appears not to carve out wholly intrastate activity, as the Wire Act (and subsequent unsuccessful attempts by Congress to amend it) and UIGEA both do quite clearly. RAWA defines the term "uses a wire communication facility for the transmission in interstate or foreign commerce of any bet or wager" as including "any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise."²³ Those last three words, "incidentally or otherwise," carry a tremendous amount of weight. They appear to suggest that any use of the Internet whatsoever, even in pursuit of gambling activity that is legal under state law, is unlawful.

From the perspective of federalism, an argument of this nature is problematic, to say the least. To treat all use of the Internet, no matter its nature, no matter the individuals or entities it might connect, as "per se interstate" and thus subject to Commerce Clause regulation, would constitute an enormous shove down the slippery slope toward federal power without meaningful limits. Writing in the *McGeorge Law Review*, Nathaniel H. Clark suggests that Congress should only exercise its Commerce Clause power on intrastate Internet transmissions with a substantial effect

²² Virginia Scitz, "Whether proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act," U.S. Department of Justice, Sept. 20, 2011. <http://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>

²³ H.R. 707, Restoration of America's Wire Act, Feb. 15, 2015.. <https://www.congress.gov/bills/114th-congress/house-bill/707/text>

on interstate commerce, thus "allowing Congress to focus on conduct that legitimately affects the national and international economy."²⁴ While the "substantial effects" test is itself fraught from a federalism perspective, this would at least articulate some sort of framework by which lawmakers and judges could evaluate the proper treatment of intrastate transmissions.

As currently drafted, RAWA would appear to overrule state authority to permit intrastate legal gaming. As Michelle Minton of the Competitive Enterprise Institute recently wrote, gaming attorney Mike Hichar asserts that "the bill would eliminate currently legal lottery offerings, such as online lottery ticket sales and subscriptions (currently available in eight states), online real-time games like pull-tabs (legal in five states when Kentucky launches this year), and of course, online casino-style games legal in New Jersey, Nevada, and Delaware for almost two years now."²⁵

To be clear, RAWA could be rewritten in such a way as to protect wholly intrastate activity from federal scrutiny. If it used the UIGEA standard of exempting from regulation any activity entirely conducted in one state, including an appropriate remedy to prevent intermediate routing from triggering Commerce Clause regulation, RAWA would be applied in a manner consistent with principles of federalism. This could be achieved quite readily, simply by deleting "incidentally or otherwise" from the new subsection e(3) it creates in the Wire Act.²⁶ Deleting that language would effectively exempt both wholly intrastate transactions and any transactions originating and terminating in a state where such activity is legal. This would effectively open the door for states with legal gambling to compact with one another to allow for transactions that are interstate in nature, but do not exist in violation of either state's laws, absent fear of federal sanction under the Wire Act.

States that wish to prohibit gambling have remedies at their disposal

RAWA's potential overreach in failing to exempt intrastate activity is unwise from the perspective of federalism, but it could also prove largely unnecessary. If a state wishes to prohibit gambling within its borders, it has sufficient power to do so and sufficient legal remedies at its disposal. States are free to ban some or all gambling activity within their borders, both on an institutional and individual level. On an institutional level, states are free to prohibit gambling operations from conducting business within their borders. This could include both brick-and-mortar gambling establishments like casinos, as well as offerings via the Internet or

²⁴ Nathaniel H. Clark, "Tangled in a Web: The Difficulty of Regulating Intrastate Internet Transmissions Under the Interstate Commerce Clause," *McGeorge Law Review*, Vol. 40, 2009. http://www.mcgeorge.edu/Documents/Publications/06_Clark_MasterMLR40.pdf

²⁵ Michelle Minton, "Chaffetz Tells States and Lotteries: If You Don't Want an Online Gambling Ban, Introduce Your Own," Competitive Enterprise Institute, March 11, 2015. <https://cei.org/blog/chaffetz-tells-states-and-lotteries-if-you-don%E2%80%99t-want-online-gambling-ban-introduce-your-own>

²⁶ H.R. 707, Restoration of America's Wire Act, Feb. 15, 2015. <https://www.congress.gov/bills/114/congress/house-bill/707/text>

other communications media. Inherent in that power is the ability to regard as unlawful any use of proxies or virtual private networks that would serve to defy the spirit of state prohibitions. Advances in geolocation technology make this easier than was the case when Congress passed UIGEA just nine years ago.

On an individual level, states can criminalize both the conduct of and participation in gambling activities. While most states prefer to target enforcement activities to institutional purveyors of prohibited services, they are well within their rights to target individual users as well. That they generally do not expend great effort subjecting individuals to enforcement action says a great deal about their law-enforcement priorities. In other words, revealed preferences suggest that states do not invest as much importance in gambling elimination as proponents of such laws profess. They instead focus their granular enforcement activities on violent crime and other more impactful behavior.

To the extent that there are cross-border issues relating to gambling – say, a betting website that operates in a state where such conduct is legal but allows individuals from out-of-state to access its services – there is a legitimate federal role to address such behavior. The laws to do so are already on the books. As previously stated, the combination of the Wire Act and UIGEA effectively make all remote interstate gambling activity illegal, including processing of payments for services. These tools allow the federal government to assist states in enforcing their own laws in a manner consistent with the Commerce Clause and principles of federalism.

Furthermore, the most prominent tests to the mistaken notion that federal law ought to reach down to wholly intrastate commerce in the realm of gambling come not from private purveyors, but from state-run institutions like lotteries. In what is surely one of the more delicious ironies of the modern era, several states that have not yet generally licensed gambling institutions within their borders nonetheless offer lotteries for which the odds of winning are infinitesimally small. Participation in these lotteries – which skews markedly toward the poor and working class²⁷ – generates significant revenue for services like education, making states dependent on gambling for substantial portions of their budgets. While private operators would surely love the ability to provide legal intrastate gambling services, it is, in fact, the states themselves that have the greatest interest in Congress exercising appropriate deference to state law.

None of this is to say that states *should* ban gambling. While I don't pretend to be an expert on the societal impacts of such behavior, my general sense is that there both are and ought to be higher law-enforcement priorities than further criminalizing betting and games of chance. There is clear evidence that federal lawmakers at least tacitly accept that conclusion, given the

²⁷ Grace M. Barnes, et al., "Gambling on the Lottery: Sociodemographic Correlates Across the Lifespan," *Journal of gambling studies* / co-sponsored by the National Council on Problem Gambling and Institute for the Study of Gambling and Commercial Gaming, April 27, 2011. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4103646/>

widespread exclusion of state-run lotteries, fantasy sports and betting on horse racing, among other activities that are largely indistinguishable from the kind that are not excluded from bans. If gambling were indeed such a powerful evil as to justify its prohibition, one would think that governments would prohibit the entire range of conduct, rather than just a portion.

Conclusion

Federalism is under serious threat in two directions. First, there are several instances where there exists a need for federal legislation to rationalize the powers of states, as applied across borders. Second, there are innumerable instances where the Commerce Clause is cited as granting the federal government authority to regulate conduct which is entirely intrastate, and sometimes even non-commercial in nature.

As written, RAWA is a problematic use of Commerce Clause power that threatens to substitute the judgment of the federal government for that of states, which are the rightful holders of the power to regulate intrastate activity. If limited government and federalism are to have any meaning in the 21st century and beyond, Congress must exercise restraint in claims of such power. This would help protect the Internet and the citizens who use it from unwise government intrusions, helping to make real the "new federalism" that so briefly flourished two decades ago.

Mr. CHAFFETZ. Thank you.

Ms. Aftab, please, you are now recognized for 5 minutes.

**TESTIMONY OF PARRY AFTAB, ESQ., FOUNDER
AND EXECUTIVE DIRECTOR, WIRESAFETY, INC.**

Ms. AFTAB. Thank you very much, Mr. Chairman and Ranking Members of both the Judiciary Committee and the Subcommittee here.

I don't have a stake in gambling. I have a stake in protecting people online. The last time I testified before this Subcommittee was several years ago on radicalization of the Internet, and that is when I informed you that terrorists were recruiting our teens online from suburban areas where they were bored. I have testified before Congress on cyber-bullying, child sexual exploitation, child pornography, and child privacy. So my stake in this is to make sure that whatever happens, our kids and consumers are safer.

So, I agree there are lots of problems. There are terrorists who are using online gambling, and there is money laundering going on, and there is malicious code that can be downloaded, but that is not happening in New Jersey, Delaware, or Nevada. It is happening currently with all of the offshore gambling sites, or many of the offshore gambling sites that are not covered by our laws, that we have been frustrated in trying to police over the years.

In this case and the reason it is a little different is once you legalize online gambling with an interstate model, you now have partners in trying to shut down the illegal sites. So the providers who are licensed within a state have a stake in making sure that those who are offshore, those who are not subject to regulation, will follow what they need to do.

I have looked long and hard at these issues, and I have surveyed the regulators in Delaware, New Jersey, and Nevada. We had done a white paper when I testified at the last hearing on online gambling, and we looked at best practices around the world. I picked up the phone and I called the top regulators in each of those states and I said are you keeping kids off? Are you having problems? What is your experience? Is the geolocation working properly? And I got very good responses from them. I was, frankly, a little surprised.

It is not perfect. There were three kids who had gotten on to online gambling in Nevada, two during the test period. They had used their parents' account. One had used his older brother's account. It is a little like when we used to send somebody into a liquor store to buy beer when we were underage, and they would come out and nobody broke the law. I think that we are starting to see some of that here.

We have had a lot of fraud over the years. I have had a lot of senior citizens who called me who had gotten into gambling offshore, and everyone was happy to take their money, but they weren't so happy to give it back.

When we talk about terrorists and money laundering, you need to recognize that in the three states that are handling traditional gaming games—and Nevada is just doing poker and the other two are doing other games in connection with online gambling—they

are very careful to make sure that you don't get paid your winnings until the right reports are made to the IRS about those winnings.

Now, I don't know a great deal about financing terrorists and money laundering, but I don't think a lot of them want to sign up with the kind of identity controls that are put into these states and then have to file something with the IRS before the money goes back to an account that has already been authenticated.

So I deal with a lot of issues of online crimes and risks against everyone, and it always comes down to verification and authentication. And the different hoops that people have to jump through to prove that they are in the state, that they have a valid bank account that has been approved under all of the Federal laws that have to, under the Know Your Customer rules on making sure that not just the IP address, which is the old-fashioned way of doing things that has been spoofed over the years, but that you can't even log on with a remote technology that lets you get into your computer when you are home because the technology that is used by the providers in these three states will block anything that is using remote access. It will block anything that is a little off, and it is actually incredibly accurate and is becoming more accurate because everyone has a stake in knowing where you are.

You will see that there was a recent article about Four Square and Twitter wanting to know exactly where you are so they can advertise to you. That is the same technology that is being used to find out where you are. So whether you are using your GPS plus an IP and triangulation, whether it is knowing that you have been trying to get in from other places in the past, we have seen very good compliance and really the state-of-the-art issues on authentication and verification of your location and knowing that you are who you are.

Is it bullet-proof? No. But I think that the lotteries will be able to learn a great deal from the providers that come from more of the commercial gaming, and I think that their best practices will improve.

Thank you.

[The prepared statement of Ms. Aftab follows:]

TESTIMONY OF PARRY AFTAB, ESQ.

**FOUNDER AND EXECUTIVE DIRECTOR,
WIRESAFETY, INC.
(A 501C-3 CORPORATION)**

**UNITED STATES HOUSE SUBCOMMITTEE
on
Crime, Terrorism, Homeland Security, and Investigations**

“H.R. 707, The ‘Restoration of America’s Wire Act’”

March 25, 2015

Thank you, Chairman Sensenbrenner, Ranking Member Jackson-Lee, Vice Chairman Gohmert, and Members of the Subcommittee for giving me the opportunity to testify today on this important topic.

Introductions:

My name is Parry Aftab. I am, among other things, an Internet privacy and security lawyer. I began my law practices as a Wall Street corporate associate. Later, after forming my own firm, I was credited with helping found the field of cyberlaw. I am relatively familiar with the substantive legal issues before this committee. And, in my legal capacity, I believe that the Office of Legal Counsel correctly interpreted the Wire Act in 2011. The 2011 interpretation finally conforms to both the legal rulings and the findings of Congress. The language is clear on its face and consistent with the historical laws of Congress that have preserved the rights of States to define gambling policy within their borders as most recently expressed in the Unlawful Internet Gambling Enforcement Act ("UIGEA") in 2006, U.S.C. §§ 5361–5367, long after the enactment of the Wire Act (see Section 5362 (10) (B) which excludes "intrastate transactions" from the definition of "unlawful internet gambling" for purposes of UIGEA).

But, while prepared to discuss the Wire Act and other related laws, I am primarily here because of my life's mission – to help protect children and empower consumers and families online. For almost twenty-one years I have devoted a majority of my time to this mission.

WiredSafety and Its Work:

I am the Executive Director of Wired Safety, the first Internet safety and help group in the world (formed twenty years ago). Along with the thousands of volunteers from around the world, I am an unpaid volunteer. We donate our time to helping others online.

In my role as executive director, my job is to keep everyone, especially kids, safer online. At WiredSafety we are all unpaid volunteers who devote our time to helping people when things go wrong online. We fight cyberbullying and help put Internet sexual predators behind bars. (We run stopcyberbullying.org.) We help protect vulnerable groups, such as cyberstalked women, people attacked online and those defrauded and victimized online. We help define best practices and confront the sites and apps that don't adhere to them.

We are a well-respected group and our and my expertise have been tapped by governmental agencies, legislative bodies, both Republican and Democratic Whitehouses, the UN, UNESCO and others over the last two decades to help create a safer and more responsible digital world for everyone. We have testified before Congress and the US Senate on a range of issues, including radicalization of the Internet and terrorist recruitment programs for our kids, children's privacy law and regulations, child sexual exploitation, cyberbullying and Internet regulation.

To help demonstrate the level of our expertise and the extent of our experience, I have included some of the appointments we have received and our collaborations over the years:

- WiredSafety served as one of the 29 members of the Harvard Berkman Center’s Internet Safety Technology Task Force (the “ISTTF”) which was commissioned to render a report to the state attorneys general on the safety of children online.
- I was also appointed to serve on the 24-member working group established by act of Congress (run by the NTIA) to render a report for Congress in June of 2010 on cybersafety issues impacting children.
- The UN, as well as the FTC and FCC have turned to us for advice and help.
- I have received both the FBI Director’s Award and the Canadian RCMP’s Child Recovery Award for work in child protection over the years.
- UNESCO named me to head up their Innocence in Danger program for the United States, addressing child sexual exploitation online.
- We train and assist law enforcement agencies to address and prevent child sexual exploitation and crimes against children from small sheriff’s offices, to attorneys general offices to Homeland Security and the FBI and Interpol.
- The Girl Scouts of the USA turned to me to design their cybersafety program for all 2.2 million scouts.
- Liz Claiborne tapped our expertise for its “Love is Not Abuse” program on teen dating violence.
- And Facebook selected us as one of its five International Safety Advisory Board members.

Our Expertise with Online Gambling Risks:

WiredSafety has over the years identified a broad range of risks related to online gambling. When we seek to reduce these risks:

- We review age-gating technologies and practices to keep everyone off the online gambling sites and apps unless they can definitively prove that they are adults.
- We review how well policies and age-gating are policed and how quickly site regulators and operators can address any issues that rise.
- We look at scams and fraud perpetrated by the gamblers, to those perpetrated by the website operators. (Rigged games and collusion using old-fashioned and digital methods are common place among unregulated websites.)
- We look at payouts, money-laundering and banking fraud, as well as credential theft.
- We look at risks to problem gamblers when the websites don’t adopt the latest tools and best practices to address problem gambling.
- We look at risks to our digital ecosystem, with malware, spyware and illegal digital codes designed to undermine our digital hygiene and security.

- We look to ways to protect children, teens and seniors from targeted schemes and fraud.
- And, we look to data protection methods, privacy, credential protection and security.

While all gambling is, by its nature, risky, unregulated gambling is the most risky. Absent regulation, consumers and families are on their own without regulations to handle underage gambling, addictive gambling, fraud, collusion, malware and malicious code, privacy and data protection, criminal involvement, disputes and online security threats. That is unacceptable.

We have not come late to this party. This isn't a new opinion by me or our charity. And unregulated online gambling isn't a recently discovered risk to children. I addressed it in the first book ever written for parents on online safety for children. In 1995 I wrote the chapter called "Are We Raising Riverboat Gamblers?" Twenty years ago, along with cyberbullying, sexual predation and illegal content online, we recognized that this was a serious risk that had to be addressed in the US.

Minors and online gambling has been on our radar since WiredSafety first began our work in 1995. Even then, kids were gambling online. Teens would use babysitting, paper-delivery and birthday money to place bets online. Teens themselves would contact us when the websites failed to pay out, or they suspected fraud. Parents and grandparents would contact us when they discovered their teens gambling online, or wanted help keeping them away from online gambling sites. We helped them when we could, reviewing filtering and blocking technologies, reaching out to the credit card companies and phone companies used as payment intermediaries and would sometimes even contact the sites themselves. But, largely, our hands were tied. There was no place for us or defrauded consumers to turn.

Over the years, online gambling abuse has become a mainstream consumer issue. Since it is WiredSafety's role to address problems affecting children and our consumer constituency online, unregulated and rogue online gambling operations and gambling apps are among the problems we must address.

Protecting Children, Families and Consumers:

Everyone on this subcommittee, on this panel and in this room wants to do what's best for our children and consumers. We all share WiredSafety's mission. We want our kids and consumers safe online and offline. We want the Internet to be secure. We want to protect consumer data and financial credentials from fraud and criminals. We want to avoid scams and con artists. We want to promote the rules of law and fairness. We want to make sure that minors are kept out of casinos and off Internet gambling sites. That's why we all recognize the need to do something to address the risks of illegal, unregulated online gambling.

It is ironic that a cybersafety charity would oppose the criminalization and recommend the legalization and strict regulation of online gambling. It is counter-intuitive at first glance. But as much as I understand and am sympathetic to the concerns of the sponsors of H.R. 707 and

others who would try to prohibit Internet gambling in the United States, I respectfully believe that while well-intended, these efforts are not well-founded. A far better approach to addressing the risks of illegal online gambling schemes is the licensing and strict regulation of online gambling in the US, coupled with effective technological safeguards and tools designed to protect American consumers, families and more vulnerable populations, such as problem gamblers.

Unfortunately, H.R. 707 and similar efforts would do precisely the opposite. The risks to our seniors, our kids, our security and our privacy would be increased by such measures. The stakes are too high to take such risks. We need to be thoughtful, instead, and craft effective and realistic methods of addressing these risks. We cannot any longer put our heads in the sand, and pretend that everything is fine. We have to own the issues and address them.

I have heard claims about our kids being more exposed to online gambling if sites are licensed and regulated in the US. I have heard claims about parents being up-at-arms. I have heard vacant arguments and seen expensive sites, campaigns and promotions targeting online gambling in the US. But, this is too important for claims. It's too important for glossy campaigns attempting to spread misinformation and hype. We shouldn't have to make unfounded claims, when we have proof that it works. We have evidence that the well-constructed regulation of online gambling, in fact, works around the world and is working effectively in the US.

Prior Testimony and Our 2009 Whitepaper Conclusions:

This is the third time I have testified before Congressional committees/subcommittees on this issue. I hoped that we had finally put it to rest. But I understand that legalizing and regulating online gambling to protect vulnerable groups and our children from unlicensed and rogue gambling sites is counter-intuitive. So, we need to look at the facts, not speculation.

In 2009, we commissioned a comprehensive study of the risks we had identified, existing and viable regulatory schemes and the ability of technology tools to address our top concerns. Would regulation of cyber-gambling work? Is there a way to address the most crucial cyber-risks under existing laws or using alternative methods? Is it practical? Will it improve the existing situation? What can be learned from other jurisdictions? How can we improve on existing approaches? Can risks be realistically mitigated? And if so, how much?

We asked Dr. Malcolm Sparrow, a professor at Harvard University's Kennedy School of Government, to be the study's lead investigator. A former deputy chief inspector with the British Police Services and a world renowned expert on approaches to regulatory policy and compliance, Dr. Sparrow reviewed the existing literature, evaluated current regulations and cutting-edge technologies, and interviewed regulators, researchers and public policy experts from around the world. Dr. Sparrow was supported by experts in technology and other relevant disciplines. (The paper can be downloaded and is linked to on the front page of Aftab.com.)

The Whitepaper we commissioned doesn't advocate for or against legalized Internet gambling. Instead, it examines and evaluates the different types and levels of consumer risks associated with existing, mostly unregulated Internet gambling against the risks associated with Internet gambling in a strictly-regulated environment.

Notwithstanding the then prohibitionist legal and regulatory approach, the study cites evidence that millions of U.S. residents gamble online through offshore gambling sites. Indeed, the report concludes that the net effect of the current approach is to push Internet gambling underground and offshore, out of the reach of U.S. courts and regulators and exposing American consumers to significant risks.

As Dr. Sparrow demonstrated, a prohibitionist regime offers no meaningful consumer protections and exposes consumers to a number of potential risks:

- gambling by minors;
- problem gambling;
- fraud by operators;
- fraud by players;
- organized crime;
- money laundering by players;
- money laundering by operators;
- violation of jurisdictional prohibitions;
- breaches of data confidentiality; and
- lack of site security.

A fundamental conclusion of the study is that the legalization and regulation of online gambling would offer significant improvements to consumer welfare and protections related to each and every risk factor. That is, if we are concerned about the potential problems with online gambling such as underage play and problem gambling, we should seek strict and intelligent regulation, coupled with technology – not by trying to completely ban the activity. For each of the risks Dr. Sparrow identified, the research identifies a set of regulatory methods and technologies that would provide appropriate risk management in a regulated online gambling environment.

The Experience in Nevada, New Jersey and Delaware – a New Survey:

In the six years since the study was prepared, the problems associated with illegal online gambling have matured, as have the solutions and real life experience at the state level in Nevada, Delaware and New Jersey.

Previously, we had no option but to look to international approaches and speculate about how those would work in the US. But now, we have almost 2 years of online gambling regulation and operations under our belts in Nevada, New Jersey and Delaware. We recently tested Professor Sparrow's conclusions about the effectiveness of the regulatory approach to online gambling by

surveying regulators in these three states. The verdict is in – with the exception of a handful of incidents which were quickly addressed, all stakeholders are safer and minors are being locked out of online gambling sites. It is much easier for them to get fake IDs and wander into a brick and mortar casino than get past the levels of age-gating used by online casinos. If you can't prove that you are an adult, the site is closed to you. Period.

The regulatory environments we surveyed effectively coordinate and cross-check various technologies and databases and have requirements for strict and independent regulation and audit that restrict participation in online gambling to adults only. To date, there have been only a handful of instances of underage gambling on regulated U.S. sites (3 in Nevada, none in Delaware and "a handful of isolated instances" in NJ). This experience is corroborated by a much longer track record from Europe indicating that technology, coupled with strict regulation, all but eliminates the threat of underage gambling.

Instances of underage gambling were in all instances but one, related to parental failure to secure their accounts. In the other case, it was the failure of a legally-aged older brother to secure his account. In each case, regulators worked with the licensed operators to resolve these issues.

Nevada, Delaware and New Jersey each mandate a series of rigorous player identification processes prior to establishing a new account to play, and verifying identity at time of play (log-in). These regulatory requirements and processes do, in fact, offer better safeguards against underage gambling than exist in the brick and mortar industry, given the fact that the identities of adults can be validated through real-time automated crosschecks of existing databases and other measures that are not utilized in brick and mortar gambling establishments.

The research also identified how in the regulated jurisdictions, age verification is part of a larger, multi-step "Know Your Customer" process that builds a secure profile of the prospective online gambling customer. Age verification, identity verification, and cross checking against databases of unwanted persons (for example, the Specially Designated Nationals list maintained by the Treasury Department) are components in an integrated process that provides, for operators and regulators alike, a comfort level that each prospective customer is who s/he say s/he is, is of legal age, is located in a jurisdiction where the activity is legal, is not an unwanted customer and is not otherwise barred from participation in regulated online gambling.

Furthermore, in regulated online gambling, regulators control the thresholds for accepting, rejecting, or requiring further information concerning age verification, and can impose additional requirements that can further mitigate/eliminate the risk of play by minors. Regulations establish requirements based on the levels of assurance that are necessary to allow a customer to gamble, thereby fine-tuning the balance between failing to detect an underage individual and rejecting a player who is of the legal age. In other words, regulatory requirements can "turn up the dial" with respect to unknown or suspicious entrants to a site, which has the effect of minimizing the potential harm if a customer falls into a grey area. If

anything, regulated online gambling sites will reject prospective customers if anything appears other than perfect, rather than allow an under-age user to register.

These results demonstrate the wisdom of Congress' response to Internet gambling and the standards set forth in the Unlawful Internet Gambling Enforcement Act ("UIGEA") of 2006. In UIGEA, Congress itself expressly defined the parameters of what was lawful and what was not with Internet gambling as applied to financial processing transactions.

In fact, Congress expressed its will in setting forth the strict technological standards for intrastate gambling by requiring (i) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and (ii) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law or regulations. These standards, followed by New Jersey, Delaware and Nevada, have proven to work in practice and suggest that the prohibition as proposed in H.R. 707 is the wrong approach and policy as prohibition will simply lead to more unregulated sites for Americans to visit, without the protections regulation and technology can provide.

I will formalize and submit the full findings of our new survey to members of the Subcommittee. I would also encourage you as part of your deliberations to contact the regulators themselves, the operators of regulated Internet gambling websites in the United States, and the various technology companies that have partnered with the regulators and operators to deliver tools that enforce age limits on Internet gambling and that meet the many other statutory and regulatory requirements that have been established.

Conclusion:

In conclusion, let me say that over the years I remain convinced that the best approach to dealing with the risks associated with online gambling is developing and maintaining a strong regulatory regime that protects American families and consumers.

After more than two decades analyzing the risks posed by unregulated Internet gambling, I have reached the firm conclusion that the best way to protect families and consumers in connection with online gambling is regulating it, not prohibiting it. Laws attempting to prohibit Internet gambling haven't worked, will not work, and cannot work in today's digital commerce environment.

It's simple, if counter-intuitive. It is also be ironic. We are a cybersafety help group yet are appearing today to ask Congress not to criminalize Internet gambling. But we are in it for our consumers, families, seniors and kids. And that means we need to be realistic and adopt strong regulations and licensing schemes, education, effective best practices and the safeguards that digital technology can bring to the table. It means that we support problem gambling prevention programs and work with the problem gambling services community to design ways to limit, restrict access, and manage problem gambling in the digital space. It means we develop security measures to protect all of our personal information and data, and prevent scams and

fraud. And it means adoption of age-verification and age-gating technologies and protocols to ensure that only adults can access regulated gaming sites. Congress can play an important role in making sure states implement these measures, should the states adopt online gambling within their borders.

Today a vast majority of the United States finds itself in the unfortunate position of incurring all the social costs of online gambling while having no control over the gaming sites that serve U.S. residents. Several methods had been deployed unsuccessfully to attempt to close the US borders to online gambling. But while we have tried to make online gambling unavailable to US residents, we have failed abysmally.

- It is estimated that each year Americans spend approximately \$2.6 billion on Internet gambling on offshore gambling sites and apps, despite attempted prohibition.
- Minors and college age youth have access to unregulated Internet gambling sites today that provide no protections against underage gambling.
- More than six percent of high school age males reported monthly use of Internet gambling sites, according to the 2010 National Annenberg Survey of Youth.
- Monthly use of Internet gambling sites was at 16.0 percent for college age male youth.

According to Annenberg, "The dramatic increase in use of online gambling by college age male youth indicates that payment restrictions on such sites are no longer a barrier to young people..... Projected on a national basis, more than 400,000 male youth in the college age range (18 to 22) gamble for money at least once a week on the Internet, and over 1.7 million do so at least once a month."

Today, authorities from perspectives as diverse as child protection advocates, law enforcement officials (including the Fraternal Order of Police and the National Association of Police Chiefs), and problem gambling experts, maintain that continuing to drive Internet gambling underground is dangerous to consumers, and that regulation is a better approach if we're sincerely interested in reducing the risks associated with illegal Internet gambling.

Advocates for regulation rather than prohibition are informed by positive experiences in several states in the U.S., many provinces in Canada, and countries in Europe that have chosen the regulatory approach, coupled with requirements on the use of state-of-art technologies to reduce risks.

I fear that if H.R. 707 is successful, we will be back where we started— fighting the shadows of rogue and unregulated international gambling sites that don't answer to US laws or US regulators and leaving consumers and families exposed. America's states, which have traditionally regulated gambling within their borders, should retain the authority established in

existing federal law to take best demonstrated international practices on Internet gambling and adapt them to their own needs and constituencies.

Thank you again for the opportunity to testify and I look forward to your questions. I can be reached directly at parry@aftab.com.

Mr. CHAFFETZ. I thank the gentle woman.

I will now recognize the Chairman of the full Committee, the gentleman from Virginia, Mr. Goodlatte, for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I am going to go right down the line. I appreciate all your testimony, and I have a few brief, straightforward questions.

The first one is, what is your position on H.R. 707, the bill introduced by the gentleman from Utah? Are you in favor of it? Are you against it? And either way, is there a key issue or a few issues that would make a difference to you?

So, we will start with you, Professor Kindt.

Mr. KINDT. I would tend to be in favor of this bill, and I think it should be actually stronger and more extensive. We need to keep the Internet gambling genie in the bottle. The U.S. National Gambling Impact Study Commission said keep this—

Mr. GOODLATTE. I am going to keep you short just because I have a bunch of questions I want to ask.

Mr. KINDT. Yes, sir.

Mr. GOODLATTE. Mr. Bernal?

Mr. BERNAL. We support the bill.

Mr. GOODLATTE. Mr. Fagan?

Mr. FAGAN. I again support the bill. I prefer to see it worded a little differently, but as a compromise it certainly is much better than not having a bill.

Mr. GOODLATTE. Mr. Moylan?

Mr. MOYLAN. I would oppose the bill for both Federalism concerns and also some practical ones, which we can get into.

Mr. GOODLATTE. You mentioned some. Is it repairable, or is it—

Mr. MOYLAN. I think it is repairable from a Federalism perspective in the sense that there is a consistent application of Federal power as it relates to Federalism that relates to intrastate conduct, legitimately, genuinely intrastate conduct. When I mention practical concern, my own view—I didn't focus on gambling in my testimony. It is not my expertise. But my own view is that gambling, while a problem, is not something that is likely to bump other priorities from a law enforcement perspective.

Mr. GOODLATTE. Got it.

Ms. Aftab?

Ms. AFTAB. I oppose the RAWA. I think that it just puts kids back into the crosshairs of the risks that we are facing in gambling.

Mr. GOODLATTE. All right. Let me now ask you what your take is on the argument that states should be allowed to permit Internet gambling within their own borders, and what about non-Internet gambling, for example in a brick-and-mortar casino? Mr. Kindt?

Mr. KINDT. I think all gambling—

Mr. GOODLATTE. Should states be allowed to permit gambling within their own borders on the Internet?

Mr. KINDT. Mr. Chairman, I think all gambling is economically problematic. You are not creating anything. There are opportunity costs. There is no product being created, artificial risk.

With regard to can it be kept within borders, I don't think technologically that is possible.

Mr. GOODLATTE. Mr. Bernal?

Mr. BERNAL. We strongly think states should not be sponsoring Internet gambling at the state level, and anyone who has any doubt—

Mr. GOODLATTE. Do you think the Federal Government should stop them, or do you think that is the responsibility of each state?

Mr. BERNAL. The Federal Government should step in and stop state governments from cheating and exploiting their citizens, yes.

Mr. GOODLATTE. Mr. Fagan?

Mr. FAGAN. Likewise. As a matter of policy, states should not have commercial gambling, whether Internet or otherwise. As a matter of Federal policy, the use of the Internet to gamble necessarily implicates Federal interests, so states shouldn't be allowed to do that. But as a matter of constitutional law, a state can choose to have gambling within its borders and set up its own intrastate Internet of sorts.

Mr. GOODLATTE. Including on the Internet?

Mr. FAGAN. Well, if it is on the Internet, it would be unwise because—

Mr. GOODLATTE. Within their state borders, they can do it on the Internet just like they do in brick and mortars.

Mr. FAGAN. They have the right to do that if they can keep it within their borders.

Mr. GOODLATTE. Okay. Mr. Moylan?

Mr. MOYLAN. I think that states are well within their power to regulate gambling into or out of existence such as they see fit. I have my own preferences in that regard, but it is pretty clear to me that they have the authority to do so, and we have seen a wide range in states' approaches to that issue that bears that out.

Mr. GOODLATTE. Do you think the Federal Government should step in and protect a state that does not want Internet gambling from bleeding into its state, if you will, from states that do have it on the Internet?

Mr. MOYLAN. Sure. I think that there is a genuine role to be played for Congress to address intrastate transmissions, as we discussed. The original Wire Act was in that vein. It was attempting to help states enforce their own laws. Their powers essentially end at their borders, and so they lacked the ability to enforce these intrastate transmissions, and that is why they turned to the Federal Government for help.

Mr. GOODLATTE. Ms. Aftab?

Ms. AFTAB. I think that the Federal role in being able to set up standards and enforce those standards so that geolocation is actually working so it is not moving across the borders is very important.

Mr. GOODLATTE. Okay. Let me ask one more question, because I have a few seconds left. Do you see a difference between gambling via online poker and sports betting versus playing the lottery? Mr. Kindt?

Mr. KINDT. Yes. Sports gambling and Internet gambling are the crack cocaine of creating new addicted gamblers and opening up vast new areas of—

Mr. GOODLATTE. You are more troubled by that than by online Internet lottery?

Mr. KINDT. I am troubled by lotteries, but I am more troubled by the sports gambling.

Mr. GOODLATTE. Mr. Bernal?

Mr. BERNAL. When governments are in the business of sponsoring gambling, we oppose that practice. Of the ones you mentioned, online poker, is really a sliver of the whole business. Those who lobby for this, just let us play poker, poker is a tiny amount of their business model. It makes people feel good. People have an association with cards, but that is a very minor piece of this.

Mr. GOODLATTE. Got it.

Mr. Fagan?

Mr. FAGAN. All the different types of gambling you suggest, if permitted online by states, are all subject to being basically slottified. They will be converted to essentially slot machine-type addictive behaviors, generating increased speed of play, people staying online as long as possible to play, even though they shouldn't do that.

Again, individual states within their borders have the right—

Mr. GOODLATTE. I am out of time, and I want to give Mr. Moylan and Ms. Aftab, if the Chairman will permit, a chance to answer.

Mr. MOYLAN. If I understand your question—

Mr. GOODLATTE. Do you see a difference between gambling via online poker and sports betting versus playing the lottery?

Mr. MOYLAN. I don't have particularly greater concern as it relates to the online conduct that you described as opposed to in-person. I think that wraps it up for you.

Mr. GOODLATTE. Ms. Aftab?

Ms. AFTAB. And I see the difference between sports betting but not poker and lottery. Sports betting has always been handled under the Wire Act. It is addressed. But I think that lotteries and poker and online slot machines are all in the same class.

Mr. GOODLATTE. Do you think that when we had a telephone as the only way of communicating, which is what we had when the Wire Act was written, do you think that it was contemplated—we knew that people would call up and say I want to put a bet on certain sports contests. But do you think somebody would call up on the phone back in 1964 and say put \$50 on red and spin the roulette wheel and tell me whether or not I won?

Ms. AFTAB. I think it is like poker.

Mr. GOODLATTE. Probably not, right?

Ms. AFTAB. I will tell you what all my cards are and I will win if you believe me.

Mr. GOODLATTE. So there is a problem there in the fact that some are trying to draw a distinction between the two, when there really isn't that big a distinction.

Ms. AFTAB. Well, I think that lotteries—I have been in states that allow it and—

Mr. GOODLATTE. No, I am saying lotteries on one side, but you have sports betting and you have casino gambling on the other side.

Ms. AFTAB. Yes, and I don't think there is a difference between casino games only because Congress has already acted under the Wire Act in connection with the wire and the kinds of things we are seeing with racketeering. We are talking about licensed gam-

bling providers here under certain regulation, and I think it is different.

Mr. GOODLATTE. Control within the state borders.

Ms. AFTAB. As long as it is within the state borders, and you can keep it within the state borders.

Mr. GOODLATTE. Right. Thank you very much.

Thank you, Mr. Chairman.

Ms. AFTAB. And keep kids off.

Mr. CHAFFETZ. I thank the gentleman.

I now recognize the Ranking Member of the Subcommittee, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Again, this is a very important discussion.

Let me go first to Mr. Moylan and ask on the question dealing with both Federalism and states' rights, the Chairman's question or theme in his remarks, Mr. Goodlatte, about bleeding into other states. I know that you are framing your discussion around the question of states' rights. Some have a system of online that they have regulated.

How would you answer the question of bleeding into other states?

Mr. MOYLAN. It is a good question, and I think that the answer to it is—and first of all, this is a question that we face in any number of areas, not just as it relates to gambling. But states have remedies at their disposal, and there is Federal law at the disposal of prosecutors today to address that conduct. If a state chose to ban gambling within its borders, it could do so on both an institutional level and an individual level. And on the Federal level, the interstate transmission of those bets are, by and large, already illegal under UIGEA and the Wire Act.

So I think that the tools are there to be able to prosecute that. Whether states choose to do that is, of course, a separate question. I am sure they are less eager about doing so with individuals than they are institutional purveyors of it. But the tools are there, in my estimation.

Ms. JACKSON LEE. And why don't you expand a little bit on general police powers that individual states have and how that would impact your discussion?

Mr. MOYLAN. Well, from a sort of broad perspective, discussing Federalism and the Constitution, police powers are reserved to the states. There have been many court cases that have tested this, and it is the reason that we have to assert what is the nexus under which the Federal Government involves itself in an issue.

So in this case, the very clear nexus is to the extent that there are interstate transmissions or issues in-between two states or international issues. But when we are talking about intrastate conduct, and to the extent that it is genuinely intrastate, those are by and large reserved to the states, and in the absence of reserving those powers to the states, I think that we worry, the R Street Institute does very much, about what that implies for the role of the Federal Government and the size of the Federal Government moving forward.

Ms. JACKSON LEE. One of the things is we have all found ourselves on the side of states' rights at one time or another.

Let me ask a question of Ms. Aftab, and as I do that I will ask the Chairman to submit into the record a letter from the National Fraternal Order of Police. I ask unanimous consent to place this into the record.

Mr. CHAFFETZ. Without objection, so ordered.

Ms. JACKSON LEE. Thank you.

[The information referred to follows:]



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JAMES D. PASCO, JR.
EXECUTIVE DIRECTOR

14 May 2014

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman and Representative Conyers,

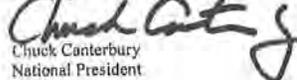
I am writing on behalf of the members of the Fraternal Order of Police to urge Congress to heed the law enforcement community with respect to recent proposals to prohibit online gaming, especially in States that have already taken measures to regulate this activity.

We cannot ban our way out of this problem as this would simply drive online gaming further and further underground and put more and more people at risk. Internet gaming forced into the shadows would exacerbate current difficulties and create new dangers. Not only does the black market for Internet gaming include no consumer protections, it also operates entirely offshore with unlicensed operators, drastically increasing the threat of identity theft, fraud or other criminal acts. There is also evidence that these gaming sites launder money for organized crime and help to finance terrorist networks. We know that these overseas gaming sites process billions of dollars every year, creating a breeding ground for transnational criminal organizations.

States like Delaware, New Jersey, and Nevada have taken the lead in creating regulated systems. Residents that choose to play have access to a well-regulated, well-monitored system and will not be drawn into putting their money or identities at risk on off-shore, unlicensed black market sites. Congress should be careful not to undermine these efforts. The FOP wants to protect our citizens and the best way to do this is to drive black market online gaming into the light and scrutiny of a regulated system that is safe, fun and fair.

I want to thank you both for taking the time to consider the FOP's views on this issue. I look forward to hearing from you about how the FOP and the law enforcement community can work with you and the Committee on this issue. If I can be of any additional assistance on this or any other issue, please do not hesitate to contact me or Executive Director Jim Pasco in my Washington office.

Sincerely,


Chuck Canterbury
National President

—BUILDING ON A PROUD TRADITION—

10-1021-0

Ms. JACKSON LEE. Ms. Aftab, I have made my point clear, my concern for children and the ultimate impact. Why don't you respond to two points, one the question of children who are making decisions that may not be the best for them and without good judgment. They are children, and it is no reflection on how good their parents are. We know technology finds its way into bedrooms, little bedrooms, and on all of the new devices that are coming out all the time. Number one.

Number two, how do we respond to the question that an unregulated process draws a lot of horror stories, particularly in the money laundering, offshore gambling that no one has control of, and that may draw innocent persons who desire to gamble and then find themselves in a worse position, being involved in unregulated processes?

Ms. AFTAB. Thank you very much, Ranking Member. I was a member of the Internet Safety Technology Task Force. It was from the Harvard Berkman Center, and we were charged by the Attorneys General to look at age verification and kids online, and it was basically to see how we could tell how old somebody was for the privacy laws that were put in place and inappropriate content.

What we recognized was you can never identify a kid, but you can identify an adult. So these technologies require that you have bank accounts. They require that you show government-issued identification. They look at these. They go through databases. A lot of them are using IDology, which is being used by a lot of the big companies out there and has been providing information to the FTC and advice to the FTC over the years.

So what you have to do is prove that you are an adult and prove that you are who you are, and prove that you live where you are, and all of the databases out there that are collecting information about us have to agree. If anything doesn't agree, you are kicked out. If they find that you are using technology on your computer that allows you to get to it remote, you are kicked out. If they find that there is any question about what is going on, you are kicked out.

Ms. JACKSON LEE. Are you suggesting, if I might, that other states would have the ability to use the technology, or are using the technology?

Ms. AFTAB. They are already using it, and it is actually very good.

Ms. JACKSON LEE. And let me conclude by just simply saying you are suggesting that the offshore operators are not following—

Ms. AFTAB. They are not doing anything. They don't want to keep kids out. Kids have a lot of money.

Ms. JACKSON LEE. Thank you so very much.

Thank you, Mr. Chairman. I yield back.

Mr. CHAFFETZ. I thank you.

We have some critical votes on the floor. We are dealing with the budget, and these are multi-trillion-dollar votes. So the Chair finds that we are going to go into recess. If Members wish to ask further questions, it is the intention to open this back up and come back into session here for this hearing within about 10 minutes of the last vote. So it is probably no sooner than at least 6:30, but it is Congress, so anything bad can happen.

So, with that, the Committee will stand in recess.

[Recess.]

Mr. CHAFFETZ. The Committee will now come to order. With votes closed on the floor and two Members present, we will continue, and I am going to recognize myself for 5 minutes.

I would like to kind of go down the line and ask a few questions and keep this confined. I have a few concerns.

The Attorney General nominee, Loretta Lynch, stated, when asked a question in her confirmation hearing, she said, "I am not aware of any statute or regulation that gives OLC opinions the force of law," OLC being Office of Legal Counsel within the Department of Justice.

Do you agree that the OLC opinion of December 23rd, 2011, does not carry the force of law?

We can start with Professor Kindt and go on down the line. I would appreciate it.

Mr. KINDT. I would concur with that, that it doesn't carry the force of law. It is simply an interpretation. It could be read differently by another attorney general.

Mr. CHAFFETZ. Thank you.

Mr. BERNAL. Absolutely, I agree that it doesn't have the force of law, and I think the best example is they released it the day before Christmas Eve. That tells you all you need to know.

Mr. CHAFFETZ. Mr. Fagan?

Mr. FAGAN. It does not have the force of law—

Mr. CHAFFETZ. Microphone, if you could, please, sir?

Mr. FAGAN. Clearly, it does not have the force of law. It is simply a lawyer's opinion and justifies a decision of non-prosecution on DOJ's part.

Mr. CHAFFETZ. Mr. Moylan?

Mr. MOYLAN. We are going to go four for four. It does not carry the force of law and it is merely their own interpretation of it.

Mr. CHAFFETZ. Do you believe, Mr. Moylan, that the states and others are taking risks by believing that it does carry the force of law?

Mr. MOYLAN. I think states are certainly taking a risk if they are acting in contravention to stated policy of the Justice Department. That in and of itself doesn't tell you what the law is or what courts would say about it, but it certainly puts them at risk of their own institutions, of their own individuals facing prosecution under Federal law.

Mr. CHAFFETZ. Ms. Aftab?

Ms. AFTAB. It doesn't carry force of law, but the Federal courts have ruled in the same way that sporting events and contests should be read together. So, although it doesn't, some Federal courts have taken the position that it does.

Mr. CHAFFETZ. The FBI has issued a couple of letters of deep concern about the ability to police this. We have this from attorneys general, we have it from the FBI, we have it from a number of different law enforcement organizations.

Mr. Moylan, how do you answer their concerns about the regulation and the policing of these types of online schemes?

Mr. MOYLAN. Sure. I think it is perfectly fair to have concerns about whether or not the laws that are on the books are sufficient

to be able to enforce what states' prerogatives are. I think what my contention is is that the laws that are necessary to do that are generally on the books; that we have, by and large, bans certainly as it relates to UIGEA interstate payment processing. The Wire Act itself obviously deals with a class that this bill would attempt to change of intrastate transactions, and states have their own prerogative inside their borders to establish a law as they see fit. So the question is really in these cross-border issues.

Mr. CHAFFETZ. We are getting to the heart of what one of my deep concerns is. I believe that this bill is a states' rights issue, that the State of Utah does not want gambling within its borders. That is our long-held position. We don't have lotteries. We don't have Indian gaming. We don't have any sort of gaming whatsoever, and it is naïve at best to think that you can suddenly just create these fictitious borders because of technology and prohibit them coming into the State of Utah.

I mean, you give me a good 16-year-old and in about 5 minutes he can figure out how to spoof this or put some virtual private network out there. You can sign up for this for a few bucks, and I don't care if you are 13 years old and live in Provo, Utah. It is fiction for anybody to believe that they can just virtually create these borders. We have videos of people going and doing this for gaming, for lotteries. It is a serious, serious problem.

Does anybody really believe on this panel, does anybody really believe that technology can prohibit a 16-year-old from getting on a VPN or creating some sort of technological way and really prohibit gaming within the State of Utah? Does anybody believe that?

Ms. AFTAB. I do.

Mr. CHAFFETZ. Why?

Ms. AFTAB. I do. The providers in the three states that we are looking at prohibit any VPN. If there is a sign that one is being used on your computer—

Mr. CHAFFETZ. Really? And who is the VPN police?

Ms. AFTAB. The VPN police are the providers who are doing the geolocation.

Mr. CHAFFETZ. Really?

Ms. AFTAB. Now, I can't talk for the lotteries, and I looked for the others, and there is always an exception to things, but this technology is getting a lot better. So that 16-year-old won't be able to spoof them, and they won't be able to do the rest as long as everyone is doing the best that they are doing now, which I have seen.

There may be an exception. There is always an exception. I told you we used to send people in to buy beer for us. But I think that what we will have is better than what exists now, which is nothing that will stop them from gambling off the Caribbean sites and the rest in Utah and in every place else.

Mr. CHAFFETZ. There are payment plans and other things, but I think it is foolish at best to assume that this technology is suddenly going to create this virtual border.

My time has expired. I will now recognize the gentleman from Texas, Mr. Poe, for 5 minutes.

Mr. POE. I want to thank the Chairman for allowing everybody to come back.

I appreciate all of y'all, including the spectators, for being back here after 7 o'clock tonight. It just shows that this is important to a lot of people for a lot of reasons.

I will try not to take very long. First, without objection, I am going to introduce the testimony of Michelle Minton, a Consumer Policy Fellow at the Competitive Enterprise Institute, for the record.

[The information referred to follows:]

Testimony of Michelle Minton
Consumer Policy Fellow
Competitive Enterprise Institute
Before the House Judiciary Subcommittee on
Crime, Terrorism, and Homeland Security
Hearing on H.R. 707, “The Restoration of America’s Wire Act”

March 25, 2015

Chairman Sensenbrenner, ranking member Jackson Lee, and members of the Subcommittee, thank you for the opportunity to present testimony on behalf of my organization, the Competitive Enterprise Institute (CEI), at this hearing considering online intrastate gambling and the effects of the proposed national prohibition on Internet wagering.

We believe the proposal has significant implications for consumer safety, Internet freedom, and federalism. I am grateful for the opportunity to express these views and address the concerns Members have expressed about allowing States to move toward legalization and regulation of this form of online commerce.

The issue of the morality of gambling has largely been settled in America. All but two states have some form of legalized betting—including lotteries, casinos, horse racing, poker rooms, or bingo parlors. Since the dawn of the Republic, the determination of what kinds of gambling are legal and how they should be regulated has largely been left up to the States. However, beginning in the 1990s, with the increasing use of the Internet, some in Congress began to assert that the Federal government has the right and responsibility to ban gambling in this new medium in order to protect vulnerable individuals such as minors, those with addictions, and states that do not want online gambling available to their residents.

Since 2007 the Competitive Enterprise Institute has made the case that no government should have the right to take away individual citizens’ right to decide what they do in the privacy of their own home and with their own money. Additionally, we note that attempts to involve the Federal government in regulation of online gambling represents a grave threat to the continued freedom of Internet commerce as well as States’ ability to decide their own laws and regulations.

We understand Members’ concerns regarding vulnerable consumers, crime, and the ability for States to keep online gambling within their borders. But we must emphatically point out that the campaign in support of a Federal online gambling prohibition has relied on fear mongering and misinformation. The technology and long history of online gambling regulation around the world show that such fears are exaggerated and the concerns that have been raised can be easily

addressed. I am grateful for the opportunity to address these misconceptions and the understandable concerns about state-based online gambling.

The Department of Justice Unilaterally Reinterprets the 1961 Wire Act

The stated purpose of H.R. 707 is to “restore” the 1961 Wire Act to what the bill’s cosponsors claim was its original intent. As I thoroughly explain in my University of Nevada, Las Vegas study, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, the 1961 Wire Act was understood by Congress and the Department of Justice as a narrowly focused law with the purpose of targeting the Mafia’s telephone-run sports gambling racket. (See addendum) As Attorney General Robert F. Kennedy phrased it when testifying on the bill in Congress, the Wire Act was created “to assist the various States in enforcement of their laws pertaining to gambling and bookmaking. It would prohibit the use of wire communications facilities for the transmission of *certain gambling information* in interstate and foreign commerce.”¹ [Emphasis added]

That the Department of Justice at the time—the chief architect of the Wire Act—intended to narrowly apply the law only to sports betting is reflected during Senate hearings on the bill. When Senator Estes Kefauver (D-Tenn.) asked Assistant Attorney General Herbert J. Miller if the Act applied to telephone gambling activities not related to sporting events or contests, Miller responded: “This bill, of course, would not cover that because it is limited to sporting events or contests.”²

It wasn’t until the 1990s, as the Internet grew and subsequently Internet gambling became more popular in America, that prosecutors began using the Wire Act against online gambling offenses. In 2000 the Clinton administration took the position that the Wire Act prohibited *certain sports* ... related gambling activities online, such as dog and horse racing.³ However, in 2002 the Department of Justice under President George W. Bush shifted its position to holding that the law not only prohibited online sports betting, but also banned “casino-style gambling” online.⁴

Then in 2009 officials from the New York State Division of the Lottery and the Office of the Governor of the State of Illinois asked the DOJ if their States’ use of the use of the internet to sell lottery tickets would violate the Wire Act. Two years later the Office of Legal Counsel (OLC) responded with a memo, stating that the Wire Act was not applicable to the activities of the lotteries because it only applies to online sports gambling. This memo clarified federal law and paved the way for States to legalize intrastate non-sports wagering online.

¹ Robert F. Kennedy, Statement before the Subcommittee of the House Committee on the Judiciary, in Support of Legislation to Curb Organized Crime and Racketeering, May 17, 1961, www.justice.gov/ag/rfkspeeches/1961/05-17-1961.pdf.

² The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 Before the Senate Committee on the Judiciary, 87th Cong. 12 (1961).

³ Statement of Administration Policy: H.R. 3125 – Internet Gambling Prohibition Act of 2000, July 17, 2000.

⁴ Letter from The United States Department of Justice, Criminal Division to Mr. Dennis K. Neilander, Chairman, Nevada Gaming Control Board August 23, 2002.

Regardless of the original intent of the Wire Act's authors, it is the prerogative of Congress to amend existing laws as they see fit.

Moreover, a national online gambling ban will do nothing to address concerns regarding potential harms related to online gambling. In fact, by preventing States from regulating the activity and implementing consumer protections, a federal ban would put Americans at greater risk than in a system where states are allowed to decide if and how they will regulate online gambling.

Bans Do Not Work

A national Internet gambling ban will strip away consumer protections instituted by States and push Americans back into the thriving online gambling black market. Americans will continue to spend billions of dollars gambling online—money that could yield revenue that otherwise might have gone to states that choose to legalize the activity. At least 85 other countries, including those adjacent to U.S. borders, have some form of legalized online gambling and most have managed to regulate the activity in a way that protects their citizens from crime and holds licensed website operators accountable. There is no reason that states cannot regulate online gambling.

Some, such as the Coalition to Stop Internet Gambling—a nonprofit funded by Sands Casino owner, Sheldon Adelson, contend that the DOJ Office of Legal Counsel's 2011 memo opened the “flood gates” for online gambling in America. But the OLC decision simply allowed states to pass legislation to implement licensing and regulatory oversight for online gambling. Additionally, the decision allowed states to require certain consumer protections for online gambling websites operating within their borders. Currently, three states—Delaware, Nevada, and New Jersey—have legalized online gambling within their borders.

Online gambling in America took off concurrently with the increase in Internet usage in the 1990s and became a multi-billion-dollar business long before 2011. By 1997 consumers had spent an estimated \$1 billion worldwide on Internet gambling, with around 60 percent coming from the U.S.⁵ Between 2003 and 2010, Americans spent \$30 billion gambling on foreign-owned and -operated gambling sites.⁶

Technology Offers Solutions

Some in Congress have expressed concerns that limiting online gambling activities to adults and residents of states that have legalized the activity relies on the available technology. For example, in order for a New Jersey website to block a player from Utah, it must be able to determine where each player is located. This fear, while understandable, is groundless. The global market for legal online gambling has fueled a vibrant market for technological solutions that have been used effectively by nations licensing and regulating online gambling. Site

⁵ Scott Olson, “Betting No End to Internet Gambling,” *Journal of Technology Law and Policy*, Vol. 4, No. 1, Spring 1999, <http://jtlp.org/vol4/issue1/olson.html>.

⁶ American Gaming Association, *Online Gambling Five Years After UIGEA*, 2011, http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/final_online_gambling_white_paper_5-18-11.pdf.

operators can determine the location of a visitor in numerous ways, such as using IP data, Wi-Fi triangulation, GPS data, and carrier data. Determining the identity and age of a customer requires similarly sophisticated techniques. In New Jersey, for example, sites may ask for a player's Social Security number, as well as a copy of a utility bill, state-issued ID, or proof that the person is who she says she is. Websites licensed by one of the States where online gambling is legal will block players until their age, location, and identity are verified because the laws of these states require them to do so. Failure to comply with the state's laws may result in hefty fines or the loss of a company's license to operate.

The technology available to verify player identity may even be *more effective* than traditional off-line methods, which usually amount to a visual scan of an I.D. Certainly, the strategies used by online gambling sites to verify identity are far more robust than those used by other sites, which require little more than credit card information for customers to open an account and spend unlimited amounts of money.

However, as with any form of restricted goods or services, there always will be a small number of people motivated enough to bypass the restrictions put in place. Kids will find a way to get a hold of alcohol or sneak into casinos. It is possible that someone sophisticated and motivated enough might bypass the restrictions put in place for online gambling websites, though there is no evidence this has happened even once in states where online gambling is legal. However, it is much difficult for someone to access legal and regulated gambling websites than to access black market websites. Furthermore, breaches are easier to spot on websites regulated by the States than on websites operated from overseas.

Bans Do Not Protect Consumers

Some have expressed concerns that allowing states to legalize online gambling will result in an increase in problem gambling, minors gambling, and online crime. It seems intuitive that as gambling becomes more available the rate of problem gambling will increase, but research has shown this is not the case. While greater opportunity for gambling does correlate with a temporary increase in disordered behavior, it is just that—temporary. Worldwide rates of problem gambling have been declining since the late 1990s.⁷ The prevalence of pathological gambling has remained relatively stable or declined during the last 35 years despite unprecedented increases in the availability of gambling activities, according to Harvard addiction expert Howard J. Shaffer.⁸

Online casinos may even be better than brick-and-mortar casinos at identifying disordered gambling patterns. While there always will be a small portion of the population who show signs

⁷ Robert J. Williams, "The Population Prevalence of Problem Gambling: Methodological influences, standardized rates, jurisdictional differences, and worldwide trends," Report Prepared for the Ontario Problem Gambling Research Centre and the Ontario Ministry of Health and Long Term Care, May 8, 2012, <https://www.uleth.ca/dspace/bitstream/handle/10133/3068/2012-PREVALENCE-OPGRC%20%282%29.pdf?sequence=3>.

⁸ Howard J. Shaffer and Ryan Martin, *Disordered Gambling: Etiology, Trajectory And Clinical Considerations*, 2011 http://thescholarship.ecu.edu/bitstream/handle/10342/2974/Shaffer%2520%26%2520Martin%2520%2528in%2520press%2529_Annual%2520Review%2520of%2520Clin.%2520Psy.%5B1%5D.pdf?sequence=1.

of pathological behavior, it is not a reason to ban an activity for everyone. In fact, it is a good argument for implementing licensing and regulatory schemes that require websites to implement strategies to identify and respond to potential problem gambling—something the three states currently offering online gambling already require.

Crime thrives in the black market: Fears that legalizing online gambling will put American consumers at greater risk of becoming victims of crime or facilitate money laundering and funding of terrorist activities are overblown. While it is possible that criminals might try to cheat unwitting players and terrorists might try to use online gambling websites to move money around, it is highly unlikely this kind of criminal activity will occur on websites operated and licensed within the U.S. with governmental oversight. Americans gambling online are far more likely to encounter criminals on black market websites. As National Fraternal Order of Police President Chuck Canterbury notes

A national ban on all online gaming would just drive online gaming further and further underground and put more and more people at risk ... We want to keep our citizens and our officers safe. And the best way to do this is to drive black market online gaming into the light and scrutiny of a regulated system that is safe, fun and fair.⁹

Federalism and Internet Freedom

In order to maintain our “laboratories of democracy” state governments must retain sovereignty over matters of intrastate commerce—regardless of how one feels about gambling in general or online gambling specifically. For most of American history, the legalization and regulation of gambling has been left to states to decide.

Some, such as Texas Governor Rick Perry argue that the Internet is a stateless territory, “transcending state boundaries” and that States cannot control this form of online commerce.¹⁰ This raises the worrying precedent the Restoration of America’s Wire Act would set. If we concede that *no* online commerce is intrastate, that means Congress has the right to intervene in *any* form of online commerce—opening the door for federal lawmakers to interfere with or ban all sorts of online transactions. Today it is Internet gambling; tomorrow a lawmaker may take issue with online sales of ammunition, tobacco, or certain foods and beverages seen as “harmful.”

Furthermore, in addition to the three states that legalized casino-style gambling online, 11 states have some form of legal online lottery offerings, including online lottery ticket sales, subscriptions, and online real-time games like pull-tabs (see addendum). Should RAWA pass, States would lose millions in tax revenue.

Personal Freedom

⁹ Chuck Canterbury, “Online gambling ban benefits criminals,” *The Hill*, March 28, 2014, <http://thehill.com/blogs/congress-blog/judicial/201949-online-gambling-ban-benefits-criminals>.

¹⁰ Rick Perry, *Online Gambling’s Other Cost*, National Review, May 12, 2014 www.nationalreview.com/article/378430/online-gamblings-other-cost-rick-perry

So long as an activity does not harm the rights of another person, no government entity should be able to prohibit an adult from voluntarily participating in it. While we understand that some Members of Congress may have a moral objection to gambling, it is neither Congress's responsibility nor its right to legislate morality. Certainly, when the residents of several states decide that legal online gambling should be legal within their borders and their state representatives enact legislation to allow this, Federal officials should not overturn those democratically enacted laws.

Conclusion

It is human nature to fear the unknown and thus understandable that lawmakers would have concerns about this new and growing industry. I hope my testimony has shown that a national ban like the one proposed by H.R. 707 would not protect consumers from the potential harms associated with online gambling and would, in fact, make these harms harder to address by pushing it into a black market. Furthermore, it puts at risk one of America's fundamental principles, the ability for state and local lawmakers to determine what regulations work for their state and reflect the will of their constituents.

Mr. POE. I have some questions for all of y'all. That is plural for "y'all" if you are from Texas. [Laughter.]

Let me just try to explain what I am thinking. I think it is a concern of many Members as well.

The Ranking Member said it best. We are all for states' rights sometimes, and I try to be for states' rights all the time. Federalism is an issue that is important to me. In Texas we have horse racing, we have dog racing, we have state-sponsored lottery which doesn't raise money for the education system even though it is supposed to. The reservations have casinos, and if people want to, they drive as fast as they can on the weekends to Louisiana where they have a lot of casinos.

By adding Internet gaming in the state, the word "Internet," and I think the debate is over the issue since it is the Internet, then the government, the Federal Government, has the authority to regulate it.

So do you agree or disagree, Mr. Moylan?

I have several questions. I will ask all of you the same question, but I will ask them to him first, and then if we are out of time, then I will just submit them to you in writing and you can answer them in writing so we are not here all night.

Do you think that if something is on the Internet, therefore the Federal Government, under the guise of the Commerce Clause, can regulate that activity?

Mr. MOYLAN. Yes. I think that it is a very problematic construction to say that any activity, any conduct on the Internet whatsoever is, per se, interstate. It effectively eviscerates the Commerce Clause as any kind of real limitation moving forward. We see now what the Internet looks like today. Think of what it might look like 20 years from now in the way that it might expand and help people connect in other ways.

So to think that the mere use of the Internet, in and of itself, justifies Federal intervention, whether or not the conduct has any other transmission across state lines of a non-incidental nature, I think is hugely problematic.

Mr. POE. But isn't that what we are saying with this legislation, that because it is on the Internet and the activity may cross state lines, therefore the Federal Government has the authority to regulate it?

Mr. MOYLAN. Right, that is essentially what underlies it. I mention in my written testimony that there are three words in RAWA itself that make that very clear. When it is adding basically Internet transmissions into the definition of the Wire Act, what it does is it says incidentally or otherwise, and that also makes clear that, for example, what led to that OLC memo in 2011, the states that were attempting to allow online sales for their lotteries that have this intermediate routing of a payment processor that happens to be in another state, but you have a purchaser and a seller that are in the same state, that that would constitute interstate for the purposes of Federal regulations.

So I think that that is a huge problem; and, yes, that is something that underpins at the heart of this bill.

Mr. POE. The types of gaming activity that I mentioned other than Internet gaming, that is a state issue?

Mr. MOYLAN. By and large, gambling activity is a state issue, sure.

Mr. POE. Horse racing and dog racing, casinos, and the state lottery—I think that covers all of them—aren't those just state issues?

Mr. MOYLAN. And there are exemptions that exist in RAWA for several of those things, which I think puts the lie to the fact that all gambling is, in and of itself, pernicious, the fact that we have legislation on the Federal level and at the state level that exempts these kinds of activities that you mentioned.

Mr. POE. I don't think the issue is whether or not the government should regulate gaming because it is bad. I think we tried that with prohibition, or demon rum, as my grandmother used to call it, and we see where that got us. That is what she called it. So that is a concern to me. It is a concern that the regulations themselves may cause more crime offshore than what we have now.

So it is your answer that this is something that if the State of Texas wants to have intrastate Internet gaming, that they should be allowed to and the Federal Government shouldn't prohibit it because other states don't like it in their states?

Mr. MOYLAN. Yes, I think that is precisely my position, that states have within their power today to determine their own fate as it relates to gambling, and they should continue to have that power. It is a power that is justly reserved to them under our system as we have it today, and this bill is problematic in that regard because it would take from them that ability because of this, as you mentioned, this sort of treatment of any kind of conduct on the Internet as inherently interstate.

Mr. POE [presiding]. I will have the same questions for all of you, but I will put them in writing so you can submit it in writing.

I will recognize the Ranking Member, Ms. Jackson Lee, who I just quoted.

Ms. JACKSON LEE. Mr. Richmond, I am willing to yield to you for a moment—we were almost closing—so that you can raise your questions, if I might, and then follow him, Mr. Chairman? He has not asked any questions.

Mr. POE. I recognize the gentleman from Louisiana, Mr. Richmond—

Ms. JACKSON LEE. Thank you.

Mr. POE [continuing]. If he wishes to ask questions.

Mr. RICHMOND. Thank you, Mr. Chairman, and I will make it short.

I have been a bunch of places on this issue, but as of late I have a quick concern, and it has probably been answered. But my question now would be how does this affect my Louisiana lottery, Mega Ball and all of those, which we as a legislature, when I was in the legislature, decided to dedicate those funds to education, to teacher pay? And for a state that is now facing a \$1.6 billion budget deficit, to lose any other revenue that is helping pay for a free tuition program for college or for a teacher's education becomes a major concern. So can someone tell me how it affects the Louisiana lottery?

Mr. KINDT. Let me address that, if I may, Representative. Going back to Illinois, which was one of the first states to legalize the lottery, allegedly to help education, we were one of the first states to

get riverboat gambling, then land-based casinos. We are now putting video lottery terminals everywhere throughout the state, at convenience stops, at very low tax rates. They are not being taxed the way other states are being taxed. And the reason is because, as I indicated in my testimony, gambling lobbyists are virtually dictating economic policy in the State of Illinois, and this has had a terrible effect. I put this in Law Review articles 20 years ago, when we were discussing this at the Illinois legislature and looking at what this was going to cause.

I would also indicate that I happen to chair the Faculty and Staff Benefits Committee at the University of Illinois. We are seeing widespread reduction on tax on our pensions, on education, on social services, and a very large component of that is the gambling issue, not just the lotteries but beyond the lotteries, of the money that is being misdirected to gambling interests.

Ms. AFTAB. I think the simple answer is, as written, your lottery goes offline.

Mr. RICHMOND. Does anybody disagree with the fact that the lottery will go offline?

Mr. BERNAL. I don't disagree with that, but I guess the policy question is not so much what happens to your lottery but to the constituents of Louisiana. Is there less inequality and unfairness in Louisiana if the lottery isn't taking their money through online venues? Because what the Louisiana lottery is, or any other lottery that you have in this country, is it is taking money from the less well-off and giving it to the haves. So the evidence is overwhelming that it is an incredible wealth transfer. It is creating inequality in our country, and it is creating it in your state.

Mr. RICHMOND. So your position would be because it is online as opposed to brick and mortar?

Mr. BERNAL. It is building on—the Louisiana lottery, part of the reason you have a deficit, a \$1.6 billion deficit, is things like the lottery was supposed to fill your budget gaps. But the truth is it has been a failed public policy.

Mr. RICHMOND. No. Actually, my Republican governor did a billion dollars in tax breaks with no pay-for.

Mr. BERNAL. I understand. [Laughter.]

Understood. But the point is that the lotteries, not just in your state, sir, but all across this country, have not produced the revenues that they were promised. What they have done is they have made everyday people poorer. They have created an incredible amount of inequality, and they go to the heart of the financial inequality in our country today. Gambling is the public voice of government in Louisiana and every other state.

Mr. RICHMOND. Well, let me close with this question. I didn't want to take up all the time, and it was so nice of Ms. Jackson Lee to yield. But as you go into casinos, brick-and-mortar casinos, you will see people who obviously are in there that can't afford, at least in your opinion, can't afford to lose whatever they are gambling and certainly shouldn't be sitting at the high-stakes slot.

So what becomes the difference? That they can get up and go?

Mr. BERNAL. From our perspective, lotteries and casinos, that is all part of an extension of government. Yes, absolutely. The people playing the slot machines, losing their paychecks, absolutely, that

is contributing to the inequality and unfairness in your state as well.

Mr. KINDT. If I might add, we have done studies throughout the years, over the last 20 years, that show that the social and economic costs to the state are at least three dollars or more for every one dollar in tax revenues coming into the lottery and other gambling taxation.

So it is a slow descent, and as I said, in Illinois we are facing \$111 billion in unfunded liabilities plus the same type of budget deficit that you are talking about in Louisiana, and a large part of that is because of this gambling.

Mr. RICHMOND. Thank you.

And thank you, Mr. Chairman. I yield back.

Mr. POE. The Chair will recognize the gentle lady from Texas for brief questions.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

And again, I want to thank the Chairman of this Committee for working with me on the importance of this hearing, and the Chairman of the full Committee, and the Ranking Member of the full Committee as well.

Let me thank the witnesses and offer one or two points that I think should be the obvious, that we have three very strong witnesses for this legislation, it appears. I think woven into your support of it is, of course, your assessment of the, if you will, ills of gambling and the addiction that occurs in some individuals and the drastic societal results of its use. I believe that this Committee, which deals with the law, should also be concerned about those societal ills.

I hope that as we proceed in reviewing this legislation, marking it up, we might find common ground on addressing how our approach should actually be. I think the question that you have made, Mr. Moylan, for those of us who take special pains to look at the Constitution and assess the infrastructure between the Federal Government and state government are troubled and want to determine how this concern of the societal ills matches with the very age-old debate on Federal and state relationships and Federal jurisdiction and states' rights. I think the point that you have made is that the state can contain itself, can provide those firewalls against other states that may not be so inclined. But how do you stop the states that are inclined from being able to do so?

I will just use an example, Mr. Chairman. When we were dealing with the question of the bricks and mortar issue with online purchases versus the issue of bricks and mortar stores, that was somewhat of a state issue as well, online versus bricks and mortar, how do you balance the guys who build buildings and sell goods versus those online. So I think that is a great concern to me.

And then finally, Ms. Aftab, if I might just get you again to state for the record—and then I have some letters to put into the record—state for the record again the process that you have discerned that protects children and counters or blocks the offshore criminal activity that is going on unregulated and that draws many of our citizens to ruin, if you will, because it is unregulated, it is untested, it is not secure. So if you would talk about the children, and I will conclude on that.

Ms. AFTAB. There are multiple steps that are brought in to make sure that you are dealing with an adult, not that it is a child but that it is an adult. So they go through age verification, they look at government I.D.s, they look at public records, they look at private records, and they make sure all along that everything matches and that you are who you say you are, and when you say you are living at some place, you really are at that place.

There is nothing at all that is happening with most of the rogue operators outside of the United States. They are not paying on bets. They don't care who you are. Kids have a lot of babysitting money and birthday money and Christmas money, and they are using it to gamble, and they are not getting their money back. I have gotten phone calls and people who have reached out to us over the years, and there is nothing I can do.

If we can have licensed providers, they will help police it because they paid a lot of money for the ability to do so within the state. They will help identify the outliers and law enforcement will be able to do something about it. Not all. It is the Internet, after all. But if you give them things that are safe, private, and keep the kids off in fair games, and they don't have malicious code, people would prefer to be there than in the rogue sites offline.

Ms. JACKSON LEE. Again, I thank the witnesses.

Mr. Chairman, I am going to yield back.

Thank you so very much for that explanation on the record.

I would like to submit into the record and ask unanimous consent for a letter from the National Governors' Association dated May 9, 2014; a report from the State of New Jersey dated January 2, 2015, "New Jersey Internet Gaming One Year Anniversary: Achievements to Date and Goals for the Future." This letter concerns the position of the National Governors' Association, the previous letter. I ask unanimous consent again. This letter was dated January 2, 2015. And then a letter from the Democratic Governors dated March 17, 2015, on the same issue, the Restoration of America's Wire Act 2015.

Mr. POE. Without objection, they all will be made a part of the record.

[The information referred to follows:]



Mary Fallin
Governor of Oklahoma
Chair

John Hickenlooper
Governor of Colorado
Vice Chair

Dan Crippen
Executive Director

May 9, 2014

The Honorable Harry Reid
Majority Leader
U.S. Senate
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
Washington, D.C. 20510

The Honorable John Boehner
Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

Dear Majority Leader Reid, Senator McConnell, Speaker Boehner, and Representative Pelosi:

The nation's governors are concerned with legislation introduced in Congress that would ban online Internet gaming and Internet lottery sales because it challenges the federal-state relationship.

The regulation of gaming is an issue that has historically been addressed by the states. Regardless of whether governors are in favor of offering gaming—through whatever form—within their own states, decisions at the federal level that affect state regulatory authority should not be made unilaterally without state input. A strong, cooperative relationship between the states and federal government is vital to best serve the interests of all citizens.

Sincerely,

Governor Robert Bentley
Chair, Economic Development and Commerce
Committee

Governor Earl Ray Tomblin
Vice Chair, Economic Development and
Commerce Committee



State of New Jersey

Chris Christie
Governor

Kim Guadagno
Lt. Governor

Office of the Attorney General
Department of Law and Public Safety
Division of Gaming Enforcement
1300 Atlantic Avenue
Atlantic City, NJ 08401

John J. Hoffman
Acting Attorney General

David Rebeck
Director

January 2, 2015

RE: New Jersey Internet Gaming One Year Anniversary – Achievements to Date and Goals for the Future

New Jersey has reached the one year anniversary of successfully regulating online gaming. On February 26, 2013, Governor Chris Christie signed legislation permitting Internet gambling in New Jersey. The New Jersey Division of Gaming Enforcement was tasked with implementing regulations and performing licensing and technical investigations for this newly approved industry. While Nevada and Delaware decided to offer only more limited forms of Internet gaming, New Jersey's plan for both poker and casino games platforms would be the most comprehensive regulated Internet gaming program in the country. The Division accomplished this unprecedented task in nine months as authorized platforms went live on November 25, 2013.

Even one year into the process with the experience which has been gained, Internet gaming is still in its early stages of development and the industry and the regulators continue to learn from each other. From a regulatory standpoint, our system is working. There have been no major infractions or meltdowns or any systematic regulatory failures that would make anyone doubt the integrity of operations. The issues that have

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arisen have been dealt with appropriately just like in the brick-and-mortar casinos. However, we are far from out of the woods; we must continue to be vigilant and ready to take on new challenges as they come our way.

History and Statistics

After the Internet gaming legislation was signed into law on February 26, 2013, the Division's regulations became effective on October 21, 2013. Amendments were then adopted with an effective date of October 28, 2013. Internet gaming soft play launched November 21, 2013 with full Internet gaming operations commencing on November 25, 2013.

New Jersey's Internet gaming operations commenced with seven active Internet gaming permit holders (Resorts as of yet has no platform). By the launch of soft play, the Division's slot lab tested and approved 253 games for play on a total of 16 authorized URLs.

For most of the year, each Internet gaming permit holder was associated with one active Internet gaming platform provider. Originally, each permit holder was only permitted one platform provider to facilitate the completion of all the required licensing and technical reviews by the November launch date. However, once the launch was completed and operations were running smoothly, the Division decided to permit multiple platforms for each permit holder with a limitation of five "skins" or brands per permit.

Internet gaming operations in New Jersey have continued to evolve throughout the year. There are now approximately 423 authorized games. Since Internet gaming operations began in late November 2014, Internet gaming permit holders Caesars, Borgata, Tropicana, and Golden Nugget have offered online gaming on a continuous basis. While Taj Mahal platform provider Ultimate Gaming ceased operations in New Jersey on September 21, Belfair transferred its operations from Trump Plaza to permit holder Golden Nugget on November 20. Pala Interactive was approved for full-time Internet gaming operations as a Borgata platform provider on November 22. As with any

nascent industry, changes and adjustments are a normal and expected part of doing business. The Division looks forward to continuing to work with the permit holders and operators as New Jersey's Internet gaming operations mature.

Accounts Created

Two days after soft play ended and full operations had commenced, as of November 27, 2013, 32,319 accounts had been created. A little over a month later, by December 29, 2013, that number rose to 126,231. The number of accounts has continued to increase each month with 506,172 accounts created as of November 30, 2014.

Revenue

According to a University of Las Vegas Center for Gaming Research study, New Jersey online gaming accounts for over 90% of the legal U.S. online gaming revenue. Although Nevada and Delaware started Internet gaming operations several months before New Jersey, New Jersey's authorized Internet sites, from January 2014 through October 2014, generated \$25 million or 75% of the total Internet poker revenue in the U.S. They also generated \$78 million or 98% of all Internet non-poker casino revenue. From the inception of New Jersey's Internet gaming operations on November 21, 2013 through November 30, 2014, Internet gaming win was \$120.5 million.

Lessons Learned

One surprise from a regulatory perspective was how operationally unprepared the platforms were to implement Internet gaming in a regulated U.S. environment. They thought they would be able to flip a switch and start up their current system here. They quickly found out that was not going to happen. There was definitely a learning curve for the operators to adjust to our regulatory framework but that has improved dramatically. Companies adapted to our new model which we believe has helped improve the industry and raised its standards.

The Division had to ensure that sufficient guidelines were applied for the "Know your customer" (KYC) process. This process ensures that patron identities are known and that the players are old enough to gamble in New Jersey. To date, this system has been working very well with no evidence that underage individuals have been able to establish accounts.

The Division also regularly monitors issues handled by customer service at the platform providers. Furthermore, as May 1, 2014, the Division required that all employees of platform providers performing customer service and fraud detection related functions and with access to confidential player information be located in New Jersey.

Geolocation

Ensuring that all play on authorized websites occurs only within the borders of New Jersey is a critical component of New Jersey's online gaming operations. Geolocation technology enables operators to determine where someone is playing within the state and to block those trying to gain access from outside New Jersey's borders. The Division has worked with the geolocation vendors and casinos to enhance the technology to make it more accurate and reliable and to reduce false negatives. Additionally, the geolocation vendors have provided more detailed information to the casinos whenever a patron fails geolocation; this information is used by the casinos to help customers resolve geolocation problems. We are always in discussion with the industry for improvement, and there have been great strides in enhancing geolocation protocols. Currently, geolocation has approximately a 98% success rate.

Payment Processing

The Division has been in discussions with the New Jersey Department of Banking and Insurance and the U.S. Office of the Comptroller of the Currency (OCC) to address the difficulties related to payment processing. Most recent statistics indicate that about 73% of Visa and 44% of Mastercard transactions are approved. A new credit card code has been created for legal online gambling transactions and it is expected to be in effect spring of 2015. It should also be noted that the rate of chargebacks for Internet gaming

is actually less than it is for retail transactions. In addition to increased credit card transaction acceptance rates, payment processing companies such as Neteller are approved to do business with New Jersey Internet casinos and provide convenient and secure methods to fund Internet gaming accounts. As the banking industry becomes more familiar with legalized Internet gaming and patrons become more educated about the various options for funding their accounts, further improvements are expected in this area.

Monitoring

The Division's technical monitoring of Internet gaming systems is unparalleled. The Division has developed monitoring tools that allow us to evaluate activity across all the platforms and quickly determine anomalies that need to be investigated. This type of comprehensive monitoring across platforms is unique to New Jersey. Recent cases have identified possible issues before anyone else was aware and the Division has taken swift action to determine the cause of the issue and the manner in which it will be addressed.

Financial Auditing

The Division has a financial team that is currently auditing to 100%. At this early stage of online gaming, the Division needs to ensure that we have a firm grasp on all variances and their causes. At this point in the learning curve, the Division's reviews are extraordinarily thorough to make sure all financial reporting is as accurate as possible.

Fraud Alerts

The Division has mechanisms in place to detect and fight payment fraud. For example, Internet gaming patron Diana Zolla was arrested on April 30, 2014, by New Jersey State Police and charged with theft by deception for attempting to claim her identity was stolen and that she was not responsible for almost \$10,000 worth of credit card charges and banking fees on her Internet gaming account. An investigation by the State Police

Casino Gaming Bureau, Financial Crimes Unit, revealed she had actually made the charges herself.

Marketing Affiliates / Illegal Sites

Recognizing that affiliate marketing companies are important to the growth of Internet gaming, the Division in June issued additional licensing guidance regarding their operations. Affiliates are licensed according to the way in which the affiliate is compensated. Those with flat fee arrangements and directing Internet traffic to specific websites only require a vendor registration. Those with revenue sharing agreements where compensation is tied to player activity require an ancillary casino service industry enterprise license.

The Division also took action in April by sending cease-and-desist letters to affiliates that were promoting illegal Internet gaming websites along with New Jersey's authorized sites. Efforts in this area are ongoing as online patrons should not be fooled by the promotion of illegal sites in connection with our legal sites and illegal sites should not profit from association with our regulated online gaming industry. Staff will continue to address with the marketing affiliates, recommendations related to improving services to consumers in this new regulated market.

Poker vs Casino Games

At the launch of Internet gaming in New Jersey, there was a perception that online poker would predominate over slots and other online games. This prediction has not been correct. From inception through November 30, 2014, poker accounts for only 25% of New Jersey's Internet revenue while the remaining 75% consists of other authorized casino games. Not all of New Jersey's platforms offer poker, but the percentage breakdown for revenue on platforms that offer both poker and casino games is approximately 40% poker and 60% other authorized games. This presents an opportunity for creators of online games to introduce their products to New Jersey gaming operators.

Responsible Gaming

The Division is very sensitive to the issues of responsible gaming. We understand that while gambling is fun and a form of entertainment for most people, it can result in serious addiction for some individuals. The Division is confident that proper technical solutions are in place to allow patrons to engage in Internet gaming responsibly. In addition to those technical requirements, the regulations mandate Internet gaming permit holders to pay \$250,000 annually to be utilized by compulsive gambling programs in the state. Other changes in responsible gaming regulations this year include legislation (Bill A244) which was passed July 30, 2014. This legislation removed from the self-exclusion sign up process any admission of problem gambling activity.

All Internet gaming platform providers are required by regulation to implement various responsible gaming features. Similar to brick-and-mortar casinos, patrons are able to exclude themselves from Internet gaming. Technology is used to verify exclusion status during registration and prior to each log in. Required notifications as to 1-800-GAMBLER are presented during registration, log in and log out, as well as from the player protection page. Mandated features remind patrons of how much time they have played during one session which prevents losing track of time and serves as a "reality" check. Patrons are limited to one account per website gaming brand and have the ability to establish several types of responsible gaming limits or suspend play at any time. Patrons are prohibited from relaxing limits until after the existing limit expires.

Systems must contain logic to identify and report potential problem gamblers to the licensee. Casino permit holders are required to maintain a record of all actions taken regarding patrons identified by the system. A mandatory player protection feature is required once a patron's cumulative deposits exceed \$2,500. Once triggered, the patron is required to acknowledge that he or she has the ability to set the responsible gaming limits discussed above and that 1-800-GAMBLER is available for help. Once met, this notification is enforced annually thereafter. The system provides an on-demand activity statement for a minimum of 180 days of patron gaming activity, and Internet gaming platforms must maintain all records of patron activity for at least ten years.

In addition to all the required responsible gaming features outlined above, New Jersey statute N.J.S.A 5:12-95.18 requires a study to be published on an annual basis to review the impact of Internet gaming in New Jersey. The Division has entered into a memorandum of agreement with Rutgers University and the Department of Human Services to produce four annual reports. The first of these reports is expected in early 2015.

Further, it is anticipated that by the end of January 2015, New Jersey citizens will be able to register for online gaming self-exclusion from the Division of Gaming Enforcement web page at www.njdge.org. Individuals interested in self-exclusion can simply visit the Division's web page to complete the process, instead of physically appearing at a Division office or having to create an online gaming account for self-exclusion. A verification quiz will be generated for citizens to confirm their identity. Initially, this option will be for online only self-exclusions. As of December 1, 2014, 775 online only self-exclusions had been registered either in person or through online gaming accounts.

New Jersey's policies have proven to be in the forefront of responsible gaming regulation. Keith Whyte, head of the National Council for Compulsive Gambling, conducted a survey which showed that New Jersey by far had the most comprehensive responsible gaming policies of all the states with authorized Internet gaming. We always strive, however, to improve, and after consulting with the Council and Mr. Whyte, the Division implemented temporary regulations effective on September 22, 2014, that make our responsible gaming requirements even more comprehensive. These new regulations address areas such as additional information regarding how to reach out for problem gambling assistance and practical tips for staying within safe limits. They also require operators to implement problem gaming training for all of their employees. All Internet gaming platform providers have to implement the requirements in order to be approved to operate in New Jersey. The Division aggressively enforces these regulations, and the sanctions for any violations are handled on a case-by-case basis.

Additional Regulatory Changes

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The Division has also implemented regulations that permit expanded uses of Internet gaming accounts. Patrons can now fund social gaming and merchandise purchases from their online accounts. The Division has also clarified rules regarding celebrity endorsements.

Looking Forward

An important area for the future of Internet gaming is Interstate/International compacts. This type of cooperation between jurisdictions is very important for building liquidity in peer-to-peer games such as poker. The legislation that authorized Internet gaming specifically permits the Division to enter into multi-jurisdictional agreements. The Division has been in discussions with other jurisdictions, such as Nevada and the United Kingdom, but no compacts have been entered to date. The Division is open to discussions in this area and always seeks to ensure that any agreements are most beneficial to New Jersey's Internet gaming industry.

In 2015, the Internet gaming industry will be permitted to build data centers outside of casino facilities as long as they are within Atlantic City. As the industry matures, having the most up-to-date and advanced data storage technologies and facilities will be of utmost importance. Other areas for action in 2015 are the implementation of an approved Division seal for use on New Jersey's authorized websites and continued discussions with the United States Department of Treasury, Financial Crimes Enforcement Network to identify and implement best practices to prevent fraud and money laundering activities. Down the road, there might be advances in biometric technology that can even further enhance the security of patron accounts. Other possibilities for Division regulation include online lotteries as technology expands.

David Rebuck
Director
Division of Gaming Enforcement

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March 17, 2015

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Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable John Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

The Honorable Harry Reid
Minority Leader
U.S. Senate
Washington, DC 20510

The Honorable Nancy Pelosi
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Dear Senators McConnell and Reid, Speaker Boehner and Leader Pelosi,

On behalf of the Democratic Governors Association, we are writing to express our opposition to the "Restoration of America's Wire Act 2015," as introduced by Representative Jason Chaffetz (R-UT).

We believe strongly that the issue of Internet gaming, as has historically been the case with other forms of gaming, is best left to the states to decide and regulate. This approach is consistent with the congressional intent related to online gaming as stated in the "Unlawful Internet Gambling Enforcement Act of 2006," decades after the Wire Act was enacted.

State legislators, working in tandem with governors and executive branch agencies, are best positioned to decide if and how online gaming works in their communities. Furthermore, a well-regulated online gaming industry could provide a significant revenue source for state governments while allowing our law enforcement agencies to better deter and prosecute dangerous criminal activity - including fraud, money laundering and terrorist financing.

As you consider the issue of Internet gaming, we hope you give strong consideration to the importance of preserving these state rights and the opportunity that embracing a state-by-state regulatory approach could provide.

Sincerely,

[Signature of Steve Bullock]

Governor Steve Bullock
Chair, DGA
State of Montana

[Signature of Maggie Hassan]

Governor Maggie Wood Hassan
Vice Chair, DGA
State of New Hampshire

Fold for by the Democratic Governors Association.
Not authorized by any candidate or candidate's committee.

Mr. POE. Yield back?

Ms. JACKSON LEE. Yield back.

Mr. POE. Just a couple of other questions. I think I have made it clear as to my biggest concern, the Federalism issue, the states having the duty, obligation, and right to determine gaming as a general rule.

Turning to another question, it is very brief, the criminal element issue. I am a former judge. I don't like crooks, outlaws, whatever you want to call them, of any type.

Will this legislation, Ms. Aftab, will this legislation encourage or discourage or have no effect on the criminal element, in your opinion?

Ms. AFTAB. My opinion, if you outlaw the legal means of doing this, then the only means out there are the criminal sites and the criminal operations. So they will go underground, they will go offshore. The more you put in to try to regulate what they are doing here without giving them an avenue, the more likely it is that you are going to be dealing with more racketeering and criminal elements. We have seen it, we are going to see more of it, and these days criminals don't just fall into the type they used to have in Texas when you used to wear your six shooters. Now we are seeing a lot that are terrorist activities and raising money, and I think that it is a great deal of money that can be made and that is being gambled by people in the United States, and we have an obligation to our consumers and to our children to ensure that we are managing what is happening with them and we don't leave them to, willy nilly, people who don't care about them at all.

Mr. POE. Are you aware of the fact that the National Order of Police is opposed to this legislation?

Ms. AFTAB. I am not, and I would love to see what it is. I am not surprised that they are opposed to the legislation in some areas. It is a very complicated argument. If anyone ever said the Internet safety charity that has been protecting people for 20 years is now coming out and saying please legalize online gambling, my mother would put me out in the woodshed somewhere. But it is bringing together a lot of strange bedfellows, and we need to recognize in the end national security, our kids, money, all of the things that we need to do can only be done if we take control. Giving up control to the rest of the world is not what Americans do.

Mr. POE. I want to thank all the witnesses again for being here for such a long period of time, and also for your testimony and expertise, and the spectators as well for showing your interest.

This Subcommittee is adjourned.

[Whereupon, at 7:23 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prof. John Warren Kindt, University of Illinois
Answers to Questions for the Record
Legislative Hearing on H.R. 707: The "Restoration of America's Wire Act"
Before the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
U.S. House of Representatives Committee on the Judiciary
March 25, 2015

Questions for all Panelists:

1. Have you, or any member of your family or household, been in the employ of any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling? If so, please provide details.

Prof. John Kindt Answer:

No. I have not "been in the employ of any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling." To the best of my knowledge, no member of my family or household has "been in the employ of any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling."

Please note that all of the several volumes of the **United States International Gambling® Report** series, which I cited during the hearing, have the following proviso on the back of each volume's title page: "Any author or editorial financial returns generated by this collection were pre-assigned to go directly to 501(c)(3) **charity**." (Emphasis added.)

2. Has the organization on whose behalf you testified before the Subcommittee received any funds or other support directly, or indirectly, from any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling? If so, please provide details.

Prof. John Kindt Answer:

I did not testify on behalf of any organization.

My testimony was predicated on more than a quarter century of my academic research on gambling issues. My research and law review publications on gambling issues, of course, predated the 1995-1999 U.S. National Gambling Impact Study Commission, and my publications in economics journals and law review publications have continued subsequent to the U.S. Gambling Commission.

Questions for the Record: Congressman Doug Collins (GA-09):

1. Georgia's lottery is unique in that it funds the HOPE scholarship, a program that has helped millions of Georgians. My priority in reviewing this legislation is to ensure that Georgia's lottery continues to be able to undertake the same activities they were able to prior to the 2011 DOJ decision. Based on your reading of the bill, would H.R. 707 allow Georgia's lottery to continue functioning as it did prior to the 2011 DOJ decision? Would it create restrictions on certain activities that were permissible under the Wire Act even before the DOJ decision?

Prof. John Kindt Answer:

Based on my reading of the bill, H.R. 707 should allow Georgia's lottery to continue functioning as it did prior to the 2011 DOJ decision.

Having many relatives in Georgia and having received two of my graduate degrees from the University of Georgia, I have been able to follow Georgia's lottery issues since before the Georgia Lottery's inception.

The net effect of H.R. 707 should be to protect lottery revenues. Despite any naïve manifestations by lottery officials to the contrary, state lotteries cannot hope to compete with the explosion of Internet gambling sites which will proliferate unless H.R. 707 is enacted. Absent enactment of the current restrictions in H.R. 707, real time gambling on cell phones and computers will decimate state lotteries and their revenues.

It should be noted that as confirmed by the *Atlanta Journal Constitution* beginning in 1996, the Georgia Lottery has continued to create some of the nation's highest rates of gambling addiction—including among young people. See Charles Walston, Staff Writer, *Teens Laying Their Futures on the Line*, ATLANTA J.-CONST., Feb. 25, 1996, at C4 [hereinafter *Teen Gambling*].

2. Should H.R. 707 be enacted, will Georgia's state-licensed computer-generated retail lottery sales be affected? What effect would the enactment of the bill have on Georgia's lottery system and other similar systems?

Prof. John Kindt Answer:

While it is difficult to predict future regulatory interpretations, H.R. 707 should create a level playing field with regard to many lottery issues, such as state-licensed computer-generated retail lottery sales.

Enactment of the bill should place Georgia's lottery system and other similar systems on an equal footing. Despite embracing new technologies, the Georgia Lottery will soon be at a competitive disadvantage as other venues and private interests necessarily outpace the Georgia Lottery with newer online technologies. Absent the enactment of H.R. 707, the Georgia Lottery and similar state lotteries will be forever relegated to a huge competitive disadvantage with private real-time gambling technologies (which are functionally unusable by state lotteries).

As I understand H.R. 707, this bill would re-confirm the Wire Act's previous nationwide standards and promote stability of expectations for all lotteries. *See*, 18 U.S.C. § 1084.

3. Millions of dollars each year are generated for the HOPE Scholarship and Pre-K programs through the existing internet sales distribution channel and current lottery game offerings by the Georgia lottery. Given the educational scholarships that rely on funding from the state lottery, do you believe it would be appropriate to create a mechanism in the legislation to ensure the scholarship program in Georgia and other similar programs wouldn't lose funding streams for those programs? Please explain.

Prof. John Kindt Answer:

H.R. 707 does not need any special legislative language regarding using funds for educational purposes or scholarships. Prior to the 2011 DOJ ruling, the uses for lottery funds for Georgia HOPE programs and other designated state programs were solely at the discretion of the state legislatures. H.R. 707 should re-establish the pre-2011 stability of expectations.

Without H.R. 707, pre-existing state lottery revenues are going to be cannibalized and decimated by an explosion of various Internet gambling sites offering a cornucopia of deceptive gambling games.

The entire country needs H.R. 707 to protect strategic economic and financial stability. Of course all of the individual states, including Georgia, are benefited by H.R. 707.

Questions for John Kindt:

1. During the hearing, my colleague, Rep. Ted Poe, asked a question regarding the right of states to offer Internet gambling. Inasmuch as you were unable to respond at that time, would you provide your assessment as to the impact the OLC opinion has on the 10th Amendment rights of states who do not wish to permit online casinos to operate within their borders?

Prof. John Kindt Answer:

First, I believe that an overwhelming majority of academic experts would conclude that the 2011 OLC/DOJ Opinion reinterpreting the Wire Act does not have the force of law. However, in contravention of the best interests and 10th Amendment rights of the individual 50 states, the OLC Opinion's ambiguities are currently being misused by Internet gambling interests to leverage huge financial gains via legally-questionable Internet gambling activities.

The legal obfuscations created by the OLC Opinion give states and private Internet gambling entities some credence to argue that they can force their online gambling operations into all 50 states, regardless of individual state laws prohibiting various or all forms of Internet gambling. Accordingly, the OLC Opinion catalyzes Internet gambling entities wishing to circumvent "the 10th Amendment rights of states who do not wish to permit online casinos to operate within their borders." (See question, *supra*.) States not wishing to allow online gambling operations will have their 10th Amendment rights violated by any state permitting various types of online gambling.

Despite hearing technological and regulatory promises that Internet gambling could be regulated and kept within geographic confines, the 1999 U.S. National Gambling Impact Study Commission (NGISC or U.S. Gambling Commission) concluded that Internet gambling could not be regulated—and that the existing total prohibition needed to be enhanced via new legislative enforcement mechanisms for financial institutions and criminal justice entities—including via the Wire Act (*see, e.g.*, NGISC Recommendation 5-1).

Monitoring technological developments regarding online gambling subsequent to the 1999 U.S. Gambling Commission, my colleagues and I are unaware of any regulatory technology which cannot be circumvented by disreputable organizations—and even teenage gamblers.

2. If the 10th Amendment puts out of the reach of the federal government Internet gambling which originates and ends within the same state, does that mean the 10th Amendment similarly puts out of the reach of the federal government actions by individuals who transmit or distribute child pornography over the Internet where such transmissions originate and end within the same state?

Prof. John Kindt Answer:

This analogy comparing child pornography to Internet gambling is both appropriate and definitive to the issues.

Most academics would probably conclude that the 10th Amendment does not apply in the scenario of Internet gambling, because by definition, Internet gambling crosses borders.

Congress should enact the provisions of H.R. 707 because it benefits the entire country. Internet gambling can definitely be considered interstate commerce as the financial assets inherent in Internet gambling definitely cross state lines—thus granting Congress regulatory authority. It is common knowledge that the U.S. Supreme Court has been liberal in granting Congress authority over activities impacting interstate commerce, and Internet gambling should be federally prohibited—as the only quasi-regulation.

The technological evidence reviewed by my colleagues and myself indicates that it is virtually impossible for a state to keep Internet gambling confined within its borders. Arguendo, if it were theoretically possible to keep Internet gambling geographically confined, the social and economic detriments associated with Internet gambling are so onerous and regionally widespread as to demand federal jurisdiction and oversight.

For a summary of Congressional determinations that “casino capitalism” and the gambling philosophy led to the 2007-08 Wall Street meltdown and the Great Recession, see *Financial WMDs*, a.k.a., *The Bet That Blew Up Wall Street*, **60 Minutes**, broadcast dates Aug. 27 & 30, 2009 (Steve Kroft reporting) (available at You Tube under “credit default swaps,” at the **60 Minutes** website, and at www.cbsnews.com/search/financial-wmds/).

3. If a licensed online gambling site rejects an individual because his age or location is not verified, what is to stop that individual from migrating to an illegal offshore online casino?

Prof. John Kindt Answer:

Despite the 2011 OLC Opinion, individuals trying to access illegal offshore online casinos will frequently find the access points blocked by the U.S. Department of Homeland Security (DHS). These sites often have DHS warnings also posted as part of the blocking mechanisms.

By virtue of these DHS policies and efforts blocking illegal offshore online casinos, no one trying to access these various sites can claim ignorance of their illegality or of the dangers of offshore online casinos.

In concert with criminal justice authorities, these DHS policies and efforts have been effective not only in protecting U.S. citizens from ubiquitous gambling scams, but also in suppressing money laundering and other criminal initiatives by organized crime and terrorist organizations.

Determined individuals, including teens, can obviously find mechanisms to bypass some safeguards utilized by DHS and other regulatory agencies. A fortiori, this problem argues for more effective blocking and enforcement mechanisms.

4. Is there any technology of which you are aware that can determine whether an individual betting over the Internet is inebriated?

Prof. John Kindt Answer:

I am unaware of any technology that can determine whether an individual betting over the Internet is inebriated.

In a well-known case, the one-time owner of the Philadelphia Eagles football franchise, Leonard Tose, gambled away his football team and his asset base while he was publicly inebriated. A fortiori, inebriated online gamblers could easily be isolated in their homes and absent any deterrents to losing their entire assets to online gambling companies.

5. If online gambling becomes legal on a widespread basis, what impact will that have on the number of minors addicted to gambling?

Prof. John Kindt Answer:

Pursuant to the criteria of the American Psychiatric Association, **Diagnostic and Statistical Manual of Mental Disorders** (4th to 5th eds., 1994 *et seq.*), and subsequent to the 1999 U.S. Gambling Commission, the studies have generally reported increases in the combined numbers of U.S. addicted gamblers and problem gamblers at 2% to 3% for the middle-aged and older populations—but 100% greater at 4% to 6% for minors and college students. For historical perspective, see *Teen Gambling, supra*.

Among young people, in particular, widespread legalized Internet gambling would create an explosion in the numbers of addicted gamblers and problem gamblers. Young gamblers would be fueled by three recognized factors.

First, young people have grown up in the Internet generation and are absorbed with all manner of online electronics, video games, apps, and cell phones. For two decades, gambling lobbyists have hailed and promoted Internet gambling as the “killer app” of the worldwide web. Legalized Internet gambling would place real time gambling on every cell phone and throughout social media sites (which are already exploring how to best exploit numerous new gambling technologies).

Secondly, young people have not been educated regarding the dangers of gambling addiction. With drug addiction there are needle marks; with alcohol addiction there is alcohol on the breath; but with gambling addiction there are only empty bank accounts—making gambling the “hidden addiction.” Compounding this problem is the factor that young people are risk takers and they think they are “bullet proof.”

Thirdly, unlike 20 years ago, young people are growing up amid the proliferation of casinos and electronic slot machines. Young people are attracted to sports but then are easily seduced into sports gambling. Accordingly, the last two years have seen an explosion in dubious “daily sports gambling” which arguably is allowed via a loophole in the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA). This alleged UIGEA loophole needs to be closed via clarifying legislation.

6. Below are screen shots of domestic websites which offer “free to play” online slot machines. Can you explain how these websites work, and whether there are any minimum age requirements imposed by the sites?

Prof. John Kindt Answer:

It is a simple step to lure a player from a “game” for free—into a “gamble” for money.

These **“Free to Play” U.S. Slots for Tots** sites are designed to maximize the seduction of young people via marketing to the sociological and psychological factors enumerated in the previous answer, namely: (1) the fascination/focus of young people with all things electronic, particularly electronic “games,” (2) naïve youth as risk takers, and (3) the allurements of sports (usually combined with sexual allurements).

The “Free to Play” marketing is designed to launch the player into first-time participation, and of course, there is “no such thing as a free lunch.” The so-called business model for these websites is that the “free” must necessarily lead to some loss of monetary value by the player—who is manipulated psychologically by the play to transform into a “gambler.” In legal terminology, a gambler must somehow lose “consideration” to the website’s owners.

In addition, this “Free to Play” marketing is also a common mechanism to subvert existing anti-gambling laws. Any signs restricting young people from playing are almost invariably window dressing and lack any bona fide enforcement mechanisms.

7. Below are screen shots of online slot machines offered by offshore gambling operators. At what age group(s) do you believe these games are targeted, and is there any federal law which would prevent an online casino licensed by a state or offered by an Indian tribe from migrating players of the “free to play” online slots to “pay to play” online slots such as the ones below?

Prof. John Kindt Answer:

As presented, these types of screen shots from offshore online gambling operators appear to be aimed primarily at young people—including minors. Migrating “free to play” gamers into “pay

to play” gamblers is the business model for online casinos offered by offshore gambling operators.

Most offshore online slot machines would likely be marketed toward the “cream markets” for online gambling, and these targeted cream markets include the following:

1. young people, who are seduced because of their naiveties;
2. senior citizens, who are also derogatorily referred to in the gambling industry as the “golden grays” because they have retirement assets and time;
3. sports gamblers, who are enticed to combine sports with focused gambling; and
4. addicted and problem gamblers, who according to loss statistics account for 35% to 55% of gambling industry revenues.

As evidenced by the alleged loophole for “daily sports gambling” in the Unlawful Internet Gambling Enforcement Act, any carve-outs or exceptions in gambling legislation and/or regulations will be exploited—because the enormous gambling monies to be siphoned out of the public outweigh any legal risk.

To the best of my knowledge, there is no absolute “federal law which would prevent an online casino licensed by a state or offered by an Indian tribe from migrating players of the ‘free to play’ online slots to ‘pay to play’ online slots.” See question, *supra*.

“Follow the Money”—the gambling industry’s model is to have everything “Pay to Play.”

8. As you may be aware, the State of New Jersey recently attempted to institute intrastate wagering on sporting events, but the State’s efforts were struck down by federal courts. What did the district court and court of appeals conclude in *National Collegiate Athletic Ass’n v. Christie*, 926 F. Supp. 2d 551 (2013), with respect to whether the 10th Amendment protects an unqualified right of the states to authorize and conduct intrastate gambling activities?

Prof. John Kindt Answer:

In *Christie* the U.S. Federal District Court determined that the 10th Amendment does not protect an unqualified right of any of the 50 states to authorize and conduct intrastate gambling activities.

Specifically referring to the 1992 Professional and Amateur Sports Protection Act (PASPA), the U.S. District Court held that: “PASPA does not violate the Tenth Amendment because it does not force New Jersey to take any legislative, executive or regulatory action. PASPA also does not raise the political accountability concerns outlined by the Supreme Court’s Tenth Amendment jurisprudence.” *Christie, supra*, at 555. PASPA, 28 U.S.C. § 3701 (effective Oct. 28, 1992).

On appeal to the U.S. Court of Appeals for the Third Circuit, the Court of Appeals affirmed the U.S. District Court and concluded that PASPA did not violate the 10th Amendment. *National Collegiate Athletic Ass'n v. Gov. of New Jersey*, 730 F.3d 200, 204 (3d Cir. 2013).

Therefore, as I have read and interpreted the provisions in H.R. 707, I believe that H.R. 707 conforms with judicial precedent and will pass any court challenge predicated on the 10th Amendment.

9. Below is an article describing online games being offered by the Georgia Lottery. How do these games differ from online slots, if at all? See *GTECH boosts Georgia Lottery's 'instant' online options*, Feb. 4, 2015.

Prof. John Kindt Answer:

It is problematic to differentiate the online games being offered in 2015 by the Georgia Lottery from online slots. The Georgia Lottery games also exemplify not only how the 2011 OLC Opinion is being exploited, but also how any exceptions or carve-outs in future legislation can also be exploited. Legislation directed toward gambling activities needs to be strictly drafted and interpreted.

The article's references to the Georgia Lottery's alleged goals to interface the lottery directly to an individual's financial e-accounts and credit cards, as well as the "Italian technology" connection, raise serious concerns which demand federal jurisdiction and action.

The fact that the Georgia Lottery has apparently ill-advisedly embroiled itself in so many problematic technological areas and judgmental errors also supports the need for federal oversight in areas not addressed by H.R. 707.

Per the findings of the U.S. National Gambling Impact Study Commission, the Georgia Lottery's 2015 online efforts apparently violate multiple ethical and managerial tenets of a well-run lottery.

While industry-oriented blog-type articles do not appear subject to traditional journalistic oversight for accuracy, the mere numbers of alleged bureaucratic errors and the consequent social costs to Georgia taxpayers dictates the reversal of these managerial lottery errors—otherwise, the resignation or removal of the responsible Georgia Lottery bureaucrats.



Questions for the Record

H.R. 707 Restoring America's Wire Act Hearing

Responses by Les Bernal,
National Director, Stop Predatory Gambling

May 28, 2015

I. Response to Questions from Representative Doug Collins (GA-09)

Question #1: If passed, H.R. 707 would allow the Georgia Lottery to continue functioning as it did prior to the 2011 DOJ opinion. This state government program can go on pushing \$30 instant scratch tickets to low-and-middle income citizens in your district and luring your constituents to lose their money on Keno games *every four minutes, 2100 times per week.*¹

Question #2: If H.R. 707 is enacted, it would prevent the Georgia Lottery from forcing \$30 scratch tickets and Keno games into every bedroom, office and smart phone in the state. It would also prevent other state government lotteries around the United States from doing the same.

The future of the Georgia Lottery and other state lotteries hinges on luring a new generation of young people to get hooked on gambling. The internet is the Lottery's primary vehicle to achieve this goal. Enacting H.R. 707 would make it harder for lotteries to lure young people to develop an active gambling habit.

Question #3: The premise of the question wrongly assumes the Hope Scholarship program has improved the lives of all Georgians. **The facts show that the Georgia Lottery has produced two things: unfairness and inequality.**

A mountain of independent evidence confirms that government's experiment of promoting lotteries is contributing to the unfairness and inequality in our nation. It is harming health, draining wealth from people in the lower ranks of the income distribution, and contributing to economic inequality. Syracuse University Professor Ross Rubenstein, a national expert on lotteries, has said there is no debate among scholars whether lotteries prey on the poor: "There's simply no disagreement about it."²

A detailed study by Cornell University affirmed that state lotteries get a disproportional amount of sales from the poor and disadvantaged and examined the reasons behind why those who have the least spend the most on the lottery. The study found that the real reason for this trend is that those stricken with poverty look to the lottery as a way to improve their lives and help them escape their poverty.³

The lottery program run by the State of Georgia is one of the nation's best examples of this trend. Not only do the poor in Georgia spend more on lottery tickets, they receive less educational aid from lottery funds than their wealthier neighbors. Since 1994, students in the ten wealthiest counties received an average of 41 cents back per dollar in some form of education benefit for every dollar spent on the lottery in their counties. By comparison, the poorest counties received only 26 cents.

The difference between Georgia's rich and poor counties is particularly stark regarding the receipt of HOPE Scholarship funds: poor counties averaged 11 cents back per dollar for college scholarships, while wealthier counties averaged 25 cents. In Oconee County, the sixth wealthiest county in Georgia, its students received a staggering 57 cents back in scholarship funds for every dollar spent on lottery tickets. On the other hand, the residents of Clay County, the poorest county in Georgia, spent an average of \$710 per person, *only to receive 4 cents back per dollar in HOPE scholarships.*⁴

Lotteries like Georgia's also create unfairness and inequality for the 2/3 of the public who rarely or never get ensnared in state-run gambling. These citizens are paying higher taxes for less services while a privileged few benefit. The reason for this is income from casinos and lotteries does not tend to grow over time as rapidly as general tax revenue. Expenditures on education and other programs will generally grow more rapidly than gambling revenue. Thus, new gambling operations that are intended to pay for normal increases in general state spending add to, rather than ease, long-term budget imbalances.⁵ **You pay even if you don't play.**

II. Responses to Questions for All Panelists

Question #1: I have never, nor has any family member, been in the employ of any entity involved in gambling, internet gambling or other services related to internet gambling.

Question #2: Stop Predatory Gambling has not received any funds or other support directly, or indirectly, from any entity involved in gambling, internet gambling or other services related to internet gambling.

III. Questions for Les Bernal

Question #1: If government sponsored online gambling, then the number of minors addicted to gambling would dramatically increase. It sets up an entire generation of young people to become problem gamblers by making it omnipresent in everyday life, *even in their own homes.*

Internet gambling is especially addictive for youth who have grown up playing video games, spending hours on their devices. Young teens who were frequent video gamers had more gray matter in the rewards center of the brain than peers who didn't play video games as much — suggesting that gaming may be correlated to changes in the brain as much as addictions are. This characteristic is precisely why casino owners are aiming to promote internet gambling and target those who are already prone to addiction.⁶

Researchers at Johns Hopkins' Bloomberg School of Public Health have published nearly a dozen papers on Baltimore youths and gambling.⁷ They found a strong link between gambling and other problems among the city's youth, largely because it fosters impulsive behavior. They concluded that making gambling widely accessible leads young people to engage in other risky behaviors, including sex, drugs and alcohol, impairing lives for years to come. Other studies in the Johns Hopkins' series found that gambling often leads to depression, crime, homelessness and joblessness in young adulthood.⁸

The evidence also shows that the younger children start gambling, the more likely it is they will become habitual gamblers and also problem gamblers, regardless whether they are from an urban or a suburban community.⁹

Equally disturbing, there have been hundreds of reports in recent years about children who have been abandoned while their parents gamble inside regional casinos. *The Chicago Sun-Times* reported that within a two-year period in Illinois alone, 85 kids were left neglected in casino parking lots.¹⁰ They are not simply the victims of "bad parents." Often, these parents have had no prior issues with state child protection service programs. The lure of the extreme forms of gambling promoted by state government is so powerful that it leads many parents and other guardians of children to act so irrationally that they leave their kids behind, alone, for hours in casino parking lots, hotel rooms and homes. How often does a local movie cinema in your district have incidences of children being left behind in the cinema parking lot while the mother or father is inside the theater watching a movie? Very rarely, if ever. If this is commonly happening with brick-and-mortar casinos, what happens to all these kids and thousands more like them, if we allow state government to run gambling operations on the internet inside people's homes, 24 hours a day?

Question #2: The speed of play and the anonymity of internet gambling are two critical features that make this form of gambling uniquely addictive and financially damaging to your constituents.

Speed

To understand how speed of gambling play contributes to the highly addictive nature of gambling, we will look to MIT Professor Dr. Natasha Schull and her nationally-acclaimed book *Addiction By Design*. Much of Schull's research focuses on the concept that many people who use electronic gambling, especially slots, do so less with a desire to win money but to get into a "zone," a zone of insulation from an unpredictable human world in which they feel disconnected and insecure.¹¹

Speed is a critical element of the zone experience. On video slots whose virtual reels "spin" rapidly, users can play every 3 to 4 seconds completing an astonishing 900 to 1200 games an hour.

One addict in Schull's book said: "It was more about keeping the pace than making the right decisions." The point is to stay in a zone "where nothing else matters." Another addict said: "The speed is relaxing. It's not exactly excitement; it's calm, like a tranquilizer. It gets me into the zone."¹²

Those who treat addicted gamblers affirm the negative impact that speed of play has on users. One problem gambling counselor told Schull: "The consistency of the experience that's described by my patients is that of numbness or escape. They don't talk about competition or excitement -they talk about climbing into the screen and getting lost."¹³

Anonymity

In addition to the high rate of speed of internet gambling, another factor that makes it so addictive and financially damaging to citizens is the anonymity of online interactions.

There is no boundary between the user and what is going on inside the computer screen, making the lure of "the zone" that Schull describes even more irresistible. The anonymity and privacy of gambling from one's own home makes internet gambling far easier for a person to hide their gambling habit.

Lastly, ID verification checks that serve as barriers to underage gambling in brick-and-mortar casinos are very difficult to effectively implement in what can be an anonymous world of online gambling.

Question #3: Most industries and companies are subject to truth-in-advertising laws enforced by the Federal Trade Commission. According to these laws, advertising must be truthful and non-deceptive, advertisers must have evidence to back up their claims, and advertisements cannot be unfair.

Since 1974, state-run lotteries have been exempted from these laws. Because of this, state lotteries have wide latitude in how they can promote their product, exaggerate chances of winning, and encourage more of our fellow citizens to lose their money instead of saving or investing.

There is no debate whether lotteries have severely abused this exemption over the last forty years. One unforgettable example is how some media plans for state lotteries blatantly stated that lottery promotions should be timed to coincide with the receipt of government benefits, payroll and Social Security payments.¹⁴

Only the uninformed and the willfully ignorant would suggest that state lotteries will promote internet gambling in a different, more ethical manner if legalized.

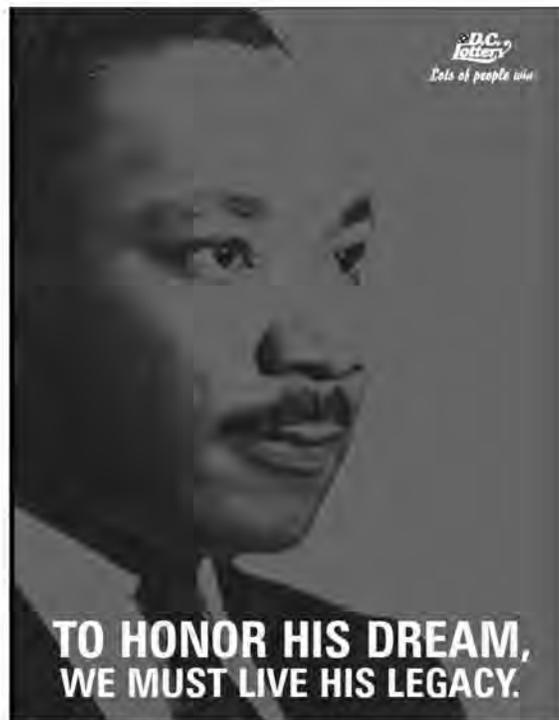
The lottery billboard below, this one by the Oregon Lottery, captures the essence of how state governments have erased any ethical line when it comes to extracting as much money as possible from the wallets and bank accounts of the American people. Why bother inventing a cartoon character like the tobacco companies did with Joe Camel when you can take the iconic figure for nearly all children across the U.S. and use it to market highly addictive, financially damaging, instant scratch off tickets? Keep in mind the ad below is not a private sector company but a *government program*.



Question #4: The facts show that state lotteries openly target minorities and undertake efforts to lure young people to gamble for the first time. Public records requests show how lotteries explicitly develop lottery games and marketing efforts for minorities and young people.¹⁵

Racial Profiling, Lottery-Style

The ad below is from the D.C. Lottery. Both the intent and the audience for the ad are clear. What is not clear is how serious public officials and opinion leaders allow the policy of predatory gambling to continue.



Using “Free Play” to Lure Young People

One way state government-run gambling lures young people into gambling for the first time is to offer “free play.”

In Delaware, IGT Interactive and DoubleDown Casino Slots & Poker, currently the vendor of the slot machines that exist in the casinos, will facilitate the no-money gambling website through Facebook. The unveiling of free play online gambling kicked off the state’s first phase of internet gambling, which was set to be up and running for real-money gambling two months later. “The first phase will allow us to get players acclimated with the virtual world,” Secretary of Finance Thomas Cook told the *Delaware News*.¹⁶ Below is how the interface was designed, a cartoon-like feel clearly geared to a younger audience that uses Facebook:



Question #5: If state lotteries that offer online gambling do not properly verify the age of players or ensure that out-of-state people cannot participate, no government agency will be in a position to enforce the law against them and bring them into compliance. There is no need to speculate because the states have a 40-year track record of “regulating” gambling and the fact is government officials are primarily concerned with the revenues their gambling operations take from citizens. It’s all about the money, not about the public interest.

Question #6: The concept of “free play” is a major part of how people get hooked on online gambling. Popular games are introducing teenagers to the excitement and rewards of gambling, even when they do not involve playing for money.

Many social media websites offer opportunities to play online gambling with virtual money. Similarly, cash-gambling sites offer free-play introductory games, and because no real money is involved, many have no age restrictions, according to Mark Griffiths, director of the International Gaming Research Unit at Nottingham Trent University in England.¹⁷

“One of the biggest predictors of whether people become gamblers is the playing of gambling-type games on free-play sites,” Professor Griffiths said, whose paper on adolescent gaming and gambling appears in the journal *Education and Health*.¹⁸ “When you start winning, you start thinking that, if I was playing with real money, I could be doing quite well. Children who play these free games are more likely to gamble and more likely to develop problem gambling behaviors. These are gateway activities that can lead people down the gambling road.”¹⁹

In his paper for *Education and Health*, Professor Griffiths cited a 2011 study of more than 2,700 British secondary students, which found that 15 per cent had played free gambling games during the week prior to the survey. He found that both gambling and social gaming offer intermittent, unpredictable rewards for users. The desire for such rewards draws the user into playing again and again.²⁰

Question #7: The screen shots of online slot machines clearly show images targeted to young people 17 years old or under.

There is no federal law which would prevent an online casino licensed by a state or offered by a Native American tribe from migrating users of “free to play” online slots to “pay to play” online slots. The entire purpose of free to play online slots is to lure people in to become daily users of real-money online slots.

- ¹⁰ Website of the Georgia Lottery, a government agency of the State of Georgia, www.galottery.com
- ¹¹ "Texas Lottery relies increasingly on the poor and less educated, studies show," *The Austin American-Statesman*, Eric Dexheimer, September 7, 2010 <http://www.statesman.com/news/news/state-regional-govt-politics/texas-lottery-relies-increasingly-on-the-poor-and-/nRxb4/>
- ¹² "Hitting the Jackpot or Hitting the Skids: Entertainment, Poverty, and the Demand for State Lotteries," Garrick Blalock, David R. Just, and Daniel H. Simon, 2004 <http://stoppredatorygambling.org/wp-content/uploads/2014/07/Cornell-Univ-study-Entertainment-Poverty-and-the-Demand-for-State-Lotteries1.pdf>
- ¹³ "Where the Money Goes," Georgia Lottery, www.galottery.com/lotterybenefitsgeorgians Population data from U.S. Census Bureau, Population and Housing Unit Estimates, www.census.gov/popest/index.html Poverty data from American Fact Finder, US census Bureau, Selected Economic Characteristics: 2009- 2013 American Community Survey 5-Year Estimates, Table DP03 http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_DP03&prodType=table
- ¹⁴ Lucy Dadayan at el, *For the First Time. A Smaller Jackpot*, Nelson A. Rockefeller Institute of Government, September 21, 2009, at 19-20, [http://www.rockinst.org/pdf/government_finance/2009-09-21-No More Jackpot.pdf](http://www.rockinst.org/pdf/government_finance/2009-09-21-No_More_Jackpot.pdf)
- ¹⁵ "Frequent gamers have brain differences, study finds," *Los Angeles Times*, November 15, 2011 <http://articles.latimes.com/2011/nov/15/news/la-heb-video-games-brain-addiction-20111115>
- ¹⁶ "Disadvantaged urban youth may be more likely to be problem gamblers: Link found between gambling, other abuses among Baltimore's youth," *The Baltimore Sun*, April 18, 2014 http://articles.baltimoresun.com/2014-04-18/health/bs-ha-youth-gambling-20140418_1_problem-gamblers-gambling-problems-las-vegas-style
- ¹⁷ *Ibid.*
- ¹⁸ "The Dangers of Youth Gambling Addiction," New York Council on Problem Gambling, Know the Odds http://knowtheodds.org/wp-content/uploads/2013/05/NYCPG_ebook_YouthGambling_052114.pdf
- ¹⁹ "Another Casino Concern: Children Left Alone," *Chicago Sun Times*, Jan, 14, 2013 <http://stoppredatorygambling.org/wp-content/uploads/2015/02/2013-Chicago-Sun-Times-Children-left-in-Cars.pdf>
- ²⁰ Natasha Dow Schüll, PhD, *ADDICTION BY DESIGN, MACHINE GAMBLING IN LAS VEGAS*, (2012), Pg 13, available at <http://press.princeton.edu/titles/9156.html>
- ²¹ *Ibid.*, Pg. 54
- ²² *Ibid.*, Pg. 19
- ²³ The National Gambling Impact Study Commission Report, sponsored by the U.S. Congress, 1999 www.govinfo.library.unt.edu/ngisc/research/lotteries.html

¹⁸ Public records request filed by Stop Predatory Gambling and Muckrock to the Massachusetts Lottery, 2010 <https://www.muckrock.com/foi/massachusetts-1/massachusetts-lottery-records-260/>

¹⁹ "Free play online gambling opens this morning in Delaware," *Delaware State News Online*, August 27, 2013 <http://delaware.news2sp.com/centraldelaware/125133-70/free-play-online-gambling-opens-this-morning-in-delaware>

²⁰ "Behavior - Online games can 'hook' children into gambling," *TES Magazine*, January 10, 2014 <https://www.tes.co.uk/article.aspx?storyCode=6389543>

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

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June 5, 2015, Responses to Members' Questions for the Record, conveyed to Witness Michael K. Fagan via e-mail on June 3, 2015

The following responds to questions submitted by Representatives Jason Chaffetz and Doug Collins, as well as questions for all Subcommittee Panelists, and uses the numeric indicators for those questions in the order they were submitted.

Questions from Representative Jason Chaffetz:

1. Based on solid, industry-independent academic evidence establishing that the economic and social costs of legalized commercial gambling far outweigh the usually-short-term, usually-overstated benefits of commercial gambling, rational legislators following best practices would reject efforts to authorize online gambling in their states. This does not always happen, however, and, in our nation's federal system, the 10th Amendment to the U.S. Constitution guarantees individual states' decision-making ability, wise or otherwise, to govern on issues not assigned by the Constitution to the federal government. States making the wiser, evidence-supported choice to not permit online commercial gambling within their borders are, and will be, impinged upon, given the nature of the Internet, by conduct of those exploiting other states' frequently desperation-driven, less rational, or greed-driven choices on this issue. This impingement is facilitated by the December 2011 Office of Legal Counsel (OLC) opinion re-interpreting the Wire Act in a way undercutting Congressional intent (see, my March 5, 2015-submitted written testimony on this point, at pp. 14-24; see also, the comprehensive Wire Act legislative history and contextual analysis, drafted by counsel with Steptoe & Johnson and separately submitted to the Subcommittee staff).

The Wire Act exists—or existed, as correctly interpreted—chiefly to assist states enforce their laws prohibiting or limiting commercial gambling within their borders. The OLC opinion weakens states' abilities to enforce such laws and, so, undercuts powers meant to be retained by individual states and protected by the 10th Amendment. The federal government's broad power to regulate interstate commerce and states' 10th Amendment-guaranteed powers to restrict or authorize wholly-intrastate commercial activity can be exercised in complementary and assistive fashion, as did the Wire Act for the fifty years pre-dating the OLC opinion. That opinion, however, has upset the balance and, given the border-ignoring nature of the Internet, erodes state powers once protected by the 10th Amendment.

2. This question contains an incorrect premise. The 10th Amendment does not put out of reach either wholly intra-state commercial gambling or intra-state child pornography transmittal or distribution when these activities occur over the Internet, since by its nature the Internet is an instrumentality of interstate commerce. This is more fully explained at p.4 of my previously-submitted March 29, 2015, "Written Supplemental Statement...: Not allowing use of the inherently-interstate communications system called the Internet—a system that the federal government created, funded, and which is interstate commerce, in its very nature—does nothing, as a practical matter, to preclude gamblers from gambling within a state which authorizes such activity; yet, it does much to preclude them from doing so across state lines and (i) threatening the integrity of state laws, (ii) imposing social costs within a state unable to recoup these remotely-imposed costs, (iii) generating illicit funds which are hard for states and the federal authorities to trace, tax, or limit to proper purposes, and (iv) willingly or unknowingly supporting organized crime and financial networks enabling terrorists and transnational criminals."

Transmissions originating and ending within the same state and using a facility of interstate commerce are clearly within long-recognized federal regulatory powers. See United States v. Lopez, 514 U.S. 549 (1995), which "identified three categories of activities that Congress may regulate (1) use of the channels of interstate commerce, (2) the instrumentalities used in interstate commerce, and (3) activities that substantially affect interstate commerce." United States v. Palfrey, 515 F.Supp.2d 120, 124 (D.D.C. 2007). Internet usage for commercial transmission of the type described in this question plainly fall within the Lopez categories.

To the extent this question implies that gambling is solely "a matter for local attention by the states under the police power reserved to them by the Tenth Amendment[...]" the answer to this argument was given long ago in the Lottery Case, Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903) and in the case involving the 'white slave' traffic, Hoke v. United States, 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523 (1913). In short, the power of Congress over interstate commerce is so complete that it may adopt any 'means' to regulate such commerce either 'necessary' or 'convenient' and irrespective of the fact that the 'means may have the quality of police regulations' (227 U.S. at 323, 33 S.Ct. at 284)."
United States v. Borgese, 235 F.Supp. 286 (S.D.N.Y. 1964)(upholding Wire Act and Travel Act against 10th Amendment challenges). See, generally, Perez v. United States, 402 U.S. 146 (1971); United States v. Darby, 312 U.S. 100 (1941). Cf., Cheyenne River Sioux Tribe v. State of South Dakota, 3 F.3d 273 (8th Cir. 1993); and United States v. Villiano, 529 F.2d 1046 (10th Cir. 1976), citing Marshall v. United States, 355 F.2d 999, 1004 (9th Cir.), cert. denied, 385 U.S. 815 (1966). More recently, the Third Circuit re-affirmed these principles in National Collegiate Athletic Ass'n. v. Governor of New Jersey, 730 F.3d 208, 225-226 (3d Cir. 2013)("... when it comes to legislating economic activity, Congress can regulate "even activity that is purely intrastate in character ... where the activity, combined with like conduct by other similarly situated, affects commerce among the States or with foreign nations." (citations omitted)).

3. This question poses a hypothetical not based in reality: the technology touted by Ms. Aftab cannot be "indeed effective," as that term is commonly understood, for geolocation and verification technology can, has, and will be evaded, spoofed, and defeated with increasing regularity. The criminal element needs only the capabilities of, say, a technologically-adept 14-year old hacker to work around these technologies, and tips for successfully doing so are regularly shared and refined in readily-accessible

chatrooms and on darkweb sites—not to mention word-of-mouth sharing of this information. The technology provides a temporary and incomplete “fix,” at best, which is not “indeed effective.” (Even simple evasive measures, like funneling externally-originating wagering information through an in-state “hub” computer (or network of computers) with dynamic IP addressing can readily defeat the touted technologies; more sophisticated and less-detectable measures are limited only by human imagination.)

4. As a former prosecutor, and as a present law enforcement and counterterrorism consultant, the OLC opinion re-interpreting the Wire Act halved its’ effectiveness and promoted the growth of illegal online gambling enterprises. By opening the floodgates for interstate and foreign-based online gambling to occur in the United States, enforcement of anti-gambling laws has become markedly more difficult, both at the federal and state level. Correctly interpreted (as it had been for 50 years), the Wire Act provided law enforcement, prosecutors, and judges with a generally-simple legal tool addressing easy-to-prove violations. Moreover, the comparatively light sentencing range under the Wire Act, combined with the flexibility to use it as a RICO predicate offense when appropriate (versus professional criminals and organized crime figures), made the Wire Act a useful component of the prosecutors’ toolbox. It didn’t scare juries from convicting the guilty, and enabled imposition of financial sanctions scaled to the offender’s conduct to help take the profit out of operating criminal gambling enterprises of all types.

Once, however, the OLC’s misguided re-interpretation of the Wire Act became DOJ policy, the tool’s benefits were no longer available in non-sports gambling cases, and the commercial gambling industry, in tandem with offshore and organized crime enterprises, vastly expanded their efforts in non-sports online gambling. States prohibiting this conduct within their borders (or allowing it, but only with licensing and regulation) are ill-equipped to combat these intrusions, and other federal statutes which might be used to assist these states are generally more complex and less desirable to use than the Wire Act. Further, the present Administration’s failure to prioritize investigation and prosecution by DOJ of illegal commercial gambling of any type makes the OLC’s evisceration of the Wire Act all the more concerning. In that regard, it would be sensible to amend HR 707 to assure that the Department of Justice assign responsibility for online commercial gambling cases to specialized staffs with adequate resources. See, pp. 5-6 of my previously-submitted March 29, 2015, “Written Supplemental Statement...” for aspects which should be added to the bill in the upcoming mark-up session to ensure that responsible and effective enforcement occurs of a restored Wire Act in ways that provide funding to states.

5. No. Emphatically no, and there never will be, realistically-speaking.

6. Based on my experience as a career prosecutor and, frankly, as a matter of common-sense (which Americans expect their Congresspersons not to have surrendered), if Internet gambling spreads and the public, including children, becomes bombarded with advertising, promotions, and enticements to bet online, the resultant changed behavior (which will occur, as that is why the companies pay for the behavior-shaping marketing) will necessarily lead to more traffic on illegal offshore Internet gambling sites that do not employ even the façade of age or location verification requirements, are capable of offering larger bonuses and more attractive betting odds, and do not report player winnings, losses, or account information to the IRS or to state revenue collection agencies. In the long-term, legal state-

operated sites cannot compete with the well-established and trusted black market, which will inevitably lead to poor revenue for the states, greater numbers of problem and pathological gamblers, increased social costs and crime, yet insufficient state revenue increases to meet these increased costs imposed from afar. See, pp. 6-7 of my previously-submitted March 29, 2015, "Written Supplemental Statement..."

7. Extremely ineffectively.

8. Yes, and multiple courts have so ruled.

9. If Congress made the decision this question hypothesizes, it would be contrary to federal court precedent. Wholly intra-state criminal communications using interstate communications transmission systems—whether the mails, the telephone network, or the Internet—have repeatedly been recognized by American courts as within federal regulatory reach. A contrary view by Congress would not be entitled to deference by these courts, who look to judicial, not legislative, precedent as controlling. Some effort to legislate a different constitutional rule would, as a matter of constitutional interpretation, plainly usurp the long-accepted role of federal courts and disturb the tripartite checks-and-balances system which has long protected our Republic.

10. The courts referenced in this question, in their rulings in the referenced recent New Jersey litigation, have not concluded that some unqualified right exists for states to authorize and conduct intra-state gambling activities, nor to my knowledge has any other court, when the activities occur in whole or part over the Internet. (The cases cited at response 2, above, reflect that any ruling purporting to identify some such unqualified right would be contrary to established U.S. Supreme Court precedent.)

Questions from Representative Doug Collins:

1. As to the first question asked: Yes (with the proviso that my understanding of how the Georgia lottery functioned prior to the 2011 DOJ OLC opinion is minimal). As to the second question asked: No (if I understand the question correctly).

2. As to the first question asked: Not if it uses a state-created intranet within its borders, rather than the Internet. As to the second question asked: Assuming you inquiring about effect and not affect, enactment of HR 707 should allow lottery systems such as Georgia's to operate as they did before December 2011, assuming they were otherwise lawfully-operated.

3. The surface appeal of educational scholarships funded through lottery sales, whether over the Internet or otherwise, evaporates upon study, as such lottery sales (i) provably cause widespread financial harm which increases over time; (ii) enact, as a government program, a system that by its nature exploits the hopes of the poor, of minorities, of immigrants, and of the under-educated (and, in doing so, engenders disrespect for government, which is thus viewed as an exploitive entity rather than as a protective one); and (iii) actually enriches large corporations to a greater degree than helping needy students. Consequently, it would be abysmal policy to build a mechanism into federal law which would encourage raising funds via government-sponsored lottery for an ostensibly-noble purpose; far more

intelligent and less harmful means of funding such programs exist, and all are less-exploitive of citizens than are lotteries.

Questions for all Panelists:

1. No.
 2. I did not testify on behalf of an organization, but as an individual.
-





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May 28, 2015

**Questions for the Record to Andrew Moylan
Executive Director, R Street Institute**

**"H.R. 707, the Restoration of America's Wire Act"
Hearing of the U.S. House Committee on the Judiciary
Subcommittee on Crime, Terrorism, Homeland Security and Investigations**

Question 1: Have you, or any member of your family or household, been in the employ of any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling? If so, please provide details.

Answer: No, I have no financial association with gambling entities, nor do any members of my family or household.

Question 2: Has the organization on whose behalf you testified before the Subcommittee received any funds or other support directly, or indirectly, from any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling? If so, please provide details.

Answer: No, The R Street Institute is not now, nor has it ever been, a recipient of support from gambling entities.

Question 3: Do you believe the Wire Act does not extend to bets or wagers placed over the Internet which originate and terminate in the same state?

Answer: Despite some overly broad interpretations of the statute's reach, the Wire Act was not intended to assert federal jurisdiction over bets or wagers that originate and terminate in the same state. The plain language of the statute specifically exempts transmissions relating to "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."¹ In other words, bets or wagers conducted entirely in a state or foreign country where such activity is legal are expressly beyond federal reach.

The Internet obviously didn't exist in 1961, and so H.R. 707, "Restoration of America's Wire Act," seeks in part to update the Wire Act's definitions to include Internet transmissions. The bill adds language specifying that "wire communication" includes "any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise."² Worryingly, those last three words, "incidentally or otherwise," mean that using the Internet to transact a bet in a state in which the activity is legal could be subject to federal reach if a state line is crossed incidentally between the origination and termination of the transaction, i.e., if the path of the electronic signal happens to cross a state border in the process of completing the transaction.

This issue of "intermediate routing" was specifically addressed in the 2006 UIGEA statute to prevent it from extending to legal intrastate betting. H.R. 707 does not include such a restraint and thus threatens to expand federal power beyond what was envisioned in the Wire Act or UIGEA.

Question 4: Do you believe those states which are permitted, under the Professional and Amateur Sports Protection Act of 1992, to offer betting on sporting events or contests, can, under the Wire Act, offer online wagering on all sporting events, including amateur sporting events, to the extent the bets originate and terminate in that particular state?

Answer: If the view expressed in the 2011 Justice Department Office of Legal Counsel memo holds, the answer would appear to be yes. That memo clarified two important points: that the Justice Department interprets the original Wire Act as applying to sports betting (as opposed to the broad range of gambling and games of chance), and that intermediate routing of transaction data between entities in a single state where the conduct was legal under state law is not interstate in nature and thus not subject to Wire Act regulation. Thus if the sports wagers in question originate and terminate in a state where that activity is legal under the Professional and Amateur Sports Protection Act (PASPA) and other relevant state law, OLC's interpretation would hold that there is no crime under the Wire Act.

If H.R. 707 were to become law, however, the answer would appear to be no. Because RAWA asserts authority over transactions that are intermediately routed across a state line, it would render illegal even bets originating and terminating in a state where the conduct was legal under PASPA and other relevant state law.

¹ 18 US Code, §1084, "Transmission of wagering information; penalties." Retrieved Mar. 24, 2015 <https://www.law.cornell.edu/uscode/text/18/1084>

² H.R. 707, Restoration of America's Wire Act, Feb. 15, 2015. <https://www.congress.gov/bill/114th-congress/house-bill/707/text>

Question 5: What guarantees do the Governors and law enforcement agencies in states which have not authorized Internet gambling have that sites taking sporting bets will not solicit or accept bets from residents of their states, and who will enforce those guarantees?

Answer: As with any statute, governors and law-enforcement agencies have no guarantees of compliance and must work with legislators to craft a body of law that is effective and enforceable. For activity conducted entirely within their borders, most states have a well-established system of law for regulating gambling. They are free to regulate gambling at both an individual and institutional level. States are free to choose to place a higher or lower emphasis on such regulation, based on an assessment of their own law-enforcement priorities. While illegal gambling can be difficult to enforce, that difficulty stems not from a lack of appropriate law but from an unwillingness to prioritize such enforcement.

For activity conducted across state lines, there is ample federal law already on the books allowing states to work with federal law enforcement to address the behavior in question. The combined effects of the Wire Act, UIGEA and the 1992 Professional and Amateur Sports Protection Act essentially render all interstate gambling activity illegal, including processing of payments for services. These tools allow the federal government to assist states in enforcing their own laws in a manner consistent with the Commerce Clause and principles of federalism.

To answer the question more directly, if a state in which gambling is illegal believes that an out-of-state site is conducting business with its residents, it can follow two tracks to address the behavior. It can work with federal law enforcement officials to identify and prosecute businesses conducting interstate gambling activity that violates federal law or it can work with its own law-enforcement officials to identify and prosecute residents who have engaged in activity that violates state law. Sufficient tools exist to prosecute such behavior without the addition of new federal law.

Question 6: Under your reading of the 10th Amendment, was enactment by Congress of the Professional and Amateur Sports Protection Act of 1992, which bars all but a handful of states from authorizing gambling on sporting events, an improper exercise of Congressional power or extension of federal jurisdiction?

Answer: PASPA is questionable, at best, from a constitutional perspective. It contains several potential infirmities, including the federal exercise of a power generally reserved to the states and non-uniform application among the states. While I will discuss my view briefly here, I would commend to your attention two law review articles that examine the issue in much greater depth: a *Marquette Sports Law Review* piece by Jeffrey Roeske ("Doubling Down on Sports

Gambling: Why PASPA Would Fail A Constitutional Challenge"³ and a *University of Nevada Las Vegas Gaming Law Journal* piece by Thomas L. Skinner III ("The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PASPA")⁴.

The general police power to regulate conduct like gambling rests with the states. The federal government legislates only on truly national or interstate matters. By enacting what amounts to a blanket ban on sports betting in all but a few states, PASPA may overstep the bounds of federal power. The structure of the ban is problematic, as well, since it functions as a prohibition on state efforts to legalize and regulate gambling, rather than as the creation of a federal crime for individuals engaged in such behavior. While the Commerce Clause may be used to justify occasional federal pre-emption of state laws, it should be limited to those measures needed to maintain free and open commerce between states, not to coercing states into enacting the federal government's policy preferences.

PASPA may also face challenges based on its non-uniform treatment of states. As written, the law carved out certain gambling activities in the states of Delaware, Montana, Nevada and Oregon, while giving New Jersey the option to secure grandfathered status within a year of PASPA's passage. In doing so, it explicitly imposes non-uniform application of the law's prohibitions across the several states. While uniformity challenges are rare and difficult to sustain, given the degraded state of modern judicial review, PASPA is blatant in allowing some states to continue licensing gambling while other states are prohibited from doing so.

Challenges to PASPA to date have failed largely on procedural grounds. Several key questions of its constitutionality have yet to be litigated at the highest levels. While it is far from clear that the statute would be invalidated if given a comprehensive review, it certainly faces serious questions that merit further investigation.

Question 7: Georgia's lottery is unique in that it funds the HOPE scholarship, a program that has helped millions of Georgians. My priority in reviewing this legislation is to ensure that Georgia's lottery continues to be able to undertake the same activities they were able to prior to the 2011 DOJ decision. Based on your reading of the bill, would H.R. 707 allow Georgia's lottery to continue functioning as it did prior to the 2011 DOJ decision? Would it create restrictions on certain activities that were permissible under the Wire Act even before the DOJ decision?

³ Jeffrey Roeske, "Doubling Down on Sports Gambling: Why PASPA Would Fail a Constitutional Challenge," *Marquette Sports Law Review*, Vol. 24 Issue 2, 2014.

<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1624&context=sportslaw>

⁴ Thomas L. Skinner III, "The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PASPA," *University of Nevada Las Vegas Gaming Law Journal*, Vol. 2, 2012.

<http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1027&context=glj>

5 | H.R. 707, the Restoration of America's Wire Act

Answer: While I claim no expertise on the specific function of Georgia's lottery, my understanding is that the state is among a small handful that currently operate real-time games via Internet sales. Georgia sells tickets to the multistate Powerball and Mega Millions games, as well as its own Fantasy 5 and KENO! games. If H.R. 707 were to become law, these online sales likely would become illegal.

As I covered in my answers to Questions 3 and 4, the key provision of RAWA that would appear to invalidate all online sales is its treatment of so-called "intermediate routing" of a transaction as inherently interstate, even if the bet in question originates and terminates in a state that has legalized such behavior. This expansive definition essentially means that all sales via the Internet would be prohibited, including the several games for which Georgia sells tickets online.

Question 8: Should H.R. 707 be enacted, will Georgia's state-licensed computer-generated retail lottery sales be affected? What affect would the enactment of the bill have on Georgia's lottery system and other similar systems?

Answer: The effect of enacting H.R. 707 on Georgia's lottery would be to take its sales off the Internet. As discussed in my answer to Question 7, RAWA effectively would prohibit online sales for any game. While lotteries could continue to sell tickets in person in brick-and-mortar establishments, they would be unable to use the modern communication system of the Internet to transact any business, even if that business is explicitly legal under state law.

Question 9: Millions of dollars each year are generated for the HOPE Scholarship and Pre-K programs through the existing Internet sales distribution channel and current lottery game offerings by the Georgia lottery. Given the educational scholarships that rely on funding from the state lottery, do you believe it would be appropriate to create a mechanism in the legislation to ensure the scholarship program in Georgia and other similar programs wouldn't lose funding streams for those programs? Please explain.

Answer: It is undoubtedly true that states like Georgia would face the prospect of diminished revenue if H.R. 707 were to pass, forcing them to contemplate policy responses to offset the loss of portions of their budget. But while many states will have revenue-related reasons to be concerned about the impact of RAWA, I believe the federalism concerns regarding the delicate balance of power between national and state governments are equally important.

As written, RAWA is a problematic use of Commerce Clause power that threatens to substitute the judgment of the federal government for that of states, which are the rightful holders of the power to regulate intrastate activity. If limited government and federalism are to have any meaning in the 21st century and beyond, Congress must exercise restraint in claims of such

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power. This would help protect the Internet and the citizens who use it from unwise government intrusions, helping to make real the "new federalism" that so briefly flourished two decades ago.



**SUPPLEMENTAL TESTIMONY OF PARRY AFTAB, ESQ.,
IN RESPONSE TO QUESTIONS ON THE RECORD**

**FOUNDER AND EXECUTIVE DIRECTOR,
WIRESAFETY, INC.
(A 501C-3 CORPORATION)**

**UNITED STATES HOUSE SUBCOMMITTEE
on
Crime, Terrorism, Homeland Security, and Investigations**

“H.R. 707, The ‘Restoration of America’s Wire Act’”

**Hearing: March 25, 2015
Supplemental Responses: May 29, 2015**

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Part I

Questions for all Panelists:

1. *Have you, or any member of your family or household, been in the employ of any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling? If so, please provide details.*

Yes.

I began practicing law at Dewey Ballantine in 1984. It is possible that Dewey Ballantine offered legal services to gambling operations. But I was not aware of any gambling clients represented by that firm at the time I was an associate there.

In 1988 I joined the NJ firm of Kimmelman, Wolf and Samson. During the two years I was at that firm, I worked as a senior associate with one of the partners, Tom O'Brien (former Director of the Division of Gaming Enforcement, NJ), with Trop and Trop World on licensing matters and helped handle the sale of their casinos to Aztar.

I own and operate a digital risk management consulting firm, WiredTrust. It offers best practices advice and privacy/security/compliance audits to digital industry leaders, worldwide. In 2013 the Poker Players Alliance retained my firm to review risk management issues pertaining to underage access to rogue offshore digital gambling sites and suggest best practice standards for online gambling sites, should they become legalized in NJ. They paid the standard \$35,000 flat fee retainer.

2. *Has the organization on whose behalf you testified before the Subcommittee received any funds or other support directly, or indirectly, from any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling? If so, please provide details.*

Yes.

In 2014, WiredSafety, Inc., a 501c-3 charity received a donation of \$25,000 from The Coalition for Consumer and Online Protection. I understand that that organization was partly funded by gambling industry members. The donation was for research, analysis and outlining of an educational program and resource for parents on digital risks, including online gambling and minors.

In January 2015, Caesars Interactive Entertainment made a donation of \$25,000 for our upcoming Cyberwellness.com, to teach medical professionals to identify and address online risks to patients in their care and their families.

Please note that WiredSafety has no paid employees and does not retain independent contractors. Everyone, including myself, have been always and remain unpaid volunteers.

Part II

Questions for Ms. Parry Aftab:

1. You testified that there are advanced online technologies that can verify people's age by, among other things, cross-referencing public and private databases. Can you provide the provisions of federal law that require the use of those advanced age-verification technologies by every Internet gambling operator (public and private) in the United States?

The Unlawful Internet Gambling Enforcement Act (UIGEA) sets forth various requirements for an intrastate online gambling legal and regulatory framework that would satisfy federal law. Included in these requirements is a mandate for effective age and location verification. The relevant section of UIGEA is provided below.

(B) INTRASTATE TRANSACTIONS.

The term 'unlawful Internet gambling' does not include placing, receiving, or otherwise transmitting a bet or wager where

- (i) the bet or wager is initiated and received or otherwise made exclusively within a single State;
- (ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include-
 - (I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and
 - (II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law regulations; and
- (iii) the bet or wager does not violate any provision of-
 - (I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);
 - (II) chapter 178 of title 28 (commonly known as the 'Professional and Amateur Sports Protection Act');
 - (III) the Gambling Devices Transportation Act (15 U. S. C. 1171 et seq.); or
 - (IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

I have previously testified before Congress, and continue to maintain, that federal law can and should encourage co-regulation of online gambling best practices standards that effectively address the principal public policy concerns that surround gambling online. Specifically, I would favor a strict regulatory system that will encourage innovation and better:

- Exclude minors.
- Restrict access to online poker from individuals residing in states and jurisdictions where online poker has been restricted by the State.
- Prevent the use of online poker sites for money laundering or other illegal purposes.
- Effectively address problem gambling by providing tools allowing customers to control their own gambling; and

- Ensure that online poker games are fair to players by preventing cheating by players, operators or through the use of poker “bots.”

Given the constant evolution and improvements in the relevant technologies, there may be danger in being overly prescriptive when it comes to the technologies themselves. However, the federal establishment of baseline standards does, I believe, merit congressional consideration. The FTC has used a similar approach to COPPA compliance.

Having said this, I would re-iterate from my testimony before this subcommittee that the results from Delaware, Nevada, and New Jersey are indeed very encouraging with respect to the ability of state-mandated compliance requirements, coupled with state-of-art technologies, to minimize the risks that can be associated with online gambling.

2. You indicated in your testimony that state lotteries could learn something from the age verification technologies used in New Jersey. What verification technologies are being used by the different state lotteries today, and do you have any data on their success/failure rates?

a. See below, under Part II Best Practices in Online Gambling Jurisdiction-Based Compliance under “Age-Verification Processes” and “State Lotteries” as to what lotteries can learn, in general, from online gambling operators.

b. WiredSafety interviewed and conducted a survey of the state regulators in Nevada, NJ and Delaware, asking among other things, about their experience with age-verification technologies. As indicated in my written submission for the hearing,

The regulatory environments we surveyed effectively coordinate and cross-check various technologies and databases and have requirements for strict and independent regulation and audit that restrict participation in online gambling to adults only. To date, there have been only a handful of instances of underage gambling on regulated U.S. sites (3 in Nevada, none in Delaware and “a handful of isolated instances” in NJ). This experience is corroborated by a much longer track record from Europe indicating that technology, coupled with strict regulation, all but eliminates the threat of underage gambling.

Instances of underage gambling were in all instances but one, related to parental failure to secure their accounts. In the other case, it was the failure of a legally-aged older brother to secure his account. In each case, regulators worked with the licensed operators to resolve these issues.

Nevada, Delaware and New Jersey each mandate a series of rigorous player identification processes prior to establishing a new account to play, and verifying identity at time of play (log-in). These regulatory requirements and processes do, in fact, offer better safeguards against underage gambling than exist in the brick and mortar industry, given the fact that the identities of adults can be validated through real-time automated crosschecks of existing databases and other measures that are not utilized in brick and mortar gambling establishments.

The research also identified how in the regulated jurisdictions, age verification is part of a larger, multi-step “Know Your Customer” process that builds a secure profile of the prospective online gambling customer. Age verification, identity verification, and cross checking against databases of unwanted persons (for example, the Specially Designated Nationals list maintained by the Treasury Department) are components in an integrated process that provides, for operators and regulators alike, a comfort level that each prospective customer is who s/he say s/he is, is of legal age, is located in a jurisdiction where the activity is legal, is not an unwanted customer and is not otherwise barred from participation in regulated online gambling.

Furthermore, in regulated online gambling, regulators control the thresholds for accepting, rejecting, or requiring further information concerning age verification, and can impose additional requirements that can further mitigate/eliminate the risk of play by minors. Regulations establish requirements based on the levels of assurance that are necessary to allow a customer to gamble, thereby fine-tuning the balance between failing to detect an underage individual and rejecting a player who is of the legal age. In other words, regulatory requirements can “turn up the dial” with respect to unknown or suspicious entrants to a site, which has the effect of minimizing the potential harm if a customer falls into a grey area. If anything, regulated online gambling sites will reject prospective customers if anything appears other than perfect, rather than allow an under-age user to register.

c. I am not aware of the age-verification systems or rules used by state lotteries. I am also not aware of their success or failure rate. We have not had lottery abuses reported to us by consumers seeking our help. While we have extensively reviewed online gambling operations, we have not reviewed online lottery operations.

We intend to do so in the near future.

3. You testified that we should legalize and regulate online gambling in the U.S. because the illegal, offshore gambling sites that some people use today may result in harms such as putting malware on computers and leading to fraud schemes. But that logic could be applied to many activities that are illegal today, including the sale of illicit drugs. When people buy cocaine or heroin, the product they buy may contain other dangerous ingredients or put them at risk of violence. Arguably, legalizing and regulating the sale of now-illegal drugs could reduce those ancillary harms. Do you think we should legalize the drugs that are currently illegal in order to protect citizens from the harms inherent in participating in an illegal marketplace?

The analogy to illegal drugs is not applicable or useful to the debate over addressing the risks of online gambling.

Today, forty-three states plus the District of Columbia have a legal, regulated state lottery. Thirty-nine states have one or more forms of legal, regulated casino gambling. Only two of the 50 states offer no forms of legal gambling.

The regulation of online gambling does not legalize a good or service that is now illegal; instead, it creates an avenue for the application of strict regulatory control in the online medium to a product that is already well-established, accepted, and regulated in the brick-and-mortar environment.

Furthermore, as I have testified, effective regulation of online gambling would shrink the market for the illegal offshore operators and create an option for American adult consumers that respects state decisions on the legality/illegality of gambling; prevents minors from participating; ensures that the games are fair and that their operators are above reproach; and provides valuable tools to promote responsible gambling.

Part III

Best Practices in Online Gambling Jurisdiction-Based Compliance

Overview:

Best practices in digital compliance involves a. adherence to applicable laws and regulations, b. risk management practices, c. security, privacy and safety policies and procedures and d. the ability to adjust to new challenges and opportunities. Best practices are always improving based on real life deployment and experience. Since best practices are baseline issues, most industry leaders cooperate and share information to improve the industry as a whole. At an event hosted by WiredSafety, a senior representative from Google described industry leaders' approach to sharing best practices. "Best practices are a competitive issue." he said. "If we don't adhere to them, we are out of business. But trustworthy industry members recognize that, by working together to improve baseline best practices, the industry as a whole is stronger and better able to address risks and innovative opportunities."

In the online gambling space, best practice baselines include:

1. The ability to authenticate users' real identities;
2. The ability to verify that the user meets the requisite age threshold;
3. The ability to rule out those on "undesirable customer" lists;
4. The income reporting processes comply with current IRS rules and regulations;
5. The ability to confirm that the user is within the requisite geographical boundary; and
6. The ability to identify and prevent player collusions, scams and fraud.

While no practices are foolproof, best practices are designed to address known and foreseeable risks to a commercially reasonable degree of certainty. Monitoring and being able to adapt for new vulnerabilities is as much a part of best practices as complicated algorithms and fancy digital tools. These practices and baselines are referred to as "rules." Any failure to satisfy all applicable rules results in the user/applicant being rejected by the system and being chronicled as an "undesirable customer."

Commonality of Interests and the Authentication Ecosystem:

The online gambling industry is not alone in needing to know who their customers are, where they are located at the time they access and use digital networks, what devices and technologies are being used and identifying patterns in users' behavior. There is an entire ecosystem of providers, innovators, and marketers and large network providers that have sought ways to identify user locations to determine roaming charges and when you are near a storefront offering breakfast specials. Billions of dollars of research and development money have been devoted to helping pinpoint exact locations of users. These advances are adopted and enhanced by other industries who seek user digital locations

Banking and financial institutions have established rigorous and comprehensive methods of identifying and authenticating their customers. These processes are called "KYC" or "know your customer" standards. KYC compliance professionals have access to extensive databases and services that allow the subscribing institutions to check identifies and authenticate their customers.

Social networks, digital banking and financial service providers and network subscriber services track device and access information for authorized users. Attempts to access an account with an unidentified device, a new cell phone or tablet will result in a security alert. Each device carries a unique identifier that is captured by security-minded providers to prevent account takeovers and unauthorized access.

Regulated online/device gambling platforms track patterns of play (when the player typically accesses their accounts, in-game purchases and methods of play) to tackle money-laundering risks, security gaps and account takeovers. And, employees in highly secure industries have their typing patterns tracked to determine who is or is not seated at their computers.

This authentication ecosystem is ever evolving and ever improving. It adapts for hacks and learns from mistakes. And these improvements are hardcoded and further improved. Although not perfect, it is far better than current offline analog versions and is getting better every single day.

Age-Verification Processes and Rules:

The online gambling operators run all applicants through several databases to confirm identity and authenticate age and credentials. These include, without limitation, the following databases:

1. PEP (worldwide politically exposed);
2. DPL (denied person list – U.S. Dept. of commerce);
3. Interpol watch list;
4. OFAC, SDN (watch list of US Treasury Department – Office of Foreign Assets Control);
5. Consolidated watch list (United Nations);
6. Fraud databases (flags customers that have committed any form of fraud on in the past as maintained in relevant internal and 3rd party databases);
7. Unverified List: Watch list US Dept of Commerce – (Bureau of Industry and Security); and
8. Responsible Gaming exclusion list maintained by casino and online gambling operators.

The KYC validation (“Know Your Customer”) is then conducted on each user. Under this critical “rule”, the full name, address, social security number, and date of birth submitted by the applicant is sent to a third party for validation. If any of these cross checks fail, the application is placed in “suspended mode” which will require additional verification and manual handling, assuming that the applicant wants to proceed with the application.

Apparent Misunderstandings of the Different Levels of Authentication and How Other Digital Risks Relate to Legalized U.S. Online Gambling:

Questions raised during the hearing indicated that there is confusion over the levels of authentication used and capable of use for different digital purposes and supervising minors’ online activities. Set forth below are common misconceptions that confuse the current inquiries. While there are real issues impacted by online gambling, these are not among them.

1. If we can't keep teens off pornography sites, how can we expect to keep them off online gambling sites?
2. Teens frequently lie about their age online. How can we prevent them from lying about their age on online gambling sites?
3. Teens hack. How do we prevent them from hacking online gambling site access?
4. Money laundering occurs online. How are money laundering/tax avoidance risks addressed on online gambling sites?
5. People lie about their locations. How are location-based technologies deployed to make sure that the online gambling sites know where their users are really located at the time they access the service?
6. Someone may start within the jurisdiction and then drive out of the jurisdiction. How do online gambling providers make sure that the person remains within the jurisdiction throughout the session?
7. Teens may use their parents' accounts to gamble online without permission.
8. Teens can find online gambling sites easily. Like other kinds of inappropriate content or sites, parents won't be able to keep their children off these sites.

The Realities:

1. *If we can't keep teens off pornography sites, how can we expect to keep them off online gambling sites?*

The laws adopted to prevent minors from accessing adult-sexual-content online have been overturned by the courts based on U.S. Constitutional free speech standards. There are no current laws in the US governing minors' access to adult sites. Therefore, there is no incentive for the adult-site operators to prevent minors (armed with credit cards or digital payment accounts) from accessing these sites.

Some adult site operators offer adult-verification systems, which are run by affiliates, as a business model designed to make them look more responsible. But most see minors are fruitful customers, as long as they have money to spend to access adult-sites for pay.

2. *Teens frequently lie about their age online. How can we prevent them from lying about their age on online gambling sites?*

No one can prevent young people from lying about their age online. But, by requiring that operators authenticate their applicants and verify their real age, it doesn't matter what age they say they are. The only thing that matters is how old the databases prove they are.

Facebook, Google, YouTube and other networks ask age, or birthdate, but do not verify age. The law governing preteen use of interactive digital technology that enables sharing of personally identifiable information does not require verification of age. As long as the operator had no actual knowledge that the user/applicant is under the age of thirteen (or are intentionally directing their site to preteens), the operators' obligations are satisfied.

3. *Teens hack. How do we prevent them from hacking online gambling site access?*

Adults over-estimate teens' and preteens' ability to "hack." Most of the supposed "hacking" is social engineering. They know or can learn enough about the users' passwords or pin numbers to guess them and use them to access someone else's account. But for real hacker-grade teens intent on gaining access to legal online gambling sites, there are much easier ways to gamble online.

These systems are designed to prevent unauthorized access. With the checks and balances required to set up and maintain an account, attempts to access someone else's account would require full credentials and approved device access, something the real account holder would spot.

4. *Money laundering occurs online. How are money laundering/tax avoidance risks addressed on online gambling sites?*

The gambling site operators at the time a user is authenticated confirm that users are either U.S. taxpayers or comply with withholding required by the IRS for non-US taxpayers. Using the same databases and procedures used by banks and financial institutions, IRS reporting is made by the operators. Digital wins are reported to the IRS in the same way as offline wins are.

In addition, money-laundering and financial manipulations are more easily spotted online than offline. Any wins are paid into the account they came from. No player-to-player transfers are allowed. And the ownership of any account used in connection with the account is confirmed as being the user's.

5. *People lie about their locations. How are location-based technologies deployed to make sure that the online gambling sites know where their users are really located at the time they access the service?*

There are two different ways location can be confirmed. The first involves the affirmative triangulation of cell towers, WIFI and GPS location services. While use of one may be subject to manipulation, the combination of all three makes the location determination very accurate.

Discussions were held regarding IP-spoofing. In low level location-based services, IP addresses are commonly used to determine location. But IP alone can be spoofed and more reliable location services are now deployed when location matters. Given the jurisdiction-restricted rules governing online gambling, a significant amount of development and innovation has been dedicated to making the location-determination even more accurate.

This is done, as well as by improving the technology, by tightening the settings. Best practices require that in the event of a close-call, the call is made against the user. Anyone being within the margin of error will be prevented from accessing their account until well within the jurisdiction.

The second issue with location services is someone accessing a device within the jurisdiction via remote access technology operated from outside of the jurisdiction. The same technology that is used to identify an authorized can scan for remote access software or VPNs. Those using these tools can be excluded from accessing their account while they are in use. In the same way

Microsoft knows you are using certain Office versions or pirated software, the online gambling operators can spot remote access or virtual private network technology.

6. *Someone may start within the jurisdiction and then drive out of the jurisdiction. How do online gambling providers make sure that the person remains within the jurisdiction throughout the session?*

In addition to calculating that the user is within the jurisdiction when the online gambling session is initiated, the system will ping the user to confirm that s/he remains within the jurisdiction. If not, the access is terminated until the user returns to the jurisdiction.

7. *Teens may use their parents' accounts to gamble online without permission.*

Teens sometimes can obtain access to their parents' online account through knowing or guessing their parents' credentials, or accessing saved credentials from their cell phone, tablet or computer. Since most Internet users rarely use different passwords for different accounts, having access to one account typically gives you access to all accounts.

Parents should be taught basic digital hygiene, so that their children are not exposed to content or interactivity not intended for them. Parents should be taught to authenticate their devices with the operators of their social networks as well as adult or online gambling providers, which makes it harder for their children to access their accounts using a different device.

Even if the teen gained the exact password and login credentials and used their parents' authorized devices, any charges made to the parents' authorized bank/financial accounts would be spotted when the parents' bills and statements arrive.

Unlike the other risks that can be managed and addressed by the operators, children finding ways to access their parents accounts of any kind online requires parental supervision and awareness. WiredSafety is creating an educational program and online resource for parents to specifically address children's accessing their parents' accounts to buy things on Amazon or Ebay, access adult-content sites on which their parent(s) may have an account, accessing their bank accounts or digital payment accounts and online gambling sites. This free site and resource, when completed, will be housed at WiredParents.org.

8. *Teens can find online gambling sites easily. Like other kinds of inappropriate content or sites, parents won't be able to keep their children off these sites.*

Teens can find online gambling sites easily. By merely inserting the search term "gambling" or one of the casino brands into Google or Bing, hundreds of sites will be displayed. But, it's not finding them that is the issue. It's accessing them. The stringent access rules keep out everyone that has not met all of the requirements for account holders.

In the same way we don't worry that teens can point out casinos, we need only to be sure that we prevent their entering them.

Other sites and networks that attract teens, but are considered inappropriate by parents, are not required to, and do not, provide strenuous gatekeeping to prevent teens and preteens from accessing their services and content. The gatekeeping by regulated online gambling operators is as tight as possible.

State Lotteries:

Most states have lotteries now. And most lottery tickets can be purchased locally and by anyone with valid ID (when IDs are required and enforced). In some ways lotteries have a common interest with online gambling operators, in other ways they are different. To the extent that lotteries offer ticket sales online, their interests are aligned. They may be prohibited from selling their lottery tickets outside of state boundaries. They may need to verify identify and age of anyone purchasing a lottery ticket online. They may have to develop processes to allow for payment of winnings digitally. Best practices that apply to online gambling operators should also apply to online lottery operators.

Given the centralized operation of any online registration for digital lottery purchases, the quality of compliance may be higher than the decentralized and inconsistent methods of age-verification checking at offline outlets. Auditing compliance is much easier at the digital level as well.

Fool-Proof Technologies:

Are the stringent systems and processes put into place by the online gambling-providers fool-proof? No. But they work very well. And they are improving every day. And most importantly, they are far better than the unregulated rogue offshore operators seeking our teens' and adults' money that answer to no one.

When asked if a teen from Utah could access an online gambling site, the answer is yes. Experts estimate that billions are waged online from U.S. residents. Without question Utah teens are among those placing online bets with offshore operators now. My research suggests, however, that regulators in the three online casino gaming states have not experienced such infiltration of their systems.

I advise many industry social media leaders on digital policy and best practices. We strive to address risks and spot them before they become epidemic. Regulation of online gambling is a natural conclusion given the advances in location-services, and the KYC checks and balances developed over recent years. The Internet leaders, from Google, to Facebook, to Instagram and Amazon, and our U.S. mobile carriers have developed and introduced technologies and tools to determine where their customers are located, how they are accessing their services and making sure that they are who they say they are.

If we can separate the issue of gambling and games of chance from the technological safeguards used by those permitting access to gambling online, we can see the issues more clearly. It seems that the value proposition of gambling itself is mudding up the digital security water. Other witnesses testified that gambling itself is wrong and should be avoided at all costs. That would apply equally to state lotteries as commercial casino brick and mortar companies. If the issue becomes one of gambling or no gambling, I can offer no expertise.

But, as long as online gambling is offered somewhere online and can be accessed by our children, vulnerable gamblers and seniors no matter how many laws we pass to stop it, we must do what it takes to protect consumers, families and all users.

Part IV

Questions for the Record from Representative Doug Collins

1. *Georgia's lottery is unique in that it funds the HOPE scholarship, a program that has helped millions of Georgians. My priority in reviewing this legislation is to ensure that Georgia's lottery continues to be able to undertake the same activities they were able to prior to the 2011 DOJ decision. Based on your reading of the bill, would H.R. 707 allow Georgia's lottery to continue functioning as it did prior to the 2011 DOJ decision? Would it create restrictions on certain activities that were permissible under the Wire Act even before the DOJ decision?*

See response below.

2. *Should H.R. 707 be enacted, will Georgia's state-licensed computer-generated retail lottery sales be affected? What affect would the enactment of the bill have on Georgia's lottery system and other similar systems?*

See response below.

3. *Millions of dollars each year are generated for the HOPE Scholarship and Pre-K programs through the existing internet sales distribution channel and current lottery game offerings by the Georgia lottery. Given the educational scholarships that rely on funding from the state lottery, do you believe it would be appropriate to create a mechanism in the legislation to ensure the scholarship program in Georgia and other similar programs wouldn't lose funding streams for those programs? Please explain.*

See response below.

Response to Representative Collins:

I am not familiar with the specific aspects of the Georgia lottery system. I am happy to research this further and provide a response under separate cover, should this be desired.

Our time to research our response has been severely limited, since we hosted a Global Stop Cyberbullying Youth Summit in Ireland on May 7 and on May 9, 2015. We were in Ireland immediately following March 25, 2015 hearing and most of April and until May 12, 2015 in connection with that major event. Otherwise, we would have taken it upon ourselves to do the research necessary to respond intelligently to these questions.