



THE DEPARTMENT OF JUSTICE'S REINTERPRETATION OF THE WIRE ACT DOES NOT CREATE AN URGENT NEED FOR FEDERAL LEGISLATION GOVERNING INTERNET GAMBLING

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In his February 1, 2012 editorial entitled “Federal Online Gambling Legislation Needed Now More Than Ever,” Frank J. Fahrenkopf, Jr., President and CEO of the American Gaming Association, argued that the December 23, 2011 opinion by the Department of Justice “illustrates the urgent need for federal legislation” governing Internet gambling (more specifically, poker) within the United States.² As readers of Public Gaming know, the Department of Justice’s December 23, 2011 opinion (the “DoJ Opinion”) changed its interpretation of the Wire Act of 1961 (18 U.S.C. §1084), declaring that the Act’s prohibitions applied to gambling-related communications only when the gambling at issue related to a sporting event or contest. As a result of the new DoJ interpretation, the primary barrier to Internet gambling within the United States was lifted, as almost all other federal prohibitions related to Internet gambling require an underlying violation of a state law or a different federal law.

Thus, the regulation of online gambling has for the moment been left to the various states in which it may (or may not) be permitted. This is consistent with long-standing past practice, as it has historically been the prerogative of the states to determine and regulate the types of gambling permitted within their boundaries. It remains to be seen, however, whether states will seize the moment and take action in response to this authority being returned to them, or whether, as the American Gaming Association urges, new federal legislation will be enacted supplanting states’ historic prerogative to regulate gambling.

Rather than an urgent call for federal legislation, the DoJ Opinion presents an opportunity for states, and, in particular, state lotteries, to demonstrate what they have been doing so well for so long – namely, operate networked, real-time gaming systems in a secure and error-free environment, in which play by underage and out-of-state persons is effectively precluded.

Mr. Fahrenkopf and the AGA “believe passing federal guidelines would keep minors from gaming online, prevent fraud and money laundering, address problem gambling and ensure players aren’t being cheated.” These are important goals, to be sure, but this statement suggests that new federal gambling legislation is needed to achieve them. As set forth below, such a suggestion is false. Existing federal laws, together with changes in state laws to accommodate Internet wagering (in those states that choose to authorize it), could fulfill each of those functions. In short, federal legislation is not needed to govern Internet wagering in the United States, and arguments to the contrary should not be accepted uncritically.

UNDERAGE GAMING

In states choosing to permit Internet gambling, state gambling laws and regulations could be supplemented and/or modified to require Internet gambling operators to use state-of-the-art age verification methods. Online gambling operators in Europe use a variety of sophisticated age-verification techniques in order to prevent underage gaming. These involve a combination of electronic verification procedures and the confirmation of age via reliable documentation available in third-party databases. When opening an account, customers must provide certain personal information (e.g., name, address, date of birth, email address, phone number

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1 See: <http://www.americangaming.org/newsroom/op-eds/federal-online-gambling-legislation-needed-now-more-than-ever>, last accessed March 2, 2012.

and credit card or bank details) and agree to the site terms and conditions. The site operator then confirms that the details provided actually relate to the customer, and it does this by comparing the information provided with documentation in third-party databases. After the account is opened, upon each use of the site for gambling, unique player identification details must be entered in order to establish that the customer is who he claims to be.

The above-described methods are proven and established, and could be mandated by states by law or regulation in order to prevent online gambling by underage persons. A federal law to mandate this is not necessary.

PREVENTING FRAUD AND MONEY LAUNDERING

In addition, new federal laws are not needed to prevent fraud or money laundering. While existing anti-fraud statutes, both federal and state, are not specific to gambling, they need not be. Existing federal anti-fraud statutes have been brought to bear by law enforcement authorities against Internet gambling operators alleged to have been operating in the United States unlawfully. Indeed, last year's "Black Friday" criminal indictments of principals involved with Poker Stars, Full Tilt Poker and Absolute Poker/Ultimate Bet - indictments that did not include Wire Act counts and thus were unaffected by the DoJ Opinion - included counts alleging conspiracy to commit wire fraud and bank fraud under federal statutes at 18 U.S.C. § 1343 (wire fraud) and 18 U.S.C. § 1344 (bank fraud), respectively. Although neither of these statutes is specific to gambling, they are more than adequate for use against dishonest Internet gambling operators conducting busi-

ness in the United States. Proving wire fraud under the federal statute requires showing that the defendant devised or intended to devise a scheme to defraud or to obtain money or property by false pretenses (i.e., lying), and transmitted an interstate communication by wire, radio or television in furtherance of the scheme. The bank fraud statute is similarly broad. In general, it requires a showing that the defendant purposefully executed or attempted to execute a scheme to defraud a financial institution, or to obtain money, funds, credit or other property from a financial institution by means of false pretenses.

Money laundering was also alleged in the "Black Friday" indictments, and again, existing federal statutes not specific to gambling appear sufficient to the task. Generally, the federal money laundering statute (18 U.S.C. §1956) is violated when a person, knowing that certain money or property is the result of some felonious activity, conducts or attempts to conduct a financial transaction with the intent to promote a specified unlawful activity, to avoid paying taxes or to conceal the nature, location, source or ownership of the proceeds of specified unlawful activity. Accordingly, if money or property is known to be the result of activity constituting a felony under federal or state (or even foreign) law, the money laundering statute may be brought to bear. A new federal law in this regard is not needed. Existing laws provide law enforcement with adequate means to prosecute online gambling operators who are engaged in or who facilitate money laundering. (Indeed, a money laundering count is among the two counts stated in the recent indictment of

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UNDERSTAND THE PLAYER.



ADVANT GAMES

TILTCTRL

TILT CTRL

A responsible gaming tool to detect and prevent tilt in ePoker. Players benefit from smarter play and operators profit from increased player lifetime value and improved liquidity.



LOTTERY INNOVATION NETWORK

LOTTERY INNOVATION NETWORK

A subscription-based innovation hub for regulated lotteries globally. LIN offers exciting twists for current retail and online products and the means to create appealing new games for the next generation of players.



ADVANTLABS

ADVANTLABS

A pioneering tool for creating interactive surveys, digital research experiences and managing web campaigns. Enables market testing both digital and retail gaming products with live audiences.

Calvin Ayre, founder of Bodog.com. The other count was under the Illegal Gambling Business Act, 18 U.S.C. §1955.)

ADDRESSING PROBLEM GAMBLING

States already address problem gambling in respect of gambling occurring within their respective boundaries. By way of example only, Illinois Law contains provisions with respect to play of the Illinois State Lottery that obligate lottery retailers to post statements regarding obtaining assistance with gambling problems, including a toll-free telephone number providing crisis counseling and referral services to families experiencing difficulty as a result of problem or compulsive gambling. (10 ILCS 1605/10.7)

In addition, unlike anonymous gambling at “bricks and mortar” facilities, the Internet gambler is identified to the Internet gambling operator, and mechanisms can be put into place to limit the amounts wagered or lost by a gambler over a specified time period. Upon reaching the limit, as established by law or regulation, no further wagering can occur by that player for a specified period of time. The implementation of such safeguards can be made a condition of licensure and need not be the purview of the federal government. While different states might have different wagering limits per specified time period, gambling operators could program their systems to apply different limits depending on the location of the player.

ENSURING PLAYERS ARE NOT CHEATED

State governments are as able, indeed perhaps more able, than the federal government, to enact laws and regulations ensuring that gamblers within their borders are not cheated. As noted above, the regulation of gambling has historically been the prerogative of state governments. States have enacted laws to prevent gambling cheating. They know what methods are and are not effective in deterring, preventing and detecting such cheating, as for years they have been using such laws to address gambling cheating at casinos, pari-mutuel race tracks and lotteries, with minimal assistance from the federal government. Moreover, there are no federal laws specific to cheating at gambling games (although the Travel Act, 18 U.S.C. § 1952, has been held applicable to cheating at gambling. See *U.S. v. Vaccaro*, 602 F.Supp. 1132 (D. Nev. 1985); *aff'd* 816 F.2d 443 (9th Cir. 1987); *cert. denied* 484 U.S. 914 (1987) and 484 U.S. 928 (1987).) To suggest that the federal government has more expertise or can more effectively address cheating at gambling than the states is not consistent with history. States successfully regulate lawful gaming within the borders currently, and could do so effectively with respect to online gambling businesses operating within their borders.

MATTERS LEFT UNADDRESSED BY THE DOJ OPINION

The AGA also points out in their editorial that the DoJ decision does not:

- Specify if lotteries and states can authorize intrastate online poker, slots and other casino games;
- Address whether different states that have legalized online gambling activity can link their lottery and/or other state-approved online gambling systems in an effort to increase liquidity;
- Address how the opinion affects wagering on pari-mutuel horse races; or
- Address gambling under the Indian Gaming Regulatory Act, and, in particular, whether the Unlawful Internet Gambling En-

forcement Act (“UIGEA”), 31 U.S.C. §§ 5361-5367, applies to Internet gambling by tribes or if existing tribal-state compacts must be renegotiated in order for tribes to offer online gambling.

All of this is correct. The DoJ was asked only to clarify its interpretation of the Wire Act in respect of the Internet gambling proposed by the New York and Illinois State Lotteries. To opine on these other matters would have been well outside the scope of the request and the DoJ’s authority. As stated in the DoJ Opinion, the DoJ was clarifying the Wire Act in light of an apparent conflict between it and the UIGEA, arising because the UIGEA appeared to permit intermediate out-of-state routing of electronic data associated with lawful lottery transactions that otherwise occur in-state, whereas the Wire Act, as had been interpreted by the DoJ, did not.

While it is true that the above-listed issues were not decided by the DoJ in its Opinion, this fact does not give rise to a need for federal legislation regulating Internet gambling. Moreover, the first issue – whether lotteries and states can authorize intrastate Internet poker, slots and other casino games – is clearly a matter to be decided by the individual states pursuant to their state laws. The second issue – whether states that have legalized intrastate Internet gambling can link their lottery and/or other state-approved systems – is a matter already decided under existing federal law. While the United States Constitution provides that states can enter into compacts with other states only with the consent of Congress (U.S. Const., Art. I, § 10, cl. 3), the U.S. Supreme Court has held that Congressional consent is required only when a state compact “enhances state power [with respect to] the National Government.” (*U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452, 473 (1978).) The *U.S. Steel* case involved an interstate tax agreement among several states and was determined to be not the sort of interstate agreement for which congressional consent was required, because: (1) it did not authorize member states to exercise any new powers other than those they already had prior to the compact; (2) states’ sovereign power was not delegated to the newly-created interstate agency; and (3) each compacting state retained its ability to adopt or reject rules and regulations developed by the interstate agency and to withdraw from the compact at any time.) Thus, interstate compacts among states pertaining to Internet gambling could be entered into without Congressional consent provided they adhered to the standards set forth in *U.S. Steel*.

The third and fourth issues are indeed open. The third issue has been undecided since the 2000 amendment to the Interstate Horseracing Act (15 U.S.C. § 3001, et seq.) which appeared to make legal, subject to certain conditions, interstate Internet gambling on horse races; and the fourth issue has been undecided since the passage of the UIGEA in 2006. Clarification of these issues is desirable. However, clarification of these issues does not require the creation and imposition on the states of a federal infrastructure with respect to Internet gambling.

THE “PATCHWORK QUILT” OF STATE RULES AND REGS

Finally, the AGA asserts that without federal Internet gambling legislation, there will be a “patchwork quilt” of state rules and regulations governing online gambling in the United States. This need not be the case. The states have shown that they can work together on gambling licensing and regulatory issues, and such cooperation has resulted in compacts among them containing uniform standards and rules. Such cooperation is evidenced not only by the National Racing Compact applicable to certain licenses pertaining to horseracing, but also by

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ment of new applications and technology.

The main idea, though, is that technology is becoming embedded in the consumer experience and this has a profound impact on the operator side of the gaming and lottery industry. The consumer expects instant access to the very newest content and most intelligent delivery systems. And since there will always be someone up to speed and ready to give it to them, it means that all of us have to be up to speed and ready to give it to them if we want to keep our customers. This is where NEFOS Intralot Cloud comes in, as a service it powers the operator's business by delivering computing resources, gaming content and gaming solutions that in turn enable the operator to deliver the newest and best games and gaming solutions over the smartest and fastest delivery channels to its players.

So, NEFOS Intralot Cloud is not just a method of reducing costs by outsourcing IT. It results in delivering state-of-the-art products on a timely basis over different types of channels. Speaking of delivery, is NEFOS offered via different cloud computing service models?

K. Farris: Indeed it is. These include a Community Cloud dedicated specifically to the gaming sector, in which operators share resources with other operators. Generally, this solution best suits smaller operators as larger operators typically have an existing IT infrastructure that they want to leverage as long as they can. The Community model not only achieves economies of scale but also enables the small operator to tap right into sophisticated and powerful computing centers, delivering the newest and best content, being able

to respond instantly to changes in consumer tastes, and scaling up fast by joining up with other operators of social games where scale is so important. A Private Cloud model is also available for operators that prefer dedicated services, operated solely for them as well as a Hybrid Model in which some services of an operator can be provisioned via a Community cloud while others via a Private cloud.

Are there limits to the amount of data that can be transmitted via the internet, from the cloud to the point of application? Is there a question of bandwidth? What about security and overall system integrity?

K. Farris: The amount of data that can be transmitted to and from NEFOS Intralot Cloud is not an issue – the capacity is flexible and more than sufficient to meet required and growing needs. Moreover concerning bandwidth, in today's world where broadband communications are or are fast-becoming the rule rather than the exception such communication methods are effectively utilized when delivering cloud solutions – NEFOS included. In cases with potential local communication issues, INTRALOT, as a leading technology provider, will draw on its extensive experience in localizing the solution to best meet the operator's requirements. Now concerning security and system integrity, NEFOS complies with state-of-the-art information security standards in cloud computing and in the lottery sector. Among these are cloud security alliance specifications, ISACA Governance, auditing and assurance practices on cloud computing, WLA Security Control Standard, ISO 27001, PCI/DDS.

There's an aspect in which the lottery and casinos do not really compete for the same type of player. The outcome-focused, high velocity casino player will want casino-style games and the traditional lottery player isn't as likely to shift their play over to casinos. The competition will become intense, though, for the explosively growing area of extended-play entertainment and social gaming. I would think that the lack of visibility on the part of the operator to see how these new game categories will evolve and alter the whole gaming environment will put an even bigger premium on staying flexible, being instantly responsive to changes in consumer tastes. Where does NEFOS Intralot Cloud fit into all this?

K. Farris: INTRALOT focuses on what we call the Universal Gaming Experience. Everything ultimately goes back to the consumer, which is why we have developed our technologies to be seamless to the player, irrespective of the engagement model (retail channels, internet, mobile or iTV). To illustrate, all the different games and content relating to operation, marketing and promotions as well as all the related services (like cross-promotions between channel partners) – when synthesized together provide the Universal Gaming Experience.

The next era of gaming will be very exciting, especially for the player. Operators will be delivering an increasingly powerful portfolio of content and technological solutions that consumers will love. Our fundamental mission is to help operators optimize the player experience and NEFOS Intralot Cloud provides operators with an alternative effective operational model to do this. ♦

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multi-state lottery games such as "Mega Millions" (involving the cooperation of 41 states, the District of Columbia and the U.S. Virgin Islands) and "Powerball" (operated by the Multi-State Lottery Association, with membership including 31 states, the District of Columbia and the U.S. Virgin Islands). States that accept some Internet gambling within their borders could agree on uniform licensing, security and operational standards, leaving them free – as indeed they should be – to determine which games will be permitted within their borders. The often-repeated claim that state regulation of Internet gambling will lead to inconsistent rules and standards need not come to pass. Pursuant to state compacts, states could establish a national license and/or national rules and standards for Internet gambling operators.

CONCLUSION

In summary, the claims of the AGA in support of federal Internet

poker legislation should not be accepted uncritically. Upon close analysis, their arguments in support of a federal infrastructure for Internet poker are not compelling. State laws can be passed to effectively deter, prevent and detect underage online gambling, problem gambling and gambling cheating, and existing federal laws can address fraud and money laundering. Further, state regulation of Internet gambling need not result in inconsistent rules and regulations. The states have demonstrated that they can reach agreement among themselves on gambling issues, and they could, pursuant to state compacts, establish uniform Internet gambling rules and regulations. The DoJ Opinion does not create a need for a federal Internet gambling infrastructure. ♦

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