

PROHIBITION REINCARNATED? THE UNCERTAIN FUTURE OF ONLINE GAMBLING FOLLOWING THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

MICHAEL D. SCHMITT*

There is a practice around today that causes a lot of problems, damages families, people lose their jobs, they get in debt. They do it in excess. It is called drinking. . . . Prohibition didn't work for alcohol; it doesn't work for gambling.

- Representative Barney Frank (D-MA)
152 Cong. Rec. H4985 (daily ed. Jul. 11, 2006)

I. INTRODUCTION

When President Bush signed the Security and Accountability For Every (“SAFE”) Port Act into law on October 13, 2006,¹ debate was immediately sparked over the appropriateness of one aspect of the new law. The controversy surrounded the inclusion of the Unlawful Internet Gambling Enforcement Act (“UIGEA”) that was seemingly “tacked on” to the end of a completely unrelated port security bill.² Opponents to the UIGEA have cried foul, saying that the Act was forced through Congress by attaching it to the noncontroversial Port Act.³ In fact, some Congressmen and Senators admit that they were not even allowed to see the final version of the gambling bill before casting their votes.⁴ While this may raise issues regarding political improprieties in Congress, challengers to the UIGEA may be wasting their time by focusing on its alleged procedural shortcomings. Instead, they should be focusing on a much more important characteristic of the Act: that it simply will not work.

Despite its daunting title, the UIGEA actually does nothing to address the legality of online gaming or describe what constitutes “unlawful

* J.D. Candidate 2008, University of Southern California Law School. B.S. 2004, Boston College. I finalized my research on this Note in the Fall of 2007. As the topic continues to evolve, I recommend the following website to readers for reliable and up-to-date information: <http://www.compatiblepoker.com/usa.php#usapokerupdates>. I would also like to thank my friends and family for their support and for listening to all of my complaints and frustrations throughout this process.

¹ Press Release, House Fin. Servs. Comm., President Enacts Leach Internet Gambling Law (Oct. 13, 2006) (on file with author).

² See I. Nelson Rose, *Congress Makes Sausages*, 11 GAMING L. REV. 1, 1 (2007) [hereinafter Rose I].

³ See Rose I, *supra* note 2, at 1.

⁴ See *id.*

Internet gambling.” Instead, the act is aimed at cutting off the flow of money to online gaming by making it illegal to accept payments or money transfers from persons involved in any form of prohibited Internet gambling.⁵ The intent of the Act is to block offshore payment processors⁶ and casinos from having access to U.S. banks and credit card companies, thus making it impossible for Americans to get money into their online gambling accounts.⁷

On its face, the UIGEA may seem like a practical way of restricting Internet gambling in the United States, but in reality the Act has numerous problems and weaknesses. The biggest problem is that it does not itself criminalize online gambling; it is only an enforcement statute.⁸ Thus, prosecutors cannot invoke UIGEA sanctions unless illegality is established through some other federal or state law.⁹ A myriad of legislation, however, has created confusion as to what forms of Internet gambling are in fact legal versus illegal. The UIGEA acknowledges intrastate and tribal casinos, horse racing, state lotteries, and some fantasy sports as legal forms of online gambling, while explicitly outlawing betting on sporting events.¹⁰ Traditional casino games like blackjack and poker, on the other hand, exist in a sort of “grey area” where questions as to their legality remain unanswered.¹¹ This uncertainty may cripple the effectiveness of the UIGEA because it becomes too difficult to determine financial transactions associated with legal online gambling versus ones made for illegal gambling.

The problems with prohibition of Internet gambling are not exclusively issues of legal uncertainty or statutory construction. From a sociological perspective, endless parallels can be drawn between the UIGEA and the alcohol prohibition of the 1920s.¹² With the UIGEA, the government is once again displaying protectionism over its citizens by restricting their ability to engage in a so-called “illicit” activity.¹³ While the addictive nature of gambling cannot be denied, the solution clearly is not to criminalize the activity. Just as was the case with drinking, the simple fact is that if Americans want to gamble, they will gamble, whether it is illegal or not.

⁵ See Tony Young, *Government Shows Its Hand in Legislation to Curb Internet Gambling*, L.A. DAILY JOURNAL, Oct. 12, 2006, available at <http://www.sheppardmullin.com/assets/attachments/150.PDF>.

⁶ Payment processors, also known as “e-wallets,” are financial intermediaries with which individuals can establish virtual accounts in order to easily transfer funds to and from illegal gambling websites. Many payment processors are located in foreign nations and are thus harder for Congress to regulate. Some examples of well known e-wallets are NETELLER and Firepay. See *id.* See also I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 540 (2006) [hereinafter Rose II].

⁷ See Young, *supra* note 5.

⁸ See Catherine Holahan, *Online Gambling Still in the Cards? Loopholes in the Unlawful Internet Gambling Enforcement Act May Render it Ineffective in Preventing Online Gambling*, BUSINESSWEEK ONLINE, Oct. 3, 2006, http://www.businessweek.com/technology/content/oct2006/tc20061002_295924.htm (last visited Jan. 4, 2008) [hereinafter Holahan I].

⁹ See *id.*

¹⁰ See George F. Will, *Prohibition II: Good Grief: When Government Restricts Americans' Choices, Ostensibly for Their Own Good, Someone is Going to Profit from the Paternalism*, NEWSWEEK, Oct. 23, 2006, at 78.

¹¹ See Young, *supra* note 5.

¹² See Will, *supra* note 10, at 78.

¹³ See *id.*

This Note will examine the social, legal, and economic ramifications of the UIGEA and analyze the future prospects of online gaming in light of the Act. Part II provides a history of online gambling and the existing legislation relating to it, concluding with a brief discussion of the motivations leading up to the UIGEA. Part III discusses the Act itself and examines how the law affects the current state of Internet gambling law. Part IV looks at how the UIGEA has affected the gambling industry and points out some of the Act's negative consequences. Part V discusses the social concerns behind the Act and considers whether the UIGEA will actually promote the social goals that it intends to. Part VI discusses the current challenges faced by the UIGEA, and offers legalization and regulation as a better long-term solution.

II. THE PATH TO THE UIGEA

The Internet explosion during the mid-nineties is probably the most significant technological development of modern times. The Internet changed everything. It changed the way we communicate, the way we learn, the way we socialize, and the way we do business. All of a sudden, people could "access tremendous amounts of information in a flexible and convenient way."¹⁴ Entrepreneurs and visionaries saw the enormous potential of the Internet in being able to reach markets and consumers that were previously inaccessible.¹⁵ A new era of "e-commerce" was launched with everybody "rac[ing] to get themselves online."¹⁶

Gambling was one of the first industries to really thrive in the online environment.¹⁷ Although many suspected that it was illegal in some form, the ambivalent and vague laws against online gambling were not enough to deter businessmen from pursuing the huge profit opportunities they envisioned.¹⁸ The first online casino and sports book opened in August 1995, with many more following shortly after.¹⁹ The industry has seen wild popularity growth over the last decade, especially in the last few years as poker has become America's new pastime.²⁰ Currently, there are estimated to be over two thousand gambling websites offering everything from poker and casino games to old fashioned bingo.²¹ Globally, Internet gambling revenues were around twelve billion dollars in 2005, and they were projected to reach twenty-four billion dollars by 2010 before the passage of

¹⁴ DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET* 176 (Univ. of Nev. Press 2005).

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *See id.* at 177.

¹⁹ AM. GAMING ASS'N, *INDUSTRY INFORMATION FACT SHEETS: INTERNET GAMBLING*, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=17 (last visited Mar. 8, 2007).

²⁰ Participation in the World Series of Poker's Main Event, widely considered the most prestigious poker tournament in the world, has increased enormously over the last decade from 517 players in 2000 to 8773 players in 2006. *See WSOP History, THE WORLD SERIES OF POKER 2007*, <http://www.wsop2007.com/wsop-history.php> (last visited Jan. 15, 2008).

²¹ AM. GAMING ASS'N, *supra* note 19.

the UIGEA.²² In the U.S. market alone, around twelve million people participated in some form of Internet gambling last year resulting in over six billion dollars in revenues.²³

A. PRE-EXISTING INTERNET GAMBLING LEGISLATION

With the amount of people and money involved, it is not surprising that state and federal governments have felt obligated to address online gambling. The surprising part, however, has been their approach. Instead of regulating and taxing the highly profitable industry, lawmakers have moved almost exclusively towards prohibition and criminalization.²⁴

“In general, gambling is a matter of state law,” but since “Internet gambling typically occurs through interstate or international means . . . federal law is used to protect the states from having their laws circumvented.”²⁵ Only eight states have explicitly outlawed Internet gambling, and the gambling laws in other states are somewhat vague in their application to the Internet.²⁶ On the federal level, existing laws are ambiguous as to which forms of gambling they apply to, and whether they apply to online gambling at all.²⁷ Nevertheless, the Department of Justice has expressed its ability to prosecute online gambling under the alleged authority of various existing federal statutes, most importantly the Wire Act.²⁸

1. *The Interstate Wire Communications Act*

The Wire Act of 1961 is the federal criminal statute most relevant to Internet gambling.²⁹ Its original purpose was to serve as a weapon against organized crime outfits that were well-known for running illegal sports books and betting services.³⁰ Subsection (a) of the act states:

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 . . . or imprisoned not more than two years, or both.³¹

²² See Henry Hensley, *Has Internet Gambling Folded for Good?*, GEO. PUB. POL'Y REV. ONLINE, Oct. 23, 2006, <http://www9.georgetown.edu/grad/gppi/GPPIReview/index.cfm?tpl=article&articleID=35> (last visited Jan. 3, 2008).

²³ See Will, *supra* note 10, at 78.

²⁴ See SCHWARTZ, *supra* note 14, at 186.

²⁵ See U.S. GEN. ACCOUNTING OFFICE, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES, GAO-03-89 11 (2002), available at <http://www.gao.gov/new.items/d0389.pdf>.

²⁶ See CHUCK HUMPHREY, STATE GAMBLING LAW SUMMARY, <http://www.gambling-law-us.com/State-Law-Summary> (last visited Mar. 19, 2007).

²⁷ See Young, *supra* note 5.

²⁸ See *id.*

²⁹ See *id.*

³⁰ See SCHWARTZ, *supra* note 14, at 117–19.

³¹ 18 U.S.C. § 1084(a) (2006).

The Wire Act was intended to assist the states in enforcing their respective laws on gambling and attack “those who would, in furtherance of any gambling activity, employ any means within direct federal control.”³²

In order to be convicted under the Wire Act, one must be “engaged in the business of betting or wagering.”³³ Individual bettors and social gamblers are excluded, and thus cannot be prosecuted.³⁴ Congress felt that the goal of stopping illegal gambling was better served by imposing duties on those who make gambling their day-to-day business, rather than imposing criminal sanctions on the individual bettor.³⁵

Since the Internet involves use of “wire communication facilities” such as telephone and data lines, online gambling operations may violate the Wire Act by accepting bets from people in the United States.³⁶ However, “[a]lthough some Internet gambling businesses, including foreign entities, have been successfully prosecuted under the Wire Act, courts do not agree on the applicability of certain sections of the statute [I]ndividual courts have reached different conclusions about the types of gambling covered by the act.”³⁷ The differing interpretations are a result of the ambiguity of the phrase “any sporting event or contest.” Courts have struggled with whether “sporting” is an adjective intended to modify both “event” and “contest” or whether “sporting event” and “contest” are independent references.³⁸ In *In re Mastercard Int’l, Inc.*, the Fifth Circuit upheld a narrow interpretation by stating that “a plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sporting event”³⁹ As a result, online casino games such as blackjack and poker are currently not covered by the Wire Act, and have thus recently “existed in a state of questionable legality.”⁴⁰

Another source of uncertainty with the language of the Wire Act is the use of the word “transmission” and its application to the Internet.⁴¹ Some courts have held that a “transmission” requires both the receiving *and* sending of information through a wire communication while others have held that simply receiving information is enough for a violation.⁴² Hence, it is difficult to know what type of activity the Internet user would have to engage in to constitute a violation of the Wire Act. Would a professional

³² *Martin v. United States*, 389 F.2d 895, 898 (5th Cir. 1968). See Jeffery Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 GAMING L. REV. 393, 394 (2002), available at <http://www.liebertonline.com/doi/abs/10.1089/109218802760363987>.

³³ § 1084(a).

³⁴ See *United States v. Baborian*, 528 F. Supp. 324, 328 (D.R.I. 1981). Individual bettors who are “professional gamblers,” however, may be convicted of violating the Wire Act. *United States v. Sellers*, 483 F.2d 37, 45 (5th Cir. 1973).

³⁵ See *Cohen v. United States*, 378 F.2d 751, 756 (9th Cir. 1967).

³⁶ See Rodefer, *supra* note 32.

³⁷ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 12.

³⁸ See Rodefer, *supra* note 32.

³⁹ *In re MasterCard Int’l, Inc.*, Internet Gaming Litig., 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff’d*, 313 F.3d 257 (5th Cir. 2002).

⁴⁰ See Young, *supra* note 5.

⁴¹ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 12.

⁴² See *United States v. Stonehouse*, 452 F.2d 455, 457 (7th Cir. 1971) (stating that the Wire Act “does not encompass mere reception” of information associated with gambling). *But see United States v. Reeder*, 614 F.2d 1179, 1184 (8th Cir. 1980) (concluding that “the statute forbids the use of interstate facilities for sending *or* receiving wagering information”) (emphasis added).

gambler who merely reads sports betting lines and information on the Internet violate the Act, even if he never uses that information to place illegal bets? It seems that many courts would say yes, but the answer is by no means certain.

Finally, the Wire Act may run into future problems with its applicability to online gambling if the Internet is eventually accessible through means that do not employ a “wire communication facility.”⁴³ For instance, gambling websites that are accessed via radio or satellite Internet connections would arguably fall outside the reach of the Wire Act.⁴⁴ This hurdle is likely insignificant, however, because it is hard to envision an entirely wireless method of accessing the Internet.⁴⁵

In recent years, there has been movement in Congress to amend the Wire Act to explicitly prohibit all forms of online gambling.⁴⁶ These efforts have met significant resistance, however, “because of the potentially broad impact of a ban on a variety of interests, including Internet service providers, state governments,” and already legal forms of online gambling like interstate horse racing.⁴⁷ Despite the uncertainty, the U.S. Justice Department continues to maintain the shaky position that the Wire Act prohibits all forms of Internet gambling.⁴⁸

2. *Other Federal Statutes*

Other federal laws seemingly applicable to Internet gambling are the Travel Act, the Interstate Transportation of Wagering Paraphernalia Act (“ITWPA”), and the Illegal Gambling Business Act (“IGBA”).⁴⁹ Both the Travel Act and ITWPA were companion legislation to the Wire Act in 1961, while the IGBA was passed nine years later in 1970.⁵⁰ All three of these statutes were aimed at curtailing syndicated gambling and bookmaking which was considered “the lifeline of organized crime.”⁵¹

The Travel Act imposes criminal penalties on those who utilize “any facility in interstate or foreign commerce . . . with the intent to distribute the proceeds of . . . or otherwise promote, manage, establish, carry on, or facilitate . . . any unlawful activity”⁵² An “unlawful activity” includes any business enterprise involving gambling which is in violation of the laws of the state in which it is conducted.⁵³ Internet gambling would be covered by the Travel Act because facilities of interstate commerce are

⁴³ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 13.

⁴⁴ See Adrian Goss, *Jay Cohen's Brave New World: The Liability of Offshore Operators of Licensed Internet Casinos for Breach of United States Anti-Gambling Laws*, 7 RICH. J.L. & TECH. 32 (2001).

⁴⁵ See Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1582 (1999).

⁴⁶ See *id.* at 1583.

⁴⁷ See AM. GAMING ASS'N, *supra* note 19.

⁴⁸ Keller, *supra* note 45, at 1583.

⁴⁹ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 13. See also Keller, *supra* note 45, at 1580 n.57.

⁵⁰ See Rodefer, *supra* note 32, at 398.

⁵¹ See *United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974).

⁵² 18 U.S.C. § 1952(a) (2006).

⁵³ § 1952(b).

used when illegal online gaming companies manage and promote their websites.⁵⁴

ITWPA criminalizes the introduction into interstate commerce of “any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing or other device used, or to be used” in illegal gambling.⁵⁵ The statute was designed to “erect a substantial barrier to the distribution of . . . materials used [for] various forms of illegal gambling.”⁵⁶ As opposed to the Travel Act, which requires the intent to participate in an illegal business enterprise, ITWPA does not require specific intent to violate the law.⁵⁷ It matters only that the perpetrator knowingly (not by accident or mistake) moved gambling paraphernalia in interstate commerce.⁵⁸ Therefore, a subscriber to an online gaming site who downloads the software necessary to place bets or wagers is violating ITWPA by sending or receiving a “device” in interstate commerce to be used for gambling.⁵⁹

The IGBA prohibits owning, operating, managing, or financing an “illegal gambling business.”⁶⁰ An “illegal gambling business” is one that violates the laws of the state in which it is conducted, “involves five or more persons,” and either is in “substantially continuous operation for a period in excess of 30 days, or has a gross revenue of more than \$2000 in any single day.”⁶¹ Given the minimal proof requirements, it seems clear that the majority of Internet gambling sites would violate the IGBA.⁶² “Like the Wire Act, the IGBA applies only to gambling businesses, not individual gamblers.”⁶³

“Internet gambling sites, as currently operated, appear to violate several of the provisions of [the above mentioned] acts.”⁶⁴ The Wire Act, though, has been the predominant tool used to prosecute Internet gambling across state and international lines.⁶⁵ This may be because a conviction is relatively easier under the Wire Act since it does not rely on the violation of a state law. Recent case law limiting the applicability of the Wire Act to certain forms of Internet gambling⁶⁶ may change this, however, and the Justice Department may be forced to pursue convictions under alternative statutes, such as the Travel Act or the IGBA.

⁵⁴ See Rodefer, *supra* note 32, at 396.

⁵⁵ 18 U.S.C. § 1953(a) (2006).

⁵⁶ Erlenbaugh v. United States, 409 U.S. 239, 246 (1972).

⁵⁷ See United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990).

⁵⁸ See *id.*

⁵⁹ See Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U. J. SCI. & TECH. L. 7, 18 (1996).

⁶⁰ See 18 U.S.C. § 1955 (2006).

⁶¹ *Id.*

⁶² U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 14.

⁶³ *Id.*

⁶⁴ Keller, *supra* note 45, at 1580 n.58.

⁶⁵ It is useful to note that all prosecutions under the Wire Act have been aimed at operators of online sports betting sites. This is because sports betting is the only form of gambling expressly prohibited by the Wire Act. See Holahan I, *supra* note 8.

⁶⁶ See notes 36–40 *supra* and accompanying text.

3. State Internet Gambling Laws

Internet gambling laws vary from state to state.⁶⁷ Currently, eight states have explicitly outlawed Internet gambling through new legislation or amendments to existing gambling laws.⁶⁸ These states are Illinois, Indiana, Louisiana, Michigan, Nevada, Oregon, South Dakota, and Washington.⁶⁹ Other states, like Utah and Wisconsin, indirectly proscribe Internet gambling through other gaming laws or blanket prohibitions on all forms of gambling.⁷⁰ Nevada, despite its express prohibition, has authorized the state gaming commission to allow Internet gambling if it determines that it can operate in compliance with all applicable federal laws and that access can be restricted to players of lawful age.⁷¹

Though most states do not have specific prohibitions, almost all state attorneys general maintain that Internet gambling is illegal within their borders.⁷² This is because the general anti-gambling laws of every state criminalize the operation of any unlicensed and unregulated gambling business.⁷³ Since gaming websites are deemed to be doing business in the state where the players are located, they would be violating the laws of each state from which they accept bets and wagers.⁷⁴ Based on this logic, it would appear that unlicensed Internet gambling is illegal in every state whether or not a specific law against it exists.⁷⁵

In reality, it is not that simple. First of all, state anti-gambling statutes face “the presumption that they do not apply if part of the activity takes place overseas,” which is clearly relevant to the majority of online casinos and sports books.⁷⁶ Furthermore, there is some speculation that state gambling laws could be unconstitutional under the dormant Commerce Clause because they are permitted to exempt specific intrastate Internet gambling entities at the expense of out-of-state or foreign entities.⁷⁷ Thus, even in states that declare Internet gambling illegal, the laws remain inconsistent and unclear. Further proof that state prosecutors lack confidence in their respective Internet gambling laws is seen in the minimal amount of criminal prosecutions that have taken place against online gambling businesses under state statutes.⁷⁸

⁶⁷ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 16–17.

⁶⁸ Joseph M. Kelly et al., *U.S. Department of Justice Travel Alert: U.S. Enforcement Efforts Likely to Curtail Business Travel Rather than Online Gambling*, 10 GAMING L. REV. 532, 533 (2006).

⁶⁹ *See id.*

⁷⁰ *See, e.g.*, UTAH CODE ANN. § 76-10-1101-02 (2006). *See also* Linda J. Shorey et al., *Do State Bans on Internet Gambling Violate the Dormant Commerce Clause?*, 10 GAMING L. REV. 240, 242 (2006).

⁷¹ *See* NEV. REV. STAT. § 463.750 (2007). *See also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 17.

⁷² *See* Kelly et al., *supra* note 68, at 533 (stating that forty-nine out of fifty state attorneys general support the federal prohibition of Internet gambling).

⁷³ *See* CHUCK HUMPHREY, ANALYSIS OF THE INTERNET GAMBLING FUNDING BAN, <http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm> (last visited Mar. 21, 2007).

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *See* Rose I, *supra* note 2, at 1–2; Rose II, *supra* note 6, at 538.

⁷⁷ *See generally* Shorey et al., *supra* note 70, at 242–46 (comparing the recent Supreme Court dormant Commerce Clause decision in *Granholm v. Heald*, 544 U.S. 460 (2005), to state Internet gambling laws).

⁷⁸ *See* Kelly et al., *supra* note 68, at 533.

B. IMPETUS FOR THE UIGEA

Given its staggering growth and popularity over the last ten years, it is obvious that existing federal and state laws were doing virtually nothing to curb Internet gambling. Most laws were aimed at criminalizing gambling businesses rather than individual bettors, so people were placing bets without fear of punishment.⁷⁹ Owners of Internet gambling businesses saw the lack of prosecution as a sign that Internet gambling laws were weak, which encouraged them to exploit the lucrative U.S. gambling market without fear.⁸⁰ Thus, online gaming continued to grow exponentially throughout the late nineties and early 2000s.

As the industry got bigger and bigger, lawmakers became more cognizant of the potential impact Internet gambling could have on American society if it went unchecked. In the eyes of some politicians, the highly addictive nature of gambling coupled with easy access to the Internet posed a huge threat to American families and youth.⁸¹ Other lawmakers focused on the negative economic aspects, calling Internet gambling a drain on the U.S. economy and a threat to state licensed gambling monopolies that generate millions of dollars in tax revenues each year.⁸² With these concerns in mind, Congress began contemplating various pieces of Internet gambling legislation that would eventually lead to the passage of the UIGEA in October 2006.⁸³

III. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

For a statute with a relatively straightforward purpose—restricting illegal Internet gambling—the UIGEA is actually quite confusing. The Act contains a large amount of definitions, exemptions, and carve-outs that, coupled with some sloppy legislative drafting, make the UIGEA nearly unintelligible. That said, the best way to understand its application and function is through a section-by-section analysis of the statutory text, which follows below.

A. SECTION 5361: CONGRESSIONAL FINDINGS AND PURPOSE

Section 5361(a) explains why Congress chose to attack the flow of money to online gaming by observing that “Internet gambling is primarily funded through personal use of payment system instruments, credit cards,

⁷⁹ See *supra* Part II.A.

⁸⁰ See Kelly et al., *supra* note 68, at 533.

⁸¹ See SCHWARTZ, *supra* note 14, at 186.

⁸² *Id.*

⁸³ The predecessor to the UIGEA was first introduced into Congress in 2003 as Senate Bill 627, also known as the Unlawful Internet Gambling Funding Prohibition (“UIGFP”). The UIGFP passed through the Senate by a large margin, but died in the House because Congress adjourned before a vote was cast. Subsequent versions of the bill would meet resistance from various lobby groups, most importantly the commercial casino industry, because they did not allow states to regulate online gaming within their own borders. Four substantially similar versions of the UIGFP died in consecutive Congresses before the UIGEA was introduced. See *id.* at 191–93.

and wire transfers.”⁸⁴ This section also accurately states that “new mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement [is] often inadequate for enforcing gambling prohibitions”⁸⁵ Subsection (b) contains a preemption clause that says the Act shall not “alter[], limit[], or extend[] any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.”⁸⁶ Read together, these two clauses point out one of the UIGEA’s major flaws—that it acknowledges the uncertainty and ineffectiveness of current Internet gambling laws, but makes the deliberate decision not to do anything about it.⁸⁷

B. SECTION 5362: DEFINITIONS

Section 5362 contains a laundry list of relevant definitions that are meant to shed light on the meaning of certain words and provisions in the UIGEA.

The term “bet or wager” as used in the Act means “the staking or risking . . . [of] something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance.”⁸⁸ The inclusion of the language “game subject to chance” is Congress’s attempt to expand the reach of federal law to online casino games and poker, two areas that are not addressed by the Wire Act.⁸⁹ There are multiple reasons, however, why this language is likely ineffective, at least as it applies to Internet poker. First, online poker companies will argue that poker is a game of skill rather than luck or “chance.” At least some state courts agree with this argument, including state courts in California.⁹⁰ Second, and most importantly, the UIGEA applies only to Internet gambling that is *already* “unlawful,” meaning the bet or wager must violate an existing federal or state law.⁹¹ Since it is often difficult to find a law that applies to a specific Internet bet, prosecutors may have trouble triggering sanctions under the UIGEA.⁹²

Section 5362 also includes a number of carve-outs for activities that are exempt from prosecution under the UIGEA. Some of the exceptions are for financial instruments that contain some elements of gambling, but are obviously not meant to be “bets or wagers” as defined by the Act.⁹³ These include securities, commodities and futures trading, insurance and indemnity contracts, and deposits or other transactions with insured depository institutions.⁹⁴ Free games and fantasy sports are also exempted

⁸⁴ 31 U.S.C. § 5361(a) (2006).

⁸⁵ *Id.*

⁸⁶ § 5361(b).

⁸⁷ See Eric Goldman & John Ottaviani, *Top Cyberlaw Developments of 2007*, CYBERSPACE LAWYER, Jan. 2007.

⁸⁸ 31 U.S.C. § 5362 (2006).

⁸⁹ Rose I, *supra* note 2, at 1. See Young, *supra* note 5. See also discussion *supra* Part II.A.1 (discussing the limitations on the applicability of the Wire Act to various forms of Internet gambling).

⁹⁰ See, e.g., *Bell Gardens Bicycle Club v. Dept. of Justice*, 36 Cal. App. 4th 717, 744 (Ct. App. 1995) (stating that poker “predominately implicates a player’s skill”).

⁹¹ See Rose II, *supra* note 6, at 538.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*; 31 U.S.C. § 5362(1)(E) (2006).

from the Act if certain requirements are met.⁹⁵ Further exclusions in the definition of “unlawful Internet gambling” include activities that are clearly gambling, but are declared by statute not to be.⁹⁶ Wholly intrastate Internet gambling is left to the individual states to regulate so long as measures are taken to block access to minors and persons outside the state.⁹⁷ Internet gambling on and between Indian reservations is similarly legal so long as it is authorized by the Indian Gaming Regulatory Act.⁹⁸ Finally, the UIGEA does not affect the legality of interstate, pari-mutuel horserace betting over the Internet which is authorized by a recent amendment to the Interstate Horseracing Act of 1978.⁹⁹ The presence of so many exceptions and carve-outs is troubling. It sends the message that “Internet gambling is bad, but not always” and gives the UIGEA a watered-down and hypocritical feeling.

Other important definitions contained in § 5362:

“Financial transaction provider” is defined broadly to encompass every possible entity, domestic and foreign, that participates in the transferring of money for Internet gambling.¹⁰⁰ By including international financial institutions, the UIGEA reaches foreign e-wallets like NETELLER and FirePay.¹⁰¹

Being in the “business of betting or wagering” expressly excludes financial transaction providers, which means banks and payment processors cannot be guilty of violating § 5363 of the UIGEA.¹⁰² Individual bettors cannot violate the UIGEA either because gambling is not their business.

A “restricted transaction” is any transfer of money for illegal Internet gambling.¹⁰³

A “designated payment system” is any payment system used by financial transaction providers that the federal government determines could be used to facilitate restricted transactions.¹⁰⁴

⁹⁵ Free games are legal as long the prizes are limited to points or credits that can be redeemed for free participation in future games, and not for any items carrying a monetary value. Fantasy sports leagues are also legal as long as fantasy teams are not composed merely of the players of a real team, and so long as “winning outcomes reflect the relative knowledge and skill of the participants” and are determined by the accumulated statistics and performance of athletes in multiple real-world sporting events. Also, prizes for fantasy sports leagues must be announced ahead of time and cannot be based on the fees paid by league participants. § 5362(1)(E)(ix); Rose II, *supra* note 6, at 538.

⁹⁶ § 5362(1)(E)(ix); Rose II, *supra* note 6, at 538.

⁹⁷ See Rose II, *supra* note 6, at 538. *But see* Shorey et al., *supra* note 70, at 242–46 (claiming that legalized intrastate gambling systems may be unconstitutional under the Commerce Clause for discriminating against out-of-state or foreign citizens and businesses).

⁹⁸ See 31 U.S.C. § 5362(10)(C) (2006); Rose I, *supra* note 2, at 2.

⁹⁹ See 15 U.S.C. §§ 3001 et seq. (2000).

¹⁰⁰ Rose II, *supra* note 6, at 538. The term “financial transaction provider means a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system.” 31 U.S.C. § 5362(4) (2006).

¹⁰¹ Rose II, *supra* note 6, at 538.

¹⁰² See *id.* The term “business of betting or wagering does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service.” 31 U.S.C. § 5362(3) (2006). However, the UIGEA will be enforceable against financial institutions once federal regulations are in place for identifying and blocking restricted transactions. See Young, *supra* note 5.

¹⁰³ § 5362(7).

¹⁰⁴ § 5362(3).

C. SECTION 5363: PROHIBITION ON ACCEPTANCE OF MONEY TRANSFERS

The basic prohibition of the UIGEA is contained in § 5363:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling

- (1) credit, or the proceeds of credit . . .
- (2) an electronic fund transfer . . .
- (3) any check, draft, or similar instrument . . . or
- (4) the proceeds of any other form of financial transaction . . . which involves a financial institution as a payor or financial intermediary on behalf of . . . such other person.¹⁰⁵

The most surprising part of § 5363 is that Congress chose to prohibit only the acceptance of money transfers for online gambling.¹⁰⁶ If the intent is to stop the flow of money to gambling websites, one would think that transmitting money would be illegal on both ends.¹⁰⁷ Congress could have made the law more effective by also criminalizing the sending of funds because the fear of criminal liability may have caused many casual bettors to abstain.

D. SECTION 5364: POLICIES AND PROCEDURES TO IDENTIFY AND PREVENT RESTRICTED TRANSACTIONS

Pursuant to § 5364, the Department of the Treasury and the Federal Reserve were given 270 days from the date of the UIGEA's enactment¹⁰⁸ to "prescribe regulations . . . requiring each designated payment system, and all participants therein, to identify and block . . . restricted transactions through the establishment of [reasonable] policies and procedures."¹⁰⁹ The first step will likely be an expansion of the use of merchant codes that are sent in authorization messages to financial institutions, allowing them to identify some information about the recipient of a money transfer.¹¹⁰ In 2001, Visa created merchant code 7995 to identify Internet gambling companies in order to prevent use of its credit cards for online gambling.¹¹¹ Federal regulations will probably require all financial transaction providers and payment systems to stop sending funds to any Internet company with the 7995 merchant code. The use of merchant codes is far from perfect,

¹⁰⁵ 31 U.S.C. § 5363 (2006).

¹⁰⁶ See Rose II, *supra* note 6, at 539.

¹⁰⁷ See *id.*

¹⁰⁸ The UIGEA was enacted on October 13, 2006, meaning the deadline for proscribing regulations was July 10, 2007. As of the writing of this Note, no regulatory action has been taken by the government. However, there has been recent speculation that proposed rules and regulations will be released in the very near future, perhaps the beginning of October. See *Poker Regulations Coming Out This Week*, COMPATIBLEPOKER.COM, Sept. 28, 2007, <http://www.compatiblepoker.com/Poker+Regulations+Coming+Out+This+Week.art.htm> (last visited Jan. 4, 2008).

¹⁰⁹ 31 U.S.C. § 5364(a) (2006).

¹¹⁰ See Andrew Serwin, *The Battle Over Online Gambling*, CYBERSPACE LAWYER, Dec. 2006, available at http://www.foley.com/files/tbl_s31Publications/FileUpload137/3754/The%20Battle%20Over%20Online%20Gambling.pdf.

¹¹¹ See Rose II, *supra* note 6, at 539.

however, and the potential for misidentifying transactions as illegal seems high. Congress therefore included § 5364(d) as a protection for financial institutions by shielding them from liability for wrongfully blocking legitimate transactions, so long as they were in compliance with the policies and procedures set forth by the Federal Reserve and the Treasury.¹¹²

As stated in § 5364(b)(1)-(3), the regulations imposed must be reasonable and appropriate such that financial institutions are not overburdened or required to implement ultra-expensive screening systems.¹¹³ Thus, transactions that cannot be practically identified and blocked are exempted from the regulations.¹¹⁴ This exception is likely a concession to the banking community that feared the UIGEA would require it to set up expensive systems for screening paper checks.¹¹⁵ Currently, “[b]anks have no way of reading who the payee is on paper checks,” and requiring them to develop a system to do so is too burdensome.¹¹⁶ In the end, Congress probably realized that paper checks represent a relatively miniscule portion of the overall money flow to Internet gambling, so allowing them to pass would not undermine the Act’s effectiveness.¹¹⁷

Federal regulators may encounter an enormous hurdle when attempting to draft policies and procedures that satisfy § 5364(b)(4), mandating that any regulations “ensure that transactions” that are “excluded from the definition of unlawful internet gambling . . . are not blocked or otherwise prevented or prohibited.”¹¹⁸ This means that financial institutions will be required to have procedures that can discern the difference between transactions associated with legal and illegal Internet gambling. Doing so would require knowing the exact location of each individual gambler at the time the money transfer takes place because Internet gambling laws are different in every state.¹¹⁹ Instead of trying to create a system capable of doing this, which seems virtually impossible and surely cost-prohibitive, financial institutions will likely block every single transaction that appears to be related to online gambling and then seek shelter under § 5364(d) to avoid liability. This sort of chaotic scheme ends up hindering the UIGEA’s effectiveness by creating a logjam of blocked financial transactions, many of which are actually legal in the first place. Interstate horserace betting and tribal gaming would also be harmed because fund transfers to their legal gambling websites would face a higher chance of being blocked.

Ultimately, the full effect of the UIGEA cannot be assessed until the regulations are implemented and financial institutions institute procedures to identify illegal transactions.¹²⁰ The July, 2007 deadline imposed by the UIGEA passed without any regulatory action, and as of the writing of this

¹¹² *See id.*

¹¹³ *See* § 5364(b)(1)-(3).

¹¹⁴ *Id.*

¹¹⁵ *See* Rose II, *supra* note 6, at 539.

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See* 31 U.S.C. § 5364(b)(4) (2006).

¹¹⁹ *See* discussion *supra* Part II.A.3, *s.*

¹²⁰ *See* Young, *supra* note 5.

Note, no regulations have been released.¹²¹ For the time being, the only potential for liability under the UIGEA rests with operators of illegal gambling websites, but that will change once the government implements its regulatory scheme.¹²² What remains unknown, however, is how effective U.S. regulations can be against offshore payment processors and foreign banks. Gambling industry expert I. Nelson Rose observes that “while Bank of America will comply, Neteller [sic] might not, because it is not subject U.S. regulations.”¹²³ While this statement may not be technically true,¹²⁴ it is accurate when viewed from a practical standpoint. Since most payment processors used by online gaming companies are located overseas, the practical hurdles in pursuing legal action against them are significant.¹²⁵ Foreign companies are often hard to serve and there are no requirements that other countries cooperate with or enforce U.S. lawsuits, nor are they likely to do so.¹²⁶ These practical and jurisdictional limitations faced by prosecutors may ultimately be a severe downfall of the UIGEA.¹²⁷

E. SECTIONS 5365–5367: CIVIL REMEDIES, CRIMINAL PENALTIES, AND CIRCUMVENTIONS PROHIBITED

Section 5365 allows federal and state attorneys general to bring civil actions against financial institutions and payment processors in federal courts.¹²⁸ It also gives the courts the power to grant preliminary and permanent injunctions to stop companies from processing restricted transactions for illegal online gambling.¹²⁹ Prosecutors, however, will likely encounter the same problems as mentioned above concerning the difficulties of enforcing court orders or injunctions against foreign entities.

Section 5366 lays out the criminal penalties for violating the UIGEA which include up to five years in prison, a fine, and a permanent bar from any future involvement in gambling.¹³⁰

Section 5367 wraps up the UIGEA with the rather obvious, but logical, assertion that financial institutions and payment processors cannot avoid liability under § 5363 if they actually operate illegal gambling sites

¹²¹ See note 108 *supra* and accompanying text.

¹²² See Young, *supra* note 5.

¹²³ See Rose II, *supra* note 6, at 539.

¹²⁴ The UIGEA actually does include foreign financial institutions among those who are subject to the Federal Reserve’s regulations (the “Fed”). “[T]he Act also grants regulatory and enforcement powers to the Fed and the Federal Trade Commission (“FTC”). The FTC’s enforcement authority specifically applies to financial transaction providers not otherwise subject to the jurisdiction of any Federal functional regulators. . . . [Thus, i]f it appears to the Fed or the FTC that these [foreign] financial intermediaries serve primarily as conduits for transmitting funds to online gambling operators, then either one of them could adopt regulations or seek enforcement sanctions effectively banning U.S. financial institutions from dealing with those intermediaries. . . .” Humphrey, *supra* note 73.

¹²⁵ See Young, *supra* note 5.

¹²⁶ See Rose II, *supra* note 6, at 540.

¹²⁷ Young, *supra* note 5.

¹²⁸ See 31 U.S.C. § 5365 (2006).

¹²⁹ See Rose II, *supra* note 6, at 540.

¹³⁰ 31 U.S.C. § 5366 (2006).

themselves.¹³¹ Where this provision might be relevant, though, is in the case of payment processors like NETELLER who normally would be exempt from liability under § 5363 as a “financial transaction provider.” Courts could determine that these overseas payment facilitators are so involved in the movement of funds used in illegal gambling that they are deemed to be “in the business of betting or wagering.”¹³²

IV. EFFECTS OF THE UIGEA ON THE INTERNET GAMBLING INDUSTRY

Following its passage last October, the UIGEA had an immediate chilling effect on much of the Internet gambling industry as gaming companies and players rushed to determine how the new laws applied to them.

A. IMPACT ON INTERNET GAMBLING OPERATORS & PAYMENT PROCESSORS

When news broke that Congress had passed the UIGEA, shares of the large, publicly-owned gambling companies on the London Stock Exchange plunged, eliminating a combined \$7 billion in market capitalization almost instantaneously.¹³³ Shares of PartyGaming PLC, the largest online gambling company, fell fifty-eight percent in a single day after an announcement that the company would shut down its U.S. operations, thus wiping out nearly eighty percent of its revenue stream.¹³⁴ Similarly, 888 Holdings, PartyGaming’s main competitor, said it would stop taking bets from U.S. customers. It then proceeded to watch its share value drop twenty-six percent.¹³⁵ Investors viewed the new law as a death blow to the online gambling companies that once relied on U.S. gamblers for a large majority of their revenues and would now have to fundamentally alter their business models.¹³⁶ These gaming companies had little choice but to leave the U.S. market because there was no reason to risk breaking U.S. laws and expose themselves to potential shareholder lawsuits when there was plenty of money to be made elsewhere.¹³⁷

¹³¹ For instance, Bank of America could not escape liability under the UIGEA for operating an illegal gambling website solely by claiming that it is a “financial transaction provider” and thus not “in the business of betting or wagering.”

¹³² In 2005, NETELLER processed more than \$7.3 billion in financial transactions, with more than ninety-five percent of its revenue coming from transfers involving online gambling. Courts may view this as enough to consider NETELLER as being “in the business of betting or wagering.” See Janet Whitman, *Two Nabbed Over ‘Net Gambling*, N.Y. POST, Jan. 17, 2007, at 34.

¹³³ See *id.*; Eric Pfanner, *Online-Gambling Shares Plunge on Passage of U.S. Crackdown Law*, N.Y. TIMES, Oct. 3, 2006, at C3.

¹³⁴ Pfanner, *supra* note 133.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* PartyGaming and 888 Holdings refocused their businesses on international markets including Latin America, Europe, and the Middle East through aggressive marketing and advertising campaigns. Both companies have experienced dramatic revivals with better than expected revenues and profits through June 2007. See Alistair Osborne, *PartyGaming Fighting Back After U.S. Online Ban*, DAILY TELEGRAPH, Aug. 30, 2007; Graeme Evans, *Gaming Firm Continues Revival*, PRESS ASSOCIATED NEWS LIMITED, Sept. 10, 2007.

The damaging effects of the UIGEA were not unique to the gambling companies. Payment processors watched their shares steeply decline as well after NETELLER issued a warning that the U.S. law would have a “material adverse effect” on future business.¹³⁸ Another e-wallet, FirePay, announced that it would stop doing business with gambling sites that accepted U.S. bets.¹³⁹

B. THE RISE OF SUSPICIOUS, PRIVATELY OWNED INTERNET GAMBLING BUSINESSES

The UIGEA clearly caused a major shakeup in the online gambling industry, at least for the short term. The “top-end people with large publicly held companies” have abandoned the U.S. market entirely and focused on increasing revenues through their international customers.¹⁴⁰ This is not to say, however, that the UIGEA has completely shut off gambling to Americans; in fact, quite the opposite has happened.¹⁴¹ When the legitimate, regulated operators like PartyGaming and 888 Holdings exited the U.S. market, the door was left open for privately held, and generally more suspect, gambling businesses to take their place.¹⁴² More privately owned gambling companies that are willing to defy the UIGEA are sure to pop up as well in an effort to grab a piece of the huge U.S. online gambling market.

For now, the UIGEA has not done very much to diminish the activity of Internet gambling—it has only shifted those who profit from it. By driving out only the legitimate players, the government has allowed the market to be dominated by back-door gambling operations that are unregulated, untaxed, and more apt to be connected to organized crime.¹⁴³ The government has in fact made Americans more vulnerable to financial crimes.¹⁴⁴ The American Gaming Association estimates that over \$5 billion will be bet online in the U.S. this year, only a slight decrease from previous years.¹⁴⁵ Thus, it seems that where there is demand for a highly lucrative and entertaining service such as gambling, there will always be people who are willing to provide that service, whether legal or not. In the Internet gambling context, however, the companies willing to serve bettors are

¹³⁸ See *Special Report: Busted Flush—Online Gambling*, THE ECONOMIST, Oct. 7, 2006, available at http://www.economist.com/business/displaystory.cfm?story_id=E1_SJSDVV (online subscription needed); *Experts: Ban Won't Stop Online Gambling*, INTERNATIONAL BUSINESS TIMES, Oct. 25, 2006, available at <http://ibtimes.com/articles/20061025/internet-gambling-ban.htm> [hereinafter *Experts*]; Lori Tripoli, *The Post-Unlawful Internet Gambling Enforcement Act Online-Gaming Surge?*, 11 GAMING L. REV. 18, 18–19 (2007).

¹³⁹ See *Experts*, *supra* note 138.

¹⁴⁰ See Tripoli, *supra* note 138, at 19.

¹⁴¹ See *id.* at 18–19.

¹⁴² See Catherine Holahan, *Online Gambling Goes Underground: A U.S. Law Aimed at Cracking Down on Internet Gambling may Drive the Practice More into the Shadows and Do Little to Deter Bettors*, BusinessWeek Online, Oct. 19, 2006, http://www.businessweek.com/technology/content/oct2006/tc20061019_454543.htm [hereinafter Holahan II].

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See Steve Mort, *Gaming Industry Discounts Effect of Law Against On-Line Gambling*, Voice of America News, Nov. 16, 2006, available at <http://www.voanews.com/english/archive/2006-11/2006-11-16-voa51.cfm>.

those that are most likely to be involved in crime, identity theft, and money laundering.¹⁴⁶

As mentioned earlier, the full long-term impact of the UIGEA will be hard to gauge until the enforcement mechanisms and procedures for financial institutions are in place.¹⁴⁷ Industry experts remain skeptical, however, that anything can be done to effectively prohibit Internet gambling in the long-run, no matter what course of action Congress takes.¹⁴⁸ In the end, the only conceivable way to discourage Americans from gambling online would likely be severe criminal sanctions on the individual bettors themselves. The virtual impossibility of enforcement against every single online gambler, however, would likely lead this sort of prohibition to fail as well.

V. PROHIBITION REINCARNATED? SOCIAL PROBLEMS RELATING TO THE UIGEA

Gambling has always been a controversial topic in American politics because it pits traditional family values and conservative morals against civil liberties and the freedom to choose the activities in which we engage. Conservative politicians generally take the stance that gambling should be prohibited because it is a destructive vice.¹⁴⁹ In its report to the House of Representatives concerning the UIGEA, the Committee on Financial Services found that Internet gambling has “[led] to personal and family hardships, such as lost savings, excessive debt, bankruptcy, foreclosed mortgages, and divorce.”¹⁵⁰ Others who support prohibitions on Internet gambling focus on the economic concerns of lost tax revenue and drain on the U.S. Gross Domestic Product from the billions of dollars sent overseas.¹⁵¹ Those who oppose prohibition believe that restrictions on Internet gambling inhibit the autonomy of the individual and advocate a sort of “cultural authoritarianism” where Americans are not free to engage in enjoyable activities when others believe they are morally wrong.¹⁵²

By declaring a total ban on Internet gambling, Congress is once again delving into the dangerous practice of legislating morality. Previous attempts to “purify Americans’ behavior” have been futile, yet the government seems resolved to ignore history’s warnings when it comes to

¹⁴⁶ See Holahan II, *supra* note 142. Privately owned Internet gambling sites almost always base their operations out of loosely regulated, developing nations which makes financial transactions more difficult to trace and more likely to end up in criminal hands. *Id.* Furthermore, some Internet gambling operations are suspected to have ties to international terrorist groups. See generally Bob Shemelgian, *Is Online Gambling a Terrorist Front?*, LAS VEGAS BUSINESS PRESS, Feb. 9, 2007, available at http://www.lvbusinesspress.com/articles/2007/02/09.news/iq_12303811.

¹⁴⁷ See notes 118–26 *supra* and accompanying text.

¹⁴⁸ See Mort, *supra* note 145.

¹⁴⁹ See, e.g., Press Release, Senator Bill Frist, Frist Statement on Passage of Internet Gambling, Sept. 29, 2006 (on file with author) (stating that gambling “undermines the family, dashes dreams, and frays the fabric of society”).

¹⁵⁰ H.R. REP. NO. 109–412, pt. 1, at 9 (2006).

¹⁵¹ See Holahan I, *supra* note 8.

¹⁵² See 152 CONG. REC. H4985 (daily ed. July 11, 2006) (statement of Sen. Barney Frank (D-MA) in opposition to proposed Internet gambling legislation).

Internet gambling.¹⁵³ The most obvious example of Congress's previous ventures into the arena of social morality is the alcohol prohibition of the Eighteenth Amendment.¹⁵⁴ Not only was the Prohibition miserably unsuccessful in halting American alcohol consumption, it drove the alcohol industry underground and into the hands of organized crime. Nothing was going to stop Americans from drinking, and Congress eventually realized that the best solution to the crime problem surrounding the alcohol industry was legalization and strict regulation. It is curious that the government seems oblivious to the endless parallels between the prohibition on alcohol and the prohibition on Internet gambling. As elected officials, lawmakers should be smart enough to realize that a more practical approach is needed in order to find a solution for online gambling and that concerning themselves with the moral value of our activities is, in this case, not appropriate.

The UIGEA and other gambling laws also raise some troubling questions regarding legislative hypocrisy and the influence of special interest groups in our government. In general, gambling laws designate certain forms of gambling as illegal, while maintaining the legality of others, almost at random.¹⁵⁵ How can one explain the difference between online betting on horseracing, which is legal, and online betting on football, which would be illegal under the Wire Act and the UIGEA? Even more curiously, what is it that makes Internet gambling acceptable so long as it takes place on an Indian reservation as opposed to within someone's home? Are the supposed dangers and threats of addictive gambling somehow less for these legal forms of gambling? The answer is no, they are not. By allowing so much inconsistency in the laws against gambling, one begins to wonder whether Congress is really so concerned about preserving the morality and integrity of the American family.¹⁵⁶ Instead it seems that our government is playing both sides of the fence by outlawing the forms of gambling that it cannot easily tax.¹⁵⁷

VI. CURRENT CHALLENGES FACED BY THE UIGEA AND A LOOK THE FUTURE

It is only a matter of time before Congress realizes it is playing a losing hand as long as it sticks to the ill-conceived UIGEA. Since its enactment in

¹⁵³ See Will, *supra* note 10.

¹⁵⁴ The Eighteenth Amendment states that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII (repealed 1933).

¹⁵⁵ Joel Stein, Editorial, *That's a losing hand: banning online gambling is a fool's wager, not to mention it just won't work*, L.A. TIMES, Oct. 24, 2006, at A17.

¹⁵⁶ See Froma Harrop, *Gambling Law Hypocrisy—More Carve-Outs Than Rushmore*, PROVIDENCE JOURNAL, Oct. 22, 2006, at D7.

¹⁵⁷ Our governments, federal and state, bemoan the immorality of Internet gambling, yet never seem to use the same arguments against established commercial casinos or racetracks. Why? The answer is money. Tax revenues from legal commercial casinos and racetracks contributed over \$5.2 billion to state and local governments in 2006. See American Gaming Association, Industry Information Fact Sheets: Tax Payments—Commercial Casinos, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=10 (last visited Sept. 28, 2007).

October of 2006, the UIGEA has met significant resistance both domestically and abroad.¹⁵⁸ Not only have gambling industry supporters challenged the law in U.S. courts,¹⁵⁹ but foreign nations have banded together in front of the World Trade Organization to allege U.S. violations of international trade agreements stemming from the UIGEA.¹⁶⁰ There is also a considerable movement among members of Congress to overturn the UIGEA and implement a system of legalized, licensed, and regulated Internet gambling within the United States.¹⁶¹

A. THE IMEGA CASE

In June 2007, the Internet Media Entertainment & Gaming Association (iMEGA),¹⁶² a newly formed lobby group in Washington D.C., joined the fight against the UIGEA by filing suit in U.S. District Court in New Jersey asking for an injunction restraining U.S. Attorney General Alberto Gonzales, the Federal Trade Commission and the Federal Reserve from enforcing the UIGEA.¹⁶³ iMEGA has challenged the constitutionality of the UIGEA saying that it “prevent[s] Americans from engaging in their fundamental rights to conduct their lives in the manner they wish to live it—to be free from the government imposing public morality in the privacy of one’s home.”¹⁶⁴ iMEGA argues that since reliable safeguarding technology exists that can ensure underage children and compulsive gamblers are blocked from gambling websites, the Act is only serving to stifle online commerce and innovation and interfere with people’s right to gamble in the privacy of their own homes.¹⁶⁵

The Department of Justice (DOJ) took their time in responding to iMEGA’s complaint, but finally filed a motion to dismiss on September 21, 2007.¹⁶⁶ The DOJ based their motion for dismissal on various civil procedure grounds including: iMEGA lacked standing to challenge the UIGEA under the First Amendment; iMEGA has not demonstrated a credible threat of prosecution under the UIGEA; iMEGA cannot base standing on rank speculation about the economic loss of third parties; the constitutional challenge of the forthcoming regulations under the UIGEA is

¹⁵⁸ See Wayne Parry, *Gambling Industry Fights Online Ban in Court*, BERGEN COUNTY RECORD, Sept. 27, 2007. See also *Internet Gambling Ban Under Pressure*, LAS VEGAS REV.-J., Sept. 13, 2007.

¹⁵⁹ See Parry, *supra* note 158. See also *Internet Gambling*, *supra* note 158.

¹⁶⁰ See *Update: WTO Internet Gambling Ruling Could Require U.S. to Pay \$100 Billion in Trade Compensation Penalties*, PR NEWSWIRE EUROPE, Sept. 26, 2007 [hereinafter *WTO Update*].

¹⁶¹ See Alan Schmadtke, *Bill Seeks to Legalize Internet Wagering*, ORLANDO SENTINEL, May 8, 2007, at D1.

¹⁶² iMEGA describes itself as “a professional association dedicated to the continued growth and innovation of the Internet . . . seek[ing] constructive engagement with government at the Federal and State levels to ensure that the challenges of this still nascent medium are addressed with the full participation of the people and companies that have built the Internet into the powerful influence on society it has become.” Interactive Media Entertainment & Gaming Association, *About*, iMEGA, <http://www.imega.org/about> (last visited Sept. 29, 2007).

¹⁶³ See *New Legislation, New Court Action Challenge U.S. Web Gambling Ban*, INTERNATIONAL GAMING & WAGERING BUSINESS, July 1, 2007, at 16(1), available at <http://www.igwb.com/article.php?id=2507>.

¹⁶⁴ See *id.*

¹⁶⁵ See Parry, *supra* note 158.

¹⁶⁶ Reply in Supp. of Defs’ Cross-Mot. to Dismiss at 1, *Interactive Media and Gaming Assoc. v. Keisler*, No. 07-2625 (D.C.N.J. 2007).

unripe because those regulations have yet to be issued; and, the UIGEA is not a content-based restriction on speech and therefore is not subject to scrutiny.¹⁶⁷

Oral arguments on the injunction and motion to dismiss were heard on September 26, 2007 by Judge Mary L. Cooper.¹⁶⁸ Due to the complexity of the issue she said that she needed more time to make a decision.¹⁶⁹ Although the ultimate decision in this case is uncertain, the publicity and coverage being garnered by iMEGA's constitutional challenge to the UIGEA clearly shows that support for Internet gambling legislation reform is real and that U.S. courts need to seriously consider the issue.

B. THE WORLD TRADE ORGANIZATION DISPUTE

Perhaps even more important than the iMEGA challenge is the question of whether the U.S. has violated its obligations to the World Trade Organization (WTO) by prohibiting foreign gambling operators from accessing U.S. markets through the UIGEA.¹⁷⁰ The dispute actually began in 2003, well before the UIGEA was enacted, when two small Caribbean nations, Antigua and Barbuda, filed trade complaints against the United States's ban on Americans gambling over the Internet.¹⁷¹ The general rule of international trade pacts, including the WTO, is that a country must treat foreign goods and services in the exact same manner as it treats domestic ones.¹⁷² The WTO ruled in 2004 that the U.S. violated this rule by blocking foreign gambling operators from accepting U.S. bets while still allowing some domestic businesses to take bets.¹⁷³ The U.S. disagreed with the WTO's ruling and never took any remedial action. But, the decision was reaffirmed twice, in 2005 and March 2007, with the WTO telling the U.S. that they must change their policies regarding Internet gambling in order to comply with international law.¹⁷⁴

With the enactment of the UIGEA, the dispute with the WTO has reappeared on the forefront and with much higher stakes as the European Union (EU) has joined Antigua and Barbuda in challenging U.S. gambling policies and has asked for compensation for trade violations.¹⁷⁵ Having exhausted its appeals, the U.S. announced that it was simply withdrawing the Internet gambling sphere from its existing international trade agreements, an unprecedented and potentially ill-advised move that, according to the U.S., would allow it to continue blocking foreign gambling companies from taking American bets without penalty.¹⁷⁶

¹⁶⁷ See *id.*

¹⁶⁸ See Parry, *supra* note 158.

¹⁶⁹ *Id.*

¹⁷⁰ See Gary Rivlin, *Place Your Bet*, N.Y. TIMES, Aug. 23, 2007, at C1.

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.* The WTO cited Youbet.com, an American online horse racing betting site, as an example of how the United States was favoring domestic gambling operations at the expense of foreign businesses.

Id.

¹⁷⁴ See *id.*

¹⁷⁵ See *WTO Update*, *supra* note 160.

¹⁷⁶ The United States claims it never intended to have Internet gambling included in any free trade agreements. See Rivlin, *supra* note 170, at C1. Experts claim that reneging on a binding treaty may

Negotiations are currently under way to determine the value of lost revenue and market share to EU companies and other foreign gambling operators, with amounts as high as \$100 billion being discussed.¹⁷⁷ Although the U.S. dismisses the claims as “exaggerated,”¹⁷⁸ it would be wise to take its obligations to the WTO and foreign trade partners seriously, as the long-term interests of U.S. trade relations could be affected on top of the possibility of enormous monetary penalties in the short term.¹⁷⁹

C. PROPOSED CONGRESSIONAL LEGISLATION

Support for legislation either amending or repealing the UIGEA all together has been growing ever since President Bush signed the SAFE Port Act last October. Massachusetts Congressman Barney Frank, who called the UIGEA “preposterous” and “one of the ‘stupidest’ [laws] ever passed,”¹⁸⁰ is leading the movement against the UIGEA in the House of Representatives, where at least four bills that would replace or limit the UIGEA are pending.

H.R. 2046, known as the Internet Gambling Regulation and Enforcement Act of 2007 (IGREA), is the most comprehensive and immediate solution for the UIGEA.¹⁸¹ Introduced by Representative Frank on April 26, 2007, the bill proposes to establish “a federal regulatory and enforcement framework to license companies and accept bets and wagers from individuals in the U.S., to the extent permitted by individual states, Indian tribes and sport leagues. . . . All such licenses would include protections against underage gambling, compulsive gambling, money laundering and fraud.”¹⁸²

While H.R. 2046 is a very promising start towards developing a system of regulated Internet gambling, it is unlikely that the bill will be passed anytime soon.¹⁸³ “There’s no chance it will pass . . . and even less, if that were possible, that President Bush would sign it,” says Professor I. Nelson Rose.¹⁸⁴ Even Frank has admitted that it is more than likely that no further action will be taken on the bill until Congress meets again next year.¹⁸⁵ However, he predicts that support for the bill will increase dramatically in

destroy the United States’ credibility in trade negotiations and discredit the WTO as an effective governing body for world trade. *WTO Update*, *supra* note 160.

¹⁷⁷ See *EU Online Gaming Sites: U.S. Owes EU \$100 Billion in Trade Concessions*, NET 4 NOW, Sept. 26, 2007, http://net4now.com/isp_news/news_article.asp?News_ID=5059 (last visited Jan. 4, 2008).

¹⁷⁸ See Doug Palmer, *U.S. Dismisses “Exaggerated” Claims in Gambling Case*, REUTERS, Sept. 27, 2007, <http://www.reuters.com/article/idUSN2735745820070927> (last visited Jan. 4, 2008).

¹⁷⁹ See *WTO Update*, *supra* note 160.

¹⁸⁰ See *Frank Eyes Restoring Web Gaming*, BOSTON.COM, Mar. 15, 2007, http://www.boston.com/news/nation/articles/2007/03/15/frank_eyes_restoring_web_gaming/ (last visited Jan. 4, 2008).

¹⁸¹ Internet Gambling Regulation and Enforcement Act of 2007, H.R. 2046, 110th Cong. (2007).

¹⁸² Press Release, House Fin. Servs. Comm., Frank Introduces Internet Gambling Regulation and Enforcement Act of 2007 (Apr. 26, 2007) (on file with author).

¹⁸³ See Schmadtke, *supra* note 161, at D1.

¹⁸⁴ See *id.*

¹⁸⁵ See Tony Batt, *Frank Assessment: Bet Bill Stalled*, LAS VEGAS REV.-J., Sept. 12, 2007, available at <http://casinocitytimes.com/news/article.cfm?contentID=168601>.

the future given that the EU has significantly raised the stakes by entering the WTO dispute.¹⁸⁶

The bill with a more realistic chance of passing through Congress is H.R. 2140, sponsored by Representative Shelley Berkley (D-Nev), which would create a comprehensive twelve-month study by the National Academy of Sciences aimed at exploring the legal framework surrounding Internet gambling, including the impact of the UIGEA and the feasibility of legalizing and regulating Internet gambling in the U.S.¹⁸⁷ The Internet Gambling Study Act (IGSA) currently has sixty-four cosponsors but, like the IGREA, is unlikely to see action until the 111th Congress meets in 2008.¹⁸⁸ A promising sign that the IGSA can be quickly enacted next year is that Senate Majority Leader Harry Reid (D-Nev.) has already stated his willingness to move the bill through the Senate if it is able to pass the House vote.¹⁸⁹

In addition to the Frank and Berkley bills, there are two less significant measures pending in Congress that have failed to garner much support or publicity. H.R. 2607, the Internet Gambling Regulation and Tax Enforcement Act of 2007, proposes licensing criteria and a system taxing Internet gambling operators at a monthly rate of two percent of all bets and wagers placed with the business.¹⁹⁰ A separate bill introduced by Representative Robert Wexler (D-Fla.) proposes to exempt poker and other “skill games” from the Internet gambling ban.¹⁹¹ While this may help to clear up the cloudiness surrounding the legality of Internet poker, it hardly goes far enough to fix the deep-rooted problems inherent in the UIGEA.

D. A LONG TERM SOLUTION: LEGALIZATION AND REGULATION

Regulation is the key to successful control of Internet gambling in the long term.¹⁹² No one denies that the problems of Internet gaming are real. There is even a case to be made that Internet gambling is relatively “worse” than the brick-and-mortar style casino gambling found in Las Vegas or Atlantic City.¹⁹³ Internet gambling is more accessible to minors and children, it provides lower payouts than normal casinos, and it can be more addicting than regular gambling because games are available at the push of a button twenty-four hours a day. Also, since online casinos exist in the virtual world of the Internet, the people who control them are unidentifiable and anonymous, thus making players more vulnerable to rigged games, identity theft, and other financial crimes.¹⁹⁴ All of these problems, however, are arguments for regulation rather than prohibition.¹⁹⁵ The legalization of

¹⁸⁶ *See id.*

¹⁸⁷ Internet Gambling Study Act, H.R. 2140, 110th Cong. (2007).

¹⁸⁸ *See* Batt, *supra* note 185.

¹⁸⁹ *Id.*

¹⁹⁰ Internet Gambling Regulation and Tax Enforcement Act of 2007, H.R. 2607, 110th Cong. (2007).

¹⁹¹ Batt, *supra* note 185.

¹⁹² *See* Joel Weinberg, *Everyone's a Winner: Regulating, not Prohibiting, Internet Gambling*, 35 Sw. U. L. Rev. 293, 311 (2006).

¹⁹³ *Ace in a Hole: Gambling Prohibition*, THE ECONOMIST, Oct. 7, 2006, at 13.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Internet gambling has the potential to make it safer. Regulators could use credit card companies and financial institutions to enforce age requirements and possibly limit how much players can lose in a specific time period.¹⁹⁶ A federal Internet gaming commission could license and certify online casinos and ensure their safety for consumers.¹⁹⁷ Regulators could also control the games that are and are not allowed in order to reduce addictive gambling, and they could push online casinos to promote counseling for problem gamblers.

Additionally, there is an enormous amount of tax revenue that could be generated through legalized Internet gambling by taxing both the operating businesses and the players themselves. According to a recent industry-sponsored study, taxing online poker alone could generate more than three billion dollars in new taxes next year.¹⁹⁸ The benefits of regulation over prohibition are seemingly clear.

VII. CONCLUSION

It is indisputable that Internet gambling is an important issue that must be addressed by the legislature. Unfortunately, the UIGEA got it all wrong. The uncertainties and carve-outs endemic to UIGEA strip it of effectiveness and credibility, causing many to claim it is hypocritical. Furthermore, that the online gambling industry is still thriving—albeit in different form—suggests that Americans will continue to gamble online no matter what the law says or who is on the other end of the Internet connection.

Congress, therefore, has an obligation to create a system whereby U.S. citizens are protected from financial crimes, rather than driving them into the hands of unscrupulous and potentially criminal operators of unregulated foreign gambling websites. Legalization of Internet gambling would allow legitimate gaming companies to enter the U.S. online landscape through a licensing process that would result in bettors being safer through added consumer protections. Furthermore, regulation and taxation has the potential to generate billions of dollars in tax revenue for federal and state governments. It is apparent that the UIGEA has not and will not do much to accomplish its intended goals. The answer to solving our Internet gambling problems is to repeal the UIGEA and replace it with an effective system of licensing and regulation.

¹⁹⁶ *Id.*

¹⁹⁷ See Weinberg, *supra* note 192, at 316–20.

¹⁹⁸ John Soat, *Online Gambling Adds Up; Law Against It Doesn't*, INFORMATION WEEK, July 17, 2006, at 8.

