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Brandon P. Rainey

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THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006:

LEGISLATIVE PROBLEMS AND SOLUTIONS

*Brandon P. Rainey**

I. INTRODUCTION

In 2007, an estimated fifteen to twenty million Americans participated in some form of Internet gambling.¹ Before the passage of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA),² global projections of Internet gambling revenues were projected to reach twenty-four billion dollars.³ In an underhanded political maneuver, the UIGEA was added to the completely unrelated Security and Accountability for Every ("SAFE") Port Act, anti-terrorism legislation which deals with container security in our nation's ports.⁴ Following the unexpected enactment of the UIGEA, the Internet gambling industry (and the Internet poker industry, in particular) went into a tailspin.⁵ Stock prices of publicly-traded Internet gambling providers collapsed, wiping out over approximately seven billion dollars of market value.⁶ Scholarly commentary on the UIGEA has ranged from skepticism of the Act's basic aims to cries of outrage claiming the UIGEA is Prohibition reincarnated.⁷

The object of this note is to determine the next legislative step for Congress addressing the problems created by the UIGEA. In order to fix the problems, it is necessary to establish what those problems are and how they are manifested. This note will begin with an examination of the theoretical foundations and prior attempts at anti-Internet gambling legislation. Next, the note will explore the shortcomings of the UIGEA in terms of both practical and legal concerns. Then, the author will survey and analyze the flurry of recent proposed legislation which followed in the wake of the UIGEA. In light of the problems

* J.D. Candidate 2010, University of Notre Dame Law School; B.A. University of California, Los Angeles.

1. Radely Balko, *Online Gambling Ban a Bad Bet for Republicans*, FOXNEWS.COM, Oct. 23, 2006, <http://www.foxnews.com/story/0,2933,224157,00.html>.

2. 31 U.S.C. §§ 5361-5367 (2006).

3. 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>.

4. SAFE Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006).

5. Gerd Alexander, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act is a Bad Bet*, DUKE L. & TECH. REV., June 2008, at 1, 2.

6. *Id.*

7. See Michael Blankenship, *The Unlawful Internet Gambling Enforcement Act: A Bad Gambling Act? You Betcha!*, 60 RUTGERS L. REV. 485, 498 (2008); see also I. Nelson Rose, *Congress Makes Sausages*, 11 GAMING L. REV. 1, 1 (2007).

the UIGEA has created and the proposed legislation that aims to remedy those problems, the author will conclude with two legislative suggestions.

One commentator has noted that Internet gambling legislation resembles a game of whack-a-mole.⁸ In one sense, the UIGEA may not have been the worst possible thing to happen to Internet gambling. The UIGEA complicated matters so much that, strangely, the most fundamental legislative holes became apparent, paving the way for proposed legislation which has the ability to fill those gaps.

II. PRIOR ANTI-INTERNET GAMBLING LEGISLATIVE ATTEMPTS

The frustration of the poker-playing community is understandable. The legality of Internet gambling is a contentious issue, especially for casino-style games. The Department of Justice maintains that the Interstate Wire Act of 1961 (Wire Act)⁹ prohibits Internet gambling.¹⁰ However, enforcing anti-Internet gambling violations was near impossible, and the industry thrived.¹¹ Prior to the passage of the UIGEA, Congress twice attempted and twice failed to pass legislation that would have clarified the issue of illegality and prohibited Internet gambling websites and their customers from using interstate Internet networks to gamble. However, even if these bills had become law, basic enforcement problems still would have persisted. The UIGEA was enacted as a new mechanism for enforcing pre-existing gambling laws on the Internet because the traditional law enforcement mechanisms were often inadequate.¹²

The Internet Gambling Prohibition Act of 1997¹³ would have clarified the applicability of the Wire Act to Internet gambling by making it "unlawful for a person to place, receive, or otherwise make a bet or wager, via the Internet."¹⁴ The bill defined "bet or wager" as "staking or risking...something of value upon the outcome of a contest, sporting event, or game of chance."¹⁵ The language "game of chance" would have been the additional phrase added as an amendment, intended to clarify the Wire Act's coverage of Internet casino-style gambling. This bill would have extended the coverage of the Wire Act to all types of Internet gambling, individual bettors, and gambling businesses.¹⁶ This bill passed the Senate with a vote of ninety to ten but died in the House.¹⁷

8. See Alexander, *supra* note 6, at 1.

9. 18 U.S.C. § 1084 (2006).

10. "Internet Gambling Prohibition Act": Hearing on H.R. 4777 Before the H. Comm. On the Judiciary and Subcomm. On Crime, Terrorism, and Homeland Security, 109th Cong. (2006) [hereafter Ohr Hearing] (statement of Bruce Ohr, Chief of Organized Crime and Racketeering Section, U.S. Dept. of Justice).

11. See Gary Cray, *Aiding-and-Abetting Liability Exposure of Affiliate Program Service Providers Under the New US Internet Gambling Law*, 10 J. INTERNET L. 1, 15 (2007).

12. 31 U.S.C. § 5361(a)(1) (2006).

13. Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997).

14. *Id.* § 3(a).

15. *Id.* § 2.

16. Pearson Liddell, Jr. et al., *Internet Gambling: On a Roll?*, 28 SETON HALL LEGIS. J. 315, 323 (2004).

17. *Id.*

Two years later, Congress tried again to prohibit Internet gambling with the Internet Gambling Prohibition Act of 1999.¹⁸ The 1999 bill similarly sought to amend the Wire Act to prohibit the use of the Internet to place a bet or wager upon “a contest of others, a sporting event, or a *game of chance*.”¹⁹ However, the 1999 bill focused on “person[s] engaged in a gambling business” rather than on the criminalization of individual gamblers.²⁰ Similarly, the 1999 bill would have exempted horse racing, state lotteries, and fantasy sports operations.²¹ Apparently Congress realized that enforcement of a blanket Internet gambling prohibition for individuals and businesses alike was completely unrealistic. The 1999 bill suffered the same fate as its 1997 namesake and died in the House.²² Internet gamblers, and particularly poker players, must have felt Internet gambling was safe.

Representative James Leach introduced what became the UIGEA in November of 2005. The UIGEA is based on two bills that previously failed to gain Congressional approval.²³ The purpose of the Act was “to prevent the use of certain payment instruments, credit cards, and fund transfers for unlawful Internet gambling, and for other purposes.”²⁴ The Act seeks to eliminate unlawful Internet gambling by preventing financial institutions, which are typically gamblers’ banks, from completing transactions with businesses involved in unlawful Internet gambling.²⁵ It is important to note that the UIGEA does not criminalize individual gamblers.²⁶ Rather, the UIGEA is an enforcement tool that depends on the prohibition of Internet gambling by other statutes.²⁷ Exceptions for Indian tribal gambling,²⁸ fantasy-style gaming,²⁹ and horse-betting³⁰ are carved out of the general ban. Representative Leach’s bill passed the House of Representatives with a vote of 317 to 93 in 2006.³¹

However, Senator Bill Frist, a staunch supporter of anti-Internet gambling legislation and former Senate Majority Leader, could not get the bill to the floor for a Senate vote before the Senate adjourned its 2006 session for mid-term

18. Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. (1999).

19. *Id.* § 2(a) (emphasis added).

20. *Id.*

21. Liddell, *supra* note 17, at 323.

22. *Id.* at 324.

23. See Internet Gambling Prohibition and Enforcement Act of 2005, H.R. 4411, 109th Cong. (2005); See Internet Gambling Prohibition Act of 2005, H.R. 4777, 109th Cong. (2005). The UIGEA is the Senate’s amended version of the Internet Gambling Prohibition and Enforcement Act.

24. H.R. 4411, 109th Cong. (2005).

25. 31 U.S.C. § 5363(1)-(4) (2006).

26. Mattia V. Corsiglia Murawski, *The Online Gambling Wager: Domestic and International Implications of the Unlawful Internet Gambling Enforcement Act of 2006*, 48 SANTA CLARA L. REV. 441, 459 (2008).

27. Allyn Jaffrey Shulman, *Legal Landscape of Online Gaming Has Not Changed*, CARDPLAYER.COM, Oct. 5, 2006, <http://www.cardplayer.com/poker-news/article/1446/legal-landscape-of-online-gaming-has-not-changed>.

28. 31 U.S.C. § 5362(10)(C) (2006).

29. 31 U.S.C. § 5362(1)(E)(ix) (2006).

30. 31 U.S.C. § 5362(10)(B)(iii)(I) (2006).

31. Govtrack.us, H.R. 4411: Internet Gambling Prohibition and Enforcement Act, available at <http://www.govtrack.us/congress/bill?bill=h109-4411> (last visited Jan. 4, 2009).

elections.³² In a suspicious move, Frist arranged to have the UIGEA added as an amendment to the SAFE Port Act,³³ a popular piece of port security, anti-terrorism legislation.³⁴ Thus, the only way the Senate could vote against the UIGEA was to vote against the SAFE Port Act. Furthermore, according to Senator Frank Lautenberg, Frist refused to allow any members of the Senate-House Conference Committee see the final language of the SAFE Port Act.³⁵ Essentially, the Senate voted blind on the UIGEA, as it was tucked deep inside the SAFE Port Act.³⁶ Not surprisingly, the UIGEA was passed by the Senate. President Bush signed the bill into law on October 13, 2006.³⁷

III. THE UIGEA IN A NUTSHELL

The UIGEA is similar to the Internet Gambling Prohibition Act of 1999 in that it focuses on Internet gambling institutions rather than seeking to criminalize individual gamblers who utilize the Internet. However, it differs in one significant respect. Instead of criminalizing those “engaged in the gambling business,”³⁸ the UIGEA essentially cuts off gamblers’ funds by prohibiting wager-based transactions from financial institutions to gambling websites. In essence, the UIGEA makes it illegal for banks and financial institutions to process transactions for Internet gambling websites.³⁹ Since the UIGEA does not criminalize gambling and there are no federal laws that explicitly prohibit forms of Internet gambling on casino-style games, the UIGEA simply adds to the growing confusion over the legality of online gambling.⁴⁰

Professor Nelson Rose, an expert in gambling law, has commented, “For a law designed to stop the flow of money, it is bizarre to make it a crime only to receive the funds, but not to send them or transmit them.”⁴¹ However, that is exactly what the UIGEA does. The UIGEA makes it a felony for those engaged in the business of betting or wagering to “knowingly accept” transactions made in the participation of unlawful Internet gambling.⁴² Although the UIGEA stops short of creating criminal penalties for financial institutions, these financial institutions are burdened with creating methods to identify and block

32. See Rose, *supra* note 8.

33. See H.R. 4954, 109th Cong. § 803 (2006).

34. Michael McCarthy & Jon Swartz, *New Legislation May Pull the Plug on Online Gambling; Ban Would Prohibit Use of Credit Cards, Electronic Funds for Internet Gaming*, USA TODAY, Oct. 3, 2006, at A18.

35. See Rose, *supra* note 8.

36. *Id.*

37. Press Release, House Fin. Servs. Cimm., President Enacts Leach Internet Gambling Law, (Oct. 13, 2006), available at <http://www.highbeam.com/doc/1P3-1145342071.html>.

38. See S. 692, 106th Cong. (1999).

39. Greg Pierce, *Inside Politics*, WASH. TIMES, Oct. 20, 2006, at A07.

40. Benjamin B. Nelson, *Regulation or Prohibition? The Troubled Legal Status of Internet Gambling Casinos in the United States in the Wake of the Unlawful Internet Gambling Enforcement Act of 2006*, 9 TEX. REV. ENT. & SPORTS L. 39 (2007).

41. I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 539 (2006).

42. 31 U.S.C. § 5363 (2006).

restricted gambling transactions.⁴³ Noncompliant financial institutions are subject to civil penalties.⁴⁴ By indirectly targeting financial institutions, the UIGEA is attempting to curb Internet gambling by cutting off the flow of money to Internet gambling facilities.

On November 12, 2008, the Bush administration finalized the UIGEA regulations.⁴⁵ They are set to go into effect on January 19, 2009, the day before the Obama administration takes office.⁴⁶ The final regulations reflect the ridiculous problems created by the UIGEA. In the end, the federal regulators charged with creating rules forcing financial institutions to identify and block money transfers for unlawful Internet gambling transactions simply could not do what was asked of them.⁴⁷ These officials could not overcome the hurdles of defining what was unlawful and the impossibility of tracking individual transactions.⁴⁸ The meaningless regulations the officials developed will not change any of the questions surrounding the UIGEA or its application to specific types of Internet gaming, and will cost United States financial institutions almost \$100 million in the first year alone.⁴⁹

IV. FUNCTIONAL AND PRACTICAL PROBLEMS OF THE UIGEA

On a practical level, the UIGEA simply does not work. Following the enactment of the UIGEA, several of the most prominent, trusted, publicly-traded Internet poker websites stopped accepting bets from United States players.⁵⁰ However, the market has been taken over by private Internet gambling operations that do not answer to shareholders and can thus afford to test the real boundaries of the UIGEA.⁵¹ Many betting analysts and industry analysts agree that the UIGEA will do little to stop online gambling.⁵² In fact, the private gambling operations have utilized several glaring loopholes in the UIGEA.

The first loophole in the UIGEA utilized by gambling operations who still accept bets from United States players involves a middleman payment processor. Payments from players' banks to gambling websites are routed to offshore intermediaries known as "e-wallets," which simply serve as a

43. 31 U.S.C. § 5364(a) (2006).

44. 31 U.S.C. § 5365 (2006).

45. Press Release, Department of the Treasury, Prohibition on Funding of Unlawful Internet Gambling (Nov. 12, 2008), available at <http://www.treas.gov/press/releases/reports/unlawfuinternetgambling11.12.08.pdf>.

46. Poker Players Alliance, [UIGEA] Treasury, Fed Issue Final Rule on Unlawful Internet Gambling (Nov. 12, 2008), <http://pokerplayersalliance.org/headlines/2008/11/12/uigea-treasury-fed-issue-final-rule-on-unlawful-internet-gambling-111208/>.

47. I. Nelson Rose, *The New Internet Gaming Regulations: Nothing Changes*, COMPATIBLEPOKER.COM, <http://www.compatiblepoker.com/final-uigea.cms.htm>.

48. *Id.*

49. Press Release, *supra* note 46.

50. Eric Pfanner & Heather Timmons, *U.K. Seeks Global Rules for Online Gambling*, N.Y. TIMES, Nov. 2, 2006, available at <http://www.nytimes.com/iht/2006/11/02/technology/IHT-02gamble.html>.

51. Associated Press, *Experts: Online-Gambling Ban Won't Work*, FOXNEWS.COM, Oct. 25, 2006, <http://www.foxnews.com/story/0,2933,224839,00.html>.

52. Rose, *supra* note 8, at 2.

middleman for the transaction.⁵³ This way, the Internet poker operators receive funds from third-party companies rather than from bettors' banks. The process is simple. A player sets up an account with an e-wallet Internet company and transfers money from their bank account into the e-wallet. Then the player is free to buy simulated poker chips, gambling credit, pay losses and collect winnings. Throughout the chain, the player's bank never directly transfers money to the gambling website. It is extremely unlikely that foreign payment processing businesses will entirely cease servicing a billion-dollar industry in order to avoid United States civil sanctions.⁵⁴ Critics have predicted a potential legislative response: a "blacklist" of noncompliant offshore payment processors from whom United States financial institutions are prohibited from transacting.⁵⁵ How far might this list go? Would federal regulators prohibit United States banks from sending funds to an overseas bank, which in turn forwards the money to an e-wallet?⁵⁶

NETeller was the largest of these e-wallets. U.S. prosecutors said NETeller processed more than \$7.3 billion in transactions in 2005 and more than ninety-five percent of its revenue from transfers involved Internet gambling.⁵⁷ Although the UIGEA does not apply to e-wallets, payment processors such as NETeller might be liable under a theory of aiding and abetting.⁵⁸ NETeller's ex-directors Stephen Lawrence and John Lefebvre were arrested in the United States, while most executives of online gambling businesses and payment processors stay safely offshore.⁵⁹ Although NETeller no longer processes American gambling transactions, a multitude of other companies still do. Privately held e-wallets like ECheck, Click2Pay, and ePassport are all available remaining payment processing companies.

Furthermore, the UIGEA specifically creates another simple but gaping loophole that has the potential to somewhat slow down Internet gambling, yet render it completely legal. The UIGEA gives the Secretary of the Treasury and the Board of Governors of the Federal Reserve System the power to "exempt certain restricted transactions or designated payment systems from any requirement imposed under [the UIGEA]" if they "find that it is not reasonably practical to identify and block, or otherwise prevent or prohibit the acceptance of, such transactions[.]"⁶⁰ Thus, the UIGEA is conspicuously aware of its own practical enforcement shortcomings and provides that if a certain payment

53. Chuck Humphrey, *New Online Gambling Funding Prohibition Law*, GAMBLING-LAW-US, Sept. 30, 2006, <http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm> (last visited April 6, 2009).

54. See Dana Gale, *The Economic Incentive Behind the Unlawful Internet Gambling Enforcement Act*, 15 CARDOZO J. INT'L & COMP. L. 533, 535 (2007).

55. See Alexander, *supra* note 6, at 32.

56. Rose, *supra* note 42, at 539.

57. Peter Harrison, *NETeller Quits U.S. After Illegal Gambling Arrests*, REUTERS, Jan. 18, 2007, <http://www.reuters.com/article/ousiv/idUSL1868020720070118>.

58. Rose, *supra* note 8, at 2.

59. Press Release, U.S. Attorney's Office, S. Dist. of N.Y., U.S. Charges Two Founders of Payment Services Company With Laundering Billions of Dollars of Internet Gambling Proceeds, (Jan. 16, 2007), available at <http://www.usdoj.gov/usao/nys/pressreleases/January07/netellerarrestspr.pdf>.

60. 31 U.S.C. § 5364(b)(3) (2006).

method is too difficult to monitor, it may be exempted.

Arguably, the most difficult payment method to monitor is the paper check because of the sheer volume of American checks written each year. A representative of the American Bankers Association stated, "Analyzing forty billion checks a year would be a largely manual process."⁶¹ Aside from asking banks to police a predominantly social issue, asking banks to manually monitor forty billion checks a year to find the ones going to gambling websites would obviously be too costly to enforce.⁶² If paper checks are exempted, gamblers would be free to send checks to gambling websites, and only need to accept and adapt to the inconvenience of waiting for their checks to be received. This logically leads to the question that shakes the foundation and purpose of the UIGEA. If checks may be exempted from UIGEA enforcement, why not e-checks?⁶³

Therefore, the real function of the UIGEA has been to drive a booming industry into private hands and turn away from an incredible base of taxable income. Studies suggest the federal government is turning its back on over three billion dollars of tax revenue by outlawing Internet gambling.⁶⁴ Generally, the businesses affected most were reputable, publicly-traded companies, who lost massive market value when the UIGEA was enacted.⁶⁵ Additionally, the main purpose of the UIGEA—protecting citizens from the perceived social and financial evils of gambling—has not been achieved. People are still gambling over the Internet due to the loopholes in the law.⁶⁶ Even if an overall decline in Internet gambling can be shown, it still would not follow that those who are in need of protection the most—underage and problem gamblers—were impeded.⁶⁷ The real effect of the UIGEA has been to deny gamers their preferred services of publicly-traded e-wallets and Internet gambling hosts.⁶⁸ By preventing American Internet gamblers from using the methods and websites they trust the most and taking the position that Internet gambling businesses are illegal, Congress has left its gambling population especially vulnerable.⁶⁹

61. Shulman, *supra* note 28; Rose, *supra* note 42, at 539.

62. Shulman, *supra* note 28.

63. *Id.* The recently-released final regulations for the UIGEA conspicuously do not exempt paper checks from the UIGEA. The federal regulators decided that doing so "would substantially undermine the efficacy of the rule and the Act." See Press Release, *supra* note 46. This necessarily means that United States financial institutions will be subject to civil penalties if personal checks from their customers are transferred to Internet gambling businesses, and those financial institutions are on the hook for manually monitoring every check. Given the volume of personal checks, this regulation may as well not exist, because the manpower to effectively enforce it simple does not exist.

64. *Poker Group Suggests Legalizing, Taxing Internet Games*, WEB CPA, July 20, 2006, <http://www.webcpa.com/article.cfm?articleid=21056&pg=tax&hbxcg=tax>.

65. See Associated Press, *Online Gambling Shares Fall as Congress OKs Bill*, FOXNEWS.COM, Oct. 3, 2006, <http://www.foxnews.com/story/0,2933,217039,00.html?sPage=fnc/scitech/personaltechnology>.

66. Catherine Holahan, *Online Gambling Goes Underground*, BUSINESS WEEK, Oct. 19, 2006, http://www.businessweek.com/technology/content/oct2006/tc20061019_454543.htm.

67. Alexander, *supra* note 6, at 36.

68. *Id.*

69. A recent "60 Minutes" report on an Internet poker scam illustrates this problem. An

V. LEGAL PROBLEMS FOR THE UIGEA

As outlined above, the UIGEA prohibits Internet gambling businesses from accepting most financial instruments, including credit cards, for “unlawful Internet gambling.”⁷⁰ “Unlawful Internet gambling,” in turn, is defined as using the Internet to place, receive, or knowingly transmit a “bet or wager” where doing so would be “unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.”⁷¹ “Bet or wager” is defined as “staking or risking . . . something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance.”⁷²

Aside from the practical and functional problems of the UIGEA outlined above, two significant legal problems are presented by the narrow but important case of Internet poker. First, many critics claim that Internet poker is not a game subject to chance, but rather that Internet poker is a game of skill. Second, serious doubts arise as to whether Internet poker is even illegal to begin with. If the critics are correct that poker is a game of skill, then poker would appear to fall outside the ambit of the UIGEA. On the other hand, if Internet poker is determined to be a lawful activity, then the UIGEA would not apply at all.

A. *Is Poker a Game of Skill? Does it Matter?*

Betting or wagering is defined as risking something of value on a contest of others, a sporting event, or a *game subject to chance*.⁷³ The phrase “game subject to chance” is the applicable section of the UIGEA which applies to the Internet poker industry.⁷⁴ At first blush, it would appear that an individual risking money on a hand of cards in Texas Hold ‘Em hosted by an Internet poker website constitutes placing a bet or wager under the UIGEA. A closer examination reveals that the issue is not so clear.

There are three types of games: games of chance, games of skill, and hybrid games of chance and skill. In games of chance, the outcome of the game is entirely determined by chance.⁷⁵ For example, lotteries and roulette are games of chance. Alternatively, the outcome of a game of skill is entirely determined by the skill of a contestant or a player.⁷⁶ Bridge, mah-jong, and chess are examples of games of skill. Hybrid games are those in which the outcome is

employee of Absolute Poker, an Internet poker website, hacked the company’s software code and played against many regular players, winning almost every hand because he was able to see the other players’ cards. The players who lost money had no legal recourse because the company was headquartered in Costa Rica and the Department of Justice maintains that Internet gambling is illegal. *60Minutes: See How Online Gamblers Unmasked Cheaters*, (CBS television broadcast Nov. 30, 2008), available at <http://www.cbsnews.com/stories/2008/11/25/60minutes/main4633254.shtml> .

70. 31 U.S.C. § 5363(1) (2006).

71. 31 U.S.C. § 5362(10) (2006).

72. 31 U.S.C. § 5362(1)(A) (2006).

73. 31 U.S.C. § 5362(1)(A) (emphasis added).

74. Rose, *supra* note 42, at 537.

75. Alexander, *supra* note 6, at 26.

76. *Id.*

determined by both chance and skill.⁷⁷ This “gray area” between games of chance and skill is undoubtedly where poker falls.

Poker is a hybrid game, and the degree to which skill and chance each play in the outcome of poker is very important, given the statutory language of the UIGEA. Poker is part chance because the players have no control over which cards they are dealt. Additionally players have no control over the cards they will receive, should they decide to “hit” or swap cards with the dealer in Five Card Draw, just as they have no control over what cards will be dealt in the community pot in Texas Hold ‘Em. There is no question that sometimes, the cards dealt directly affect the outcome of the game. However, poker is a game of skill because there is an undeniable human element. Players play against each other, and knowing how to read other players, when to bluff, when to call bluffs and how to bet effectively separates the novice from the professional. Those who understand how to competitively play poker, as most Internet poker players do, will not dispute the effect skill in these areas can and will have in determining the outcome of poker games.

Courts have grappled with exactly where to find the tipping point at which hybrid games become legally considered as games of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.⁷⁸ While this is a helpful test, it still deprives courts of an explicit line dividing games of chance and skill because there is no scientific test which can quantify exactly what degree a player’s skill affects the outcome of the game, especially in a relative game where all players are playing against each other and the hands are always different.

The Poker Players Alliance, not surprisingly, contends that poker is a game of skill.⁷⁹ Professor Alan Dershowitz agrees that poker is a game of skill.⁸⁰ Scientific studies have indicated that poker is a game of skill to the degree that winning results are directly related to additional instruction of poker tactics.⁸¹ That is, the amount instruction new players receive on tactics, betting, and reading other players directly corresponds with the amount of games won by the new player.⁸²

The Poker Players Alliance contention is most likely inconsequential, in light of the UIGEA. While critics and the PPA are correct in the legal distinction between games of chance and skill, the UIGEA does not depend on that distinction. By its own words, the UIGEA applies to persons “engaged in the business of betting or wagering.”⁸³ “Bet or wager” is defined as risking

77. *Id.*

78. 38 AM. JUR. 2D *Gambling* § 4 (2008).

79. Poker Players Alliance, Mission Statement, <http://pokerplayersalliance.org/about/mission/> (last visited January 4, 2009).

80. Hartley Henderson, *Poker, a Game of Skill?*, GLOBAL POKER STRATEGIC THINKING SOCIETY, <http://www.gpsts.org/poker-a-game-of-skill> (last visited Nov. 13, 2008).

81. Michael A. Dedonno & Douglas K. Ditterman, *Poker is a Skill*, 12 GAMING L. REV. 31, 33 (2008).

82. *Id.*

83. 31 U.S.C. § 5363 (2006).

something of value on the outcome of a game *subject to chance*, among other things.⁸⁴ “Game subject to chance” is not a term defined in the UIGEA. Seeing as how the outcomes of hybrid games are, by their nature, at least partially dependent on chance, poker presumably falls within the ambit of the UIGEA. Thus, the Poker Players’ Alliance advocates are making an incorrect argument that games predominantly based on skill fall outside the scope of the UIGEA.⁸⁵

Further, other language of the UIGEA endorses the view that the Act was intended to apply to hybrid games such as poker.⁸⁶ The following subparagraph defining “bet or wager” applies to lotteries in which players purchase a chance or opportunity to win where that opportunity to win is “predominantly subject to chance.”⁸⁷ Congress could have easily included the word “predominantly” in its definition of bet or wager, but did not because the UIGEA was intended to cover hybrid games of chance and skill like poker.⁸⁸

B. *Is Internet Poker Even Illegal?*

Operating under the likely assumption that poker does not gain an exemption by virtue of being a hybrid game predominantly determined by skill, another huge legal problem develops for the UIGEA. The key word in the title of the Unlawful Internet Gambling Enforcement Act is “enforcement.” The UIGEA is an enforcement statute, the goal of which is to enforce already-existing laws.⁸⁹ The Act explicitly states that “[n]ew mechanisms for enforcing gambling laws on the Internet are necessary because traditional . . . mechanisms are often inadequate. . . .”⁹⁰

The UIGEA outlaws transactions related to betting or wagering between two parties engaged in “unlawful Internet gambling.”⁹¹ Simply put, the stronger argument for pro-Internet poker advocates is not that poker is a game of skill, but rather that Internet poker is not “unlawful Internet gambling.”⁹² “Unlawful Internet gambling” is defined in the UIGEA as placing or receiving a bet “where such bet or wager is unlawful under any applicable Federal or State law.”⁹³ Therefore, the UIGEA does not create any new categories of unlawful Internet gambling, but merely serves to enforce already existing laws by the new method of prohibiting transfers of money to gambling websites.

The Department of Justice takes the position that the Wire Communications Act of 1961 (Wire Act) prohibits Internet gambling for games like poker.⁹⁴ The

84. 31 U.S.C. § 5362(1)(A) (emphasis added).

85. See Alexander, *supra* note 6, at 27.

86. *Id.*

87. 31 U.S.C. §5362(1)(B) (2006).

88. See Alexander, *supra* note 6, at 28.

89. Shulman, *supra* note 28.

90. 31 U.S.C. § 5361(a)(4) (2006).

91. 31 U.S.C. § 5363 (2006).

92. See Liddell, *supra* note 17, at 322.

93. 31 U.S.C. § 5362(10)(A) (2006).

94. See Ohr Hearing, *supra* note 11; see also *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001) (an offshore Internet gambling operator was convicted of violating the Wire Act because his company used telephone wires and other wire communications to facilitate the taking of bets over the

Wire Act states, in pertinent part:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.⁹⁵

However, the issue is not as clear as the Attorney General would suggest. Immediately, two serious arguments against the Wire Act's applicability to Internet poker arise. First, a very convincing argument can be made supporting the view that the Wire Act simply does not and was never intended to cover Internet poker. Second, even if it is applicable, the Wire Act's applicability to Internet poker is outdated and tenuous given the increasingly wireless nature of the Internet.

1. Courts Disagree On Whether Internet Gambling Falls Under the Wire Act

The original purpose of the Wire Act was to prohibit illegal sports books and betting services that were typically run by organized crime groups.⁹⁶ Similar to the UIGEA, the Wire Act does not criminalize individual gambling in the form of betting or wagering.⁹⁷ In order to be convicted under the Wire Act, one must be "engaged in the business of betting or wagering."⁹⁸ Thus, under the Wire Act, gambling businesses which make gambling over wires their day-to-day occupation may be prosecuted, but individual gamblers cannot be.⁹⁹ Congress felt that the goal of stopping illegal gambling was better served by imposing duties on illegal gambling business rather than imposing criminal sanctions on individual bettors.¹⁰⁰ In addition to being "engaged in the business of betting or wagering," the Wire Act explicitly requires that said businesses must also be using a wire communication facility to take bets on "any sporting event or contest."¹⁰¹ The term "sporting event or contest" is a contentious issue between different federal appellate courts and the Department of Justice.

Internet).

95. 18 U.S.C. § 1084(a) (2006).

96. DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET*, 117-119 (2005).

97. Beau Thompson, *Internet Gambling*, 2 N.C.J.L. & TECH. 81, 91 (2001).

98. 18 U.S.C. §1084(a) (2006).

99. See Michael D. Schmitt, *Prohibition Reincarnated? The Uncertain Future of Online Gambling Following the Unlawful Internet Gambling Enforcement Act of 2006*, 17 S. CAL. INTERDISC.L.J. 381, 385 (2008).

100. *Id.*

101. 18 U.S.C. § 1084(a).

a. *In re MasterCard*

In re MasterCard was the first case to test the Department of Justice's theory that the Wire Act prohibited all forms of online gambling.¹⁰² A group of gamblers accrued debt from online gambling, then sued MasterCard to free themselves from that burden on the theory that the gambling was illegal and as such, MasterCard could not collect the gamblers' debts.¹⁰³ The District Court of the Eastern District of Louisiana held the plain language of the Wire Act required a finding that the Act did not apply to online casino-style gambling.¹⁰⁴ Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from plain statutory language.¹⁰⁵

Judge Duvall of the District Court held that a plain reading of the statutory language "sporting event or contest" clearly required the object of the gambling to be limited to a sporting event or contest.¹⁰⁶ In so holding, Judge Duvall relied on relevant case law, which led to the conclusion that any sporting event or contest must be the subject of the gambling.¹⁰⁷ In an obvious show of thoroughness, Judge Duvall also examined the legislative history of the Wire Act, in which the House Judiciary Committee Chairman explained that the Wire Act involved the "transmission of wagers or bets and layoffs on horse racing and other sporting events."¹⁰⁸ Further, Judge Duvall referenced legislative attempts prior the case's litigation, which sought to amend the Wire Act to prohibit the use of the Internet to place a bet or wager upon "a contest of other, a sporting event, or a game of chance . . ."¹⁰⁹ Such legislative attempts imply a Congressional admission that the Wire Act was indeed limited in scope.¹¹⁰

In light of the plain language of the Wire Act, prior case law, and legislative history, Judge Duvall held "the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests."¹¹¹ The plaintiffs' suit was dismissed because casino-style gambling was not sports gambling, and was therefore not illegal under federal law.¹¹² In a thinly veiled signal to Congress, Judge Duvall added that the plaintiff's complaint was "more appropriately directed to the legislative branch."¹¹³

102. Alexander, *supra* note 6, at 14.

103. *In re MasterCard Int'l. Inc.*, 132 F.Supp.2d 468, 473 (E.D. La. 2001).

104. *Id.* at 480.

105. *See Salinas v. United States*, 522 U.S. 52, 57 (1997).

106. *MasterCard*, 132 F.Supp.2d at 480.

107. *See United States v. Kaczowski*, 114 F.Supp.2d 143, 153 (W.D.N.Y.2000) (Wire Act "prohibits use of 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"); *see also* *U.S. v. Marder*, 474 F.2d 1192, 1194 (5th Cir.1973) (first element of statute satisfied when government proves wagering information "relative to sporting events").

108. *MasterCard*, 132 F.Supp.2d at 480-481 (citing 107 CONG. REC. 16533 (Aug. 21, 1961)).

109. *Id.* at 480 (referencing S. 474, 105th Cong. (1997); S. 692 106th Cong. (1999)).

110. *See Alexander, supra* note 6, at 14.

111. *MasterCard*, 132 F.Supp.2d at 481.

112. *Id.*

113. *Id.*

On appeal, the Fifth Circuit affirmed.¹¹⁴ In a succinct statement, the Court dealt a swift blow to the Department of Justice's position that all online gambling was illegal. "We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion."¹¹⁵ However, the judiciary still disagrees about the true scope of the Wire Act with respect to non-"sporting event or contest" gambling on the Internet.

b. *United States v. Lombardo*

The most coherent argument in favor of the Wire Act's application to Internet casino-style gambling came from an unreported opinion from the District Court from the Central Division of the District of Utah in the case of *United States v. Lombardo*.¹¹⁶ In an expansion of similar reasoning in a New York state case,¹¹⁷ the Lombardo court held that at least part of the Wire Act applies to forms of gambling that are unrelated to sporting events. The legal analysis boiled down to basic tenets of statutory construction and an examination of the Wire Act's confusing legislative history.

The *Lombardo* court essentially divided up the Wire Act into prohibitions in order to determine that the Act is not confined entirely to wire communications related to sports betting or wagering:

The statute proscribes using a wire communication facility (1) 'for the transmission . . . of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest'; or (2) 'for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers'; or (3) 'for information assisting in the placing of bets or wagers.'¹¹⁸

After dividing up the Wire Act into three distinct prohibitions, the court relied on principles of statutory construction in reaching its conclusion that the phrase "sporting event or contest" modifies only the first of the three prohibited uses of a wire communication facility.¹¹⁹ To the *Lombardo* court, the exclusion of the "sporting event or contest" phrase in the second and third prohibitions indicated that at least part of the Wire Act applied to forms of gambling unrelated to sporting events.¹²⁰ The court also examined the Tenth Circuit

114. In re MasterCard Int'l, Inc., 313 F.3d 257, 260 (5th Cir. 2002).

115. *Id.* at 262.

116. *United States v. Lombardo*, No. 2:07-CR-286 TS, 2007 WL 4404641 (D. Utah, Dec. 13, 2007).

117. *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. 1999). (The Attorney General was able to enjoin a foreign online casino from running their business within New York, all the while avoiding an examination of the "sporting event or contest" language of the Wire Act. The New York Superior Court held that "[b]y hosting [the] casino and exchanging betting information with the user, an illegal communication in violation of the Wire Act . . . has occurred." In order to reach this conclusion, the court pointed to a House Report concerning the Wire Act which stated that "[t]he purpose of the bill is to assist various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses." (citing H.R. Rep. No. 967 (1961))).

118. *Lombardo*, 2007 WL 4404641, at *6.

119. *Id.*

120. *Id.* (citing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)) (establishing the principle of statutory

Criminal Pattern Jury Instructions, which do not attach a “sporting event” or qualifier to either a provision of information assisting in the placing of bets or wagers or informing another of his or her entitlement to money or credit resulting from bets or wagers.¹²¹

One apparent consequence of this line of statutory interpretation is that the Wire Act becomes partially superfluous and confused. On one hand, the only form of actual gambling prohibited by the Wire Act is betting or wagering on sporting events or contests. The other two prohibitions do not mention the real action of actually placing a bet or wager. Additionally, the second and third prohibitions are arguably broad enough to engulf the first prohibition if the qualifier “sporting event or contest” is indeed limited. The “sporting event or contest” language becomes superfluous. Under this interpretation, the Wire Act becomes exactly what the Department of Justice advocates—a blanket prohibition against any and all Internet gambling, and any exchange of information related to assisting in the placement of Internet bets or wagers. Aside from being an unenforceable position for practical reasons, it is near impossible to draw a line between legal and illegal gambling activity.¹²²

2. The Wire(LESS?) Communications Act?

The Wire Communications Act of 1961, by its own name, applies to wired communications. In 1961, the Act’s drafters were concerned with organized crime running betting rings over telephone lines.¹²³ The issue of the Wire Act’s applicability to wireless technology is interesting, but fairly straightforward.

To date, such a thing as an entirely wireless Internet does not exist.¹²⁴ Even with wireless access to the Internet, the point of origin enabling the Internet access is bound to involve a wire.¹²⁵ On the other hand, an argument could be made and supported that the express statutory language of the Wire Act regarding “wire communication[s]” means that the Wire Act covers only wire communications like corded telephone conversations, whereas satellite cell phone communications would fall outside the ambit of the Act.¹²⁶ Additionally, the intent of the Wire Act could not have been to apply to technology like the Internet because such a thing was inconceivable.

Using the Wire Act to regulate an increasingly wireless Internet which it could not have even foreseen is similar to trying to sail the Merrimack into outer space. For now, wireless Internet concerns in light of the Wire Act are easily discarded because at some point, wires connect us to the Internet.

construction of phrase modification)).

121. *Id.* at *7.

122. As an extreme example, what are the implications of this interpretation for publicly traded securities estimates and forecasts? Playing the stock market is arguably gambling (one might argue it’s a hybrid game of chance and skill) and using the Internet to buy shares or post stock market predictions might arguably become covered by the Wire Act if it is interpreted so broadly.

123. Schwartz, *supra* note 98.

124. PRESTON GRALLA, *HOW THE INTERNET WORKS* 5-7 (4th ed. 1998).

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

126. Liddell, *supra* note 17, at 321.

However, at the rate our society develops new technology, an entirely wireless Internet is foreseeable. If and when this new technology comes to fruition, the Wire Act will be entirely defunct. New technology governed by strained interpretations of old, questionably applicable laws is a recipe for confusion and frustration.

C. *Summary of the UIGEA*

One of the primary reasons the UIGEA is an ill-conceived means to the end of prohibiting Internet gambling is that it is only an enforcement statute. In essence, the UIGEA enforces the transactional side of “unlawful Internet gambling,” with the phrase “unlawful Internet gambling” depending on the Wire Act squarely prohibiting all types Internet gambling. First of all, the loopholes in the UIGEA utilized by intermediary payment processors and paper checks render the Act toothless and rife with gaps. Secondly, the federal Circuit Court split shows the Wire Act may or may not prohibit Internet gambling on casino-style games. Thus, either the UIGEA is a creative tool for enforcing true Wire Act prohibitions, or it is completely useless by virtue of the legality of these casino-style Internet games. Most likely, the latter will prevail.

If a blanket prohibition of Internet gambling, including casino-style games, is a legitimate concern of Congress (which given the questionable passage of the UIGEA and failed prior legislative attempts is debatable), the UIGEA simply does not fix the problem. In the aftermath of the UIGEA, Congress has scrambled, proposing a stream of legislation intended to right the ship. Leaving policy questions for Congress to determine, the problems mentioned above must be addressed one way or another. Specifically, Congress must pass legislation clarifying the application of the Wire Act to Internet casino-style gambling. Additionally, Congress must pass legislation directed towards the transactions between financial institutions and Internet gambling websites.

VI. POST-UIGEA TURMOIL

This section of this note will examine the recent proposed legislation in relation to the Internet poker industry and the UIGEA. Each piece of legislation was introduced following the UIGEA and is intended to remedy or clarify problems the UIGEA caused. Each will be analyzed, and the author will conclude with a suggestion for which bill would be the most help with solving the problems caused by the UIGEA.

A. *Internet Gambling Regulation and Enforcement Act of 2007*

On April 26, 2007, Representative Barney Frank introduced the Internet Gambling Regulation and Enforcement Act.¹²⁷ Four days later, the bill was referred to the Subcommittee on Commerce, Trade and Consumer Protection. The bill sought to amend both the UIGEA and the Wire Act.

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

In effect, the Internet Gambling Regulation and Enforcement Act of 2007 (IGREA) would have clarified the UIGEA by legalizing Internet gambling for casino-style games, provided that Internet gambling providers were licensed, taxed, and regulated.¹²⁸ Under the IGREA, section 5383(b) would have provided that no person could engage in the business of betting or wagering without a license.

Governmental licenses for Internet gambling businesses would have provided protection for each individual gambler. The ability to do business in the United States would depend on honest and legal business practices because of the threat of federal prosecution for violation of established gambling practices.¹²⁹ Similarly, gamblers would have more protection because in order to be licensed, the licensee must agree to be come within the jurisdiction of the United States, giving individual gamblers a venue which is currently lacking.¹³⁰

The particular part of the proposed bill which would effectively eviscerate the UIGEA is the addition of section 5384(b). This section provides: "No financial institution shall be held liable for engaging in financial activities and transactions for or on behalf of a licensee or involving a licensee, if such activities are performed in compliance with this subchapter and with applicable Federal, State, and foreign banking laws and regulations."¹³¹ Recall that the UIGEA enforced "unlawful Internet gambling" by prohibiting transactions between financial institutions and Internet gambling businesses.¹³² The addition of section 5384(b) of the IGREA would completely overturn the UIGEA, and at the same time it would have legalized Internet gambling businesses, subject of course to state laws, on the condition that such businesses were licensed and subjected to tax liabilities.

Although the IGREA is a strong step in the direction of fixing the problems caused by the UIGEA, it will not succeed in Congress. The reason for this impending failure is the blanket allowance it creates for presumably all Internet gambling ventures, regardless of the degree to which skill or chance controls the outcome, conditioned on the website maintaining a license. The tension between the Internet gaming community and the UIGEA is the blanket prohibition it throws on Internet gambling. Just as flat bans have a tendency to produce dangerous black markets and undesirable consequences, flat allowances would have a tendency to create unpalatable results.¹³³ Regulation is usually a desirable alternative.¹³⁴ The IGREA is too drastic of a motion in the opposite direction.

Interestingly, section 5389(b) of the proposed bill would provide that the IGREA would not permit any bet or wager which would otherwise be illegal under four different gambling statutes, not one of which is the Wire Act. Thus, the proposed bill implicitly adopts the position of the Fifth Circuit Court of

128. *See id.* § 2(a).

129. *See id.*

130. *Id.*

131. *Id.*

132. *See* 31 U.S.C. § 5363 (2006).

133. *See* Alexander, *supra* note 6, at 45.

134. *Id.*

Appeals that Internet casino-style gambling is not covered by the Wire Act.¹³⁵

In fact, there is a strong argument that the IGREA actually strips the Wire Act of its supposed application to Internet gambling. Proposed section 5382(2) would define “bet or wager” the same way it is defined in the UIGEA,¹³⁶ which includes bets or wagers on sporting events.¹³⁷ The Wire Act explicitly prohibits those in the business of betting or wagering from using wire communication facilities to place bets on sporting events. Under the IGREA, it would be legal for businesses to make and accept bets on sporting events over the Internet, provided they had a license. Thus, passage of the IGREA would significantly reduce the current scope of the Wire Act.¹³⁸

B. Skill Game Protection Act

On June 7, 2007, Representative Robert Wexler introduced the Skill Game Protection Act, a short, straightforward bill which would have amended the Wire Act and the UIGEA.¹³⁹ One of the findings of the Skill Game Protection Act is the disagreement between federal courts over the applicability of the Wire Act to casino-style Internet gaming.¹⁴⁰ Essentially, the bill would add a clarifying amendment which would exempt games like poker from the Wire Act. Implicit in this proposed bill is another endorsement of the Fifth Circuit Court of Appeals’ interpretation of the Wire Act and its inapplicability to casino-style Internet gaming.¹⁴¹

The bill would have added a subsection to the Wire Act, clarifying that “the term ‘bets or wagers’ does not include operating, or participation in, poker, chess, bridge, mahjong or any other game where success is predominantly determined by a player’s skill”¹⁴² By removing the prohibition against these types of games under the Wire Act, the games would not be unlawful and the UIGEA would not apply.

However, the Skill Game Protection Act is a “quick fix” attempt for a problem which is not so easily solved. The primary problem with the Skill Game Protection Act is the wording “predominantly determined by a player’s skill.”¹⁴³ Earlier in this note, the author discussed how finding a scientific method to prove skill predominates over chance in the outcome of hybrid games is virtually impossible.

Second, the Skill Game Protection Act is based on an incorrect premise of the predominance test. One of the findings of the proposed bill restates the predominance test utilized by courts: “Games where success is predominantly determined by the skill of the players involved, as a matter of law and of policy,

135. See *MasterCard*, 313 F.3d 257.

136. H.R. 2046, 110th Cong. § 2(a) (2007).

137. 31 U.S.C. § 5362(1)(A) (2007).

138. The scope of the Wire Act, as discussed in prior sections, is debatable.

139. Skill Game Protection Act, H.R. 2610, 110th Cong. (2007).

140. *Id.* at § 2(5).

141. See *MasterCard*, 313 F.3d 257.

142. H.R. 2610, 110th Cong., § 3 (2007).

143. *Id.*

are distinct from the games of chance traditionally described and addressed in Federal and State gambling statutes.”¹⁴⁴ This summary is fair. However, the proposed bill also states in its findings that despite the element of chance, “over any *substantial interval*, a player’s success at any of these games is determined by that player’s relative level of skill”¹⁴⁵

The problem is that Representative Wexler’s proposed bill has turned the predominance test employed by courts on its head. Recall that the predominance test is a determination of whether chance or skill “is the dominating element that determines the *result* of the game.”¹⁴⁶ For example, the hybrid game of poker could be either a game of skill or chance based on the outcome of each individual hand dealt and played. The predominance test says nothing of long-term success in favor of short-term success. The proposed bill conflicts with the predominance test utilized by courts in applying gambling law, which requires fifty-one percent of the outcome of a game to be determined by skill in order to be legally considered a skill game. Instead of a clear statistical predominance, the Skill Game Protection Act would tie the predominance test to how much time Internet gamblers could potentially spend sitting in front of their computers placing bets or wagers.

As a matter of public policy, it appears that the Skill Game Protection Act is somewhat transparently attempting to legalize Internet poker for the sake of professional gamblers and serious poker enthusiasts.¹⁴⁷ If a “substantial interval” of time playing Internet poker is required to see the effects of skill prevailing over chance, these two groups of people would likely be the only ones spending enough time to reap the benefits of skill. Thus, the Skill Game Protection Act would carve out a skill exception for certain games, not based on the skill required by the game, but on the basis of the skill of the professional or serious hobby player.

C. *Payment Systems Protection Act of 2008*

The Payment Systems Protection Act of 2008 was introduced by Representative Barney Frank on September 11, 2008.¹⁴⁸ There are two important sections to this short bill, both of which have a direct and immediate impact on the UIGEA. First, section two would suspend the enforcement of any regulations of the UIGEA.¹⁴⁹ Therefore, if the Payment Systems Protection Act became law, financial institutions would have a window of time to openly transact with Internet gambling businesses, except those providing sports gambling.¹⁵⁰ This window of time would either close or remain open depending on section three of the Payment Systems Protection Act.

Section three would require the Secretary of the Treasury, the Governors of

144. *Id.* at § 2(4).

145. *Id.* at § 2(3) (emphasis added).

146. 38 AM. JUR. 2D *Gambling* § 4 (2008) (emphasis added).

147. H.R. 2610, 110th Cong., § 2(2) (2007).

148. Payment Systems Protection Act of 2008, H.R. 6870, 110th Cong. (2007).

149. *Id.* § 2.

150. *Id.*

the Federal Reserve System, and the Attorney General to jointly develop and implement regulations under the UIGEA.¹⁵¹ Most importantly, section three would require these parties to clarify the definition of “unlawful Internet gambling.”¹⁵² The interesting part of the Payment Systems Protection Act is that “unlawful Internet gambling” is already defined in the UIGEA as using the Internet to place a bet or wager where doing so would be unlawful under any applicable Federal or State law.¹⁵³ Thus, passage of the Payment Systems Protection Act would be an implicit Congressional notice of the federal court split and an order for the Secretary, Governors of the Federal Reserve System and the Attorney General to clarify exactly what activities are prohibited by certain anti-gambling laws. Given the legislative timeline and the amount of public pressure following the UIGEA, it is a fair assumption that the specific clarification desired of “unlawful Internet gambling” would require an analysis of the Wire Act and whether or not Internet gambling on casino-style games is unlawful.

The suspension of UIGEA regulations seems to be a practical solution, pending the determination of what exactly constitutes “unlawful Internet gambling.” Financial institutions should not be unnecessarily burdened with an ambiguous law while Congress and the courts struggle to determine what the law actually means. However, two criticisms of the Payment Systems Protection Act become apparent. First, the temporary nature of the bill merely provides a window of opportunity for financial institutions to deal with Internet gambling operations. There is no guarantee one way or another as to whether this window will stay open or close again. Secondly, it is difficult to see how the Payment Systems Protection Act would remedy the fundamental problem. Congress created the UIGEA and made its scope ambiguous. Courts have struggled with what it actually enforces. The Payment Systems Protection Act seems to be “passing the buck” to the Secretary of the Treasury, the Governors of the Federal Reserve System, and the Attorney General to decide what Congress meant by “unlawful Internet gambling.” It would be difficult to support legislation in which Congress asks the parties above to determine what Congress itself meant.

At the time of printing, the Payment Systems Protection Act was marked up by the House Committee on Financial Services, reported, and added to the Senate calendar.¹⁵⁴

D. Internet Skill Game Licensing and Control Act of 2008

Senator Robert Menendez introduced the Internet Skill Game Licensing and Control Act (ISGLCA) on September 26, 2008.¹⁵⁵ This proposed bill represents the most coherent synthesis of prior legislative attempts at fixing the problems

151. *Id.* § 3(a).

152. *Id.*

153. See 31 U.S.C. § 5362(10)(A) (2007).

154. Govtrack.us, H.R. 6870: Payment System Protection Act of 2008, available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-6870> (last visited Jan. 4, 2009).

155. Internet Skill Game Licensing and Control Act of 2008, S. 3616, 110th Cong. (2008).

caused by the UIGEA. The bill performs dual functions. First, it mimics the proposed Internet Gambling Regulation and Enforcement Act of 2007 by offering to license Internet gambling businesses.¹⁵⁶ The bill also takes a cue from the Skill Game Protection Act by limiting Internet gambling business licenses to businesses running games predominantly dominated by skill.¹⁵⁷ Finally, the proposed bill would borrow from the Payment Systems Protection Act by allowing transactions between financial institutions and licensed Internet skill game gambling businesses.¹⁵⁸

The licensing function of the Internet Skill Game Licensing and Control Act is found in proposed section 5382(a). Should the bill become law, six months after licensing becomes available to businesses, "it shall be unlawful for a person to operate an *Internet skill game facility* in interstate or foreign commerce without a license . . ." ¹⁵⁹ An "Internet skill game facility" is defined as "an Internet site through which a *permitted bet or wager* is placed, accepted, or otherwise made, whether transmitted by telephone, Internet, or other electronic communication."¹⁶⁰ "Permitted bet or wager" is defined as a "bet or wager made with respect to the outcome of an *Internet skill game* that is a *non-house banked game*."¹⁶¹ "Non-house-banked" games are defined as games in which players play against each other and not against the operator of the game.¹⁶² "Internet skill game," is defined as an "Internet-based game that uses simulated cards, dice, or tiles in which success is predominantly determined by the skill of the players, including poker, bridge, and mahjong."¹⁶³ Thus, the ISGLCA would permit licensed Internet skill game gambling operations to accept bids on a small class of games where players do not play against the house.

Again, the immediately apparent issue is the "predominantly determined" language borrowed from the Skill Game Protection Act.¹⁶⁴ As discussed, just because a bill announces a certain category of game as a game predominantly determined by skill does not make it true. However, the language in this bill can easily be reformulated, for example, by changing "predominantly determined" to "significantly determined." The reason the language in this bill differs from the proposed Skill Game Protection Act is because the findings of the ISGLCA do not tie the designation of a skill game to an incorrect interpretation of the judicial predominance test. Admittedly, courts would be burdened with finding a new threshold for when hybrid games of skill and chance become "significantly determined" by skill rather than "predominantly determined." However, the examples of games outlined in the ISGLCA (poker, bridge, mah-jong) and the method of playing these games (simulated cards, dice, or tiles) provides the courts with plenty of guidance with which to base

156. See H.R. 2046, 110th Cong. (2007).

157. See H.R. 2610, 110th Cong. (2007).

158. See H.R. 6870, 110th Cong. (2007).

159. S. 3616 § 2(a) (2008) (emphasis added).

160. *Id.* (emphasis added).

161. *Id.* (emphasis added).

162. *Id.*

163. *Id.*

164. See Keller, *supra* note 127.

their interpretations. Despite the minor issue of changing the skill language, the quality of the remainder of the proposed ISGLCA would provide a functional system for effectively managing Internet skill game facilities.

Protection of gamblers is also a strong theme of the ISGLCA. In this regard, the bill would provide for the licensing and legal operation of Internet skill game gambling facilities, but proposed section 5382(g)(1) would require safeguards and mechanisms with respect to any (and therefore all) permitted bets or wagers.¹⁶⁵ The proposed bill would require licensees to submit to the jurisdiction of the United States courts.¹⁶⁶ On the same token, the proposed bill would require safeguards to ensure that all gamblers were eighteen years of age or older and were placing their bets from within a jurisdiction which permits the operation of an Internet skill game facility.¹⁶⁷ Additionally, the proposed bill protects individual gamblers by requiring reasonable safeguards to prevent or mitigate social problems which may be associated with Internet skill games,¹⁶⁸ and also requires reasonable safeguards to protect the privacy and security of individual gamblers.¹⁶⁹

The proposed bill would also benefit federal and state governments. The ISGLCA requires reasonable safeguards to prevent fraud and money laundering through licensed operating facilities,¹⁷⁰ one of the main concerns of the Wire Act.¹⁷¹ Further, provisions are made for mechanisms to ensure that taxes are collected from individual gamblers who earn proceeds from their Internet skill game participation,¹⁷² and even more broadly "all taxes relating to Internet skill games. . . are collected as required by law."¹⁷³ Thus, federal and state governments would benefit reap tax benefits from both individual gamblers and Internet skill game operators. An estimated \$3 billion of tax revenue could be generated in the first year of licensing alone.¹⁷⁴

The ISGLCA is especially attractive because of its thorough approach. The second major function of the bill borrows the approach of the proposed Payment Systems Protection Act.¹⁷⁵ It is important to note that licensing Internet skill game facilities removes such gambling operations from the scope of the UIGEA. However, the ISGLCA not only makes it inescapably clear that the UIGEA would no longer have any effect on licensed Internet skill game facility operators, but that it would also no longer affect financial institutions or payment processing companies who transact with these facility operators. Proposed section 5383(b) would provide that "[a] person may not be held liable for engaging in payments processing activities involving a licensee . . ."¹⁷⁶

165. S. 3616, 110th Cong. § 2(a) (2008).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. See Schwartz, *supra* note 98.

172. S. 3616, 110th Cong. § 2(a) (2008).

173. *Id.*

174. Schmitt, *supra* note 101, at 403.

175. See H.R. 6870, 110th Cong. (2007).

176. S. 3616, 110th Cong. § 2(a) (2008).

Additionally, under proposed section 5383(c), “financial institution[s] may not be held liable for engaging in financial activities and transactions involving a licensee”¹⁷⁷ These are express allowances for e-wallets like NETeller and financial institutions, respectively, to send money to licensed Internet skill game facilities. This section of the proposed bill makes sure not to impede on the Sarbanes-Oxley Act of 2002, the Securities Act of 1933, the Securities Exchange Act of 1934, and any other applicable provision of law governing securities.¹⁷⁸

The Internet Skill Game Licensing and Control Act represents the best legislative attempt to fix the problems associated with the UIGEA. Despite its definitional shortcomings by utilizing the common phrase “predominantly subject to chance,” the language is easily changeable. Games like Internet poker are not necessarily predominantly determined by chance, though they are significantly subject to chance. Clarifying the definition of skill games removes lots of the legal confusion while hardly, if at all, impacting the amount of games falling within the scope of the proposed bill.

The ISGLCA is preferable to the other significant bills on point for several reasons. It is similar to the proposed Skill Game Licensing Act in that it uses an imperfect definition of skill games. However, the predominance test it proposes is not fundamentally tied to an incorrect interpretation of the test and thus is more malleable. Additionally, the ISGLCA offers plenty of specific guidance to the judiciary in the bill which will help guide the courts in determining which games are licensable and which are not.¹⁷⁹ Further, the ISGLCA is a better legislative option than the Payment Systems Protection Act because it permanently legalizes transactions between financial institutions and licensed Internet skill game facilities with a clear line rule. Lastly, the ISGLCA is favorable to the proposed Internet Gambling Regulation and Enforcement Act because it limits the scope of licenses for Internet gambling businesses to games based on skill, rather than a blanket allowance for any and all gambling businesses.

Another benefit of the ISGLCA is the simple fact that the legislature would save face. The UIGEA would still exist as an enforcement statute for existing gambling laws. The ISGLCA simply carves out a relatively small subset of Internet gambling, leaving the UIGEA with plenty to enforce. Although the UIGEA would no longer apply to skill games such as Internet poker, which was presumably the target of the legislation due to the size of the industry, it would still exist as a creative and effective enforcement tool against every form of unlawful Internet gambling.

177. *Id.*

178. *Id.*

179. *See id.* (proposed section 5381(4) explains Congress intends the type of games it is licensing to be those that use simulated cards, dice, or tiles in games like poker, bridge, and mah-jong).

VII. CONCLUSION AND SUGGESTIONS: WHAT IS THE BEST BET FOR THE UIGEA AND INTERNET POKER?

The Unlawful Internet Gambling Enforcement Act represents everything the legislature should avoid. From its suspicious beginning, the UIGEA was bound to encounter cries of foul play and attacks on its effectiveness. What more could Congress expect when it attached an unrelated “pet” bill into the SAFE Port Act? When the UIGEA became law, the practical and legal implications as to the enforcement of and basic application to Internet poker came to bear. The author would offer two suggestions for determining whether or not the UIGEA applies to the huge industry of Internet poker and what the next legislative step should be.

First and simplest, the Wire Act should be examined and a definite position should be taken on the issue of whether or not Internet gambling on casino-style games is a violation of the Wire Act. The judiciary may have an opportunity to examine this issue, in which event the court will have to favor one side of a federal Circuit Court split. Should it be decided that the Wire Act does, in fact, apply to Internet casino-style gambling businesses, such activity is unlawful Internet gambling and is subject to enforcement under the UIGEA. Should the issue be decided in the alternative, the UIGEA would not be able to enforce regulations against Internet gaming operations like the poker industry. Regardless of the outcome of this determination, the Wire Act should be amended. If Congress decides it wants to allow Internet gambling, they should amend the Wire Act accordingly. Likewise, if Congress decides to prohibit Internet gambling, it should clarify the Wire Act accordingly by amendment.

Most likely, Congress will decide that it wants to allow some Internet gambling but not all. The appropriate step would be passing clear legislation outlining exactly what sorts of Internet gambling are lawful and which sorts are unlawful. Following an examination of the leading bills, it is clear that the best option of the proposed legislation is the Internet Skill Game Licensing and Control Act. This proposed legislation offers the benefits of licensing Internet skill game facilities, which can be summarized as consumer protection, taxation benefits, and federal jurisdiction over said facilities. The ISGLCA also protects the transactional business of Internet gambling on skill games, meaning that financial institutions are allowed to send money to licensed gambling websites from their clients’ accounts. Finally, the ISGLCA would leave the UIGEA undisturbed. The UIGEA itself is a creative and effective tool for managing unlawful Internet gambling, as seen by its effect on the Internet poker industry. The problems of the UIGEA are reducible to the Act’s scope. Once clarification of the legality of certain forms of Internet gambling has been determined by new legislation, the UIGEA will be an even better tool for law enforcement.