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THE RISE OF ONLINE GAMING: THE DOMINANT FACTORS OF POKER & THE FALL OF THE UIGEA AND ITS PREDECESSORS

Peter Schiavone

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I. INTRODUCTION

Gambling has always been a large part of American culture. In fact, “today, 48 states and the District of Columbia permit some form of legalized gambling,”¹ and the widespread availability of gambling combined with states that permit gambling in some form has led to a federal research study that has shown that over sixty percent of adults gamble in one form or another.² Furthermore, a Gallup Poll showed that eighty percent of those surveyed supported

¹ Richard Raysman & Peter Brown, *Cyber-Casinos: Gambling Meets the Internet*, N.Y. L.J., Aug. 12, 1997, at 3.

² Michael P. Kailus, Note, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U. Ill. L. Rev. 1045 (1999) (citing James Mann & Gordon Bock, *Gambling Rage Out of Control?*, U.S. News & World Rep., May 30, 1983, at 27).

legalizing gambling.³ Although much of that gambling may have been done in traditional casinos there has been a clear move in recent years towards online gambling,⁴ and the rapid growth of the online gaming industry over the last fifteen years is evidence of that trend.⁵ The first online gambling sites showed up around 1995⁶ and these sites have grown in number to the point that the volume of gambling done through the Internet is greater than that of Las Vegas and Atlantic City⁷. The projected revenue from all online gambling sites in 2009 is roughly twenty billion dollars and that figure is expected to continue to grow in years to come.⁸

Historically, sports betting accounted for the majority of the money that was gambled on online casinos.⁹ However, over the past decade there has been a significant shift in how online gamblers are betting,¹⁰ and the shift to poker has accounted for more than forty percent of all online gambling.¹¹ One of the larger online casinos, PartyGaming, reported revenue in 2005 of nearly one billion dollars.¹² Eighty-eight percent of their revenue came from online poker¹³ and of the approximately eight hundred eighty million dollars gambled on their site eighty-four percent of that revenue was generated from players in the United States.¹⁴ Furthermore, the total amount gambled online in the United States was estimated at approximately six billion dollars.¹⁵ Approximately fifteen to twenty million people in the United States had placed bets online

³ Id at 27.

⁴ David O. Stewart, *An Analysis of Internet Gambling and Its Policy Implications* 1 (Am. Gaming Ass'n ed., 2006)

⁵ Id.

⁶ Joseph J. McBurney, Comment, *To Regulate or To Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry's Future in the United States*, 21 *Conn. J. Int'l L.* 337, 348-49 (2006).

⁷ Id at 339. Online casinos have boomed to approximately 1,800 in 2002. Id.

⁸ Id

⁹ Id

¹⁰ Id.

¹¹ Id.

¹² PartyGaming Plc, 2005 Annual Report 48.

¹³ Id.

¹⁴ Id

¹⁵ Associated Press, *Experts: Online-Gambling Ban Won't Work*, FOXNEWS.COM, Oct. 25, 2006, http://www.foxnews.com/prINTER_friendly_story/0,3566,224839,00.html.

during 2005 which accounted for that six billion dollars.¹⁶ These numbers clearly represent that, despite the efforts of U.S. lawmakers, people continue to gamble online in incredible numbers. In fact, the growth of online poker has been projected to reach over twenty-four billion dollars at the end of this year.¹⁷

A great deal of the growth and popularity of online poker, and in particular Texas Hold-em, can be traced to the television exposure that poker received through channels like ESPN, The Travel Channel, and Bravo,¹⁸ each of these channels nationally broadcast high stakes poker tournaments in the United States¹⁹. The amount of television exposure that United States citizens received was overwhelming and online gambling sites were quick to cater to Americans that wanted to try their luck at online gaming. However, the Department of Justice (“DOJ”) was quick to step in and try to stop these sites from advertising in the U.S. and they issued letters to the National Association of Broadcasters alerting them that allowing online casinos to advertise would be considered aiding or abetting illegal gambling operations.²⁰ Shortly after the DOJ issued this statement several media companies were issued subpoenas²¹ but there were no actual cases where the DOJ prosecuted a lawsuit against any of these companies.²² Although U.S. lawmakers tried to limit the ability of online gambling sites to advertise on U.S. television these companies were able to avoid any further trouble by advertising their dot-net sister-site rather

¹⁶ Radely Balko, *Online Gambling Ban a Bad Bet for Republicans*, FOXNEWS.COM, Oct. 23, 2006, http://www.foxnews.com/printer_friendly_story/0,3566,224157,00.html.

¹⁷ Lorraine Harrington, Note, *Loaded Dice: Do National Internet Gaming Statutes Violate World Trade Organization Fair Trade Access Standards?*, 24 *Ariz. J. Int'l & Comp. L.* 769, 769 (2007).

¹⁸ See, e.g., *World Series of Poker* (ESPN); *World Poker Tour* (The Travel Channel); *Celebrity Poker Showdown* (Bravo)

¹⁹ Christopher Grohman, *Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet gambling Ban of 2006*, 1 *J. Legal Tech. Risk Mgmt.* 34, 64 (2006).

²⁰ See Megan E. Frese, Note, *Rolling The Dice: Are Online Gambling Advertisers “Aiding and Abetting” Criminal Activity or Exercising First Amendment-Protected Free Speech?*, 15 *Fordham Intell. Prop. Media & Ent. L.J.* 547, 612 (2005).

²¹ *Id.* at 555.

²² See Joseph Lewczack, *Safe Bet?*, *PROMO MAGAZINE*, Jan. 1, 2006, http://promomagazine.com/legal/marketing_safe_bet

than using the dot-com site.²³ After exploiting this loophole the ability of online gambling companies to advertise freely in American markets certainly aided in making online poker in the United States extremely popular.

The growing popularity and the revenue generated from online gambling, and poker in particular, led lawmakers to try and bring to an end, or at the very least limit the ability of U.S. citizens to access online gambling sites.²⁴ These attempts came in two forms: a somewhat inconsistent interpretation of the Wire Act²⁵, and the Unlawful Internet Gambling Enforcement Act (“UIGEA”).²⁶ However, each of the acts has struggled to limit or prosecute individual online gamblers because of how difficult it is to track people in cyberspace.²⁷ Furthermore, many proponents of legalizing poker argue that poker is a game of skill as opposed to a game of chance and therefore not within the reach of either the Wire Act or the UIGEA.²⁸ The skill aspect of poker and its effect on the classification of online poker will be explored in the text to follow. In addition, the effectiveness and applicability of the Wire Act and the UIGEA will be examined below along with some of the issues arising from each act. Finally, the issue of State action and legalization with regard to online poker will be considered.

²³ This became an important distinction in the eyes of the Department of Justice and media companies because the dot-com sites offered gambling for real money which was in direct conflict with the stance of the DOJ in regard to online gambling. On the other hand, the dot-net sites offered the ability to play for free and avoided any potential issues with the DOJ. However, it is clear that the advertising was effective in getting players to gamble on the dot-com sites as well as visit the dot-net sites. See Joseph Lewczak, *Safe Bet?*, PROMO MAGAZINE, Jan. 1, 2006, http://promomagazine.com/legal/marketing_safe_bet/.

²⁴ See generally Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 *B.U.L. Rev.* 371. (2006) n. 286. Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act. Hearing on H.R. 21 and H.R. 1223 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. On the judiciary, 108th Cong. 8-12 (2003) (statement of John G. Malcolm, Deputy Assistant Att’y Gen., Criminal Division, U.S. Department of Justice) (reporting that the DOJ “has concerns” about the feasibility of regulating Internet gambling as proposed in H.R. 1223, and that the DOJ believed that Internet gambling should be prohibited and not regulated).

²⁵ 18 *U.S.C. § 1084* (2006)

²⁶ 31 *U.S.C. §§5361-5367*.

²⁷ Bruce P. Keller, *The Game’s the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 *Yale L.J.* 1569, 1593 (1999).

²⁸ Bennett M. Liebman, *Poker Flops Under New York Law*, 17 *Fordham Intell. Prop. Media & Ent. L.J.* 1, 1-2 (2006).

II. THE DOMINANT FACTOR IN POKER AND THE CHANCE/SKILL SPECTRUM

It has often been said with regard to poker that if you cannot find the sucker at the table then it is you.²⁹ This simple statement is rooted in the idea that poker is a game of skill and that the more skillful players will always win over the less skilled or novice players. Poker is a game that requires a specific skill set and some of those skills include:

1. The ability to calculate precise mathematical odds of a needed card coming on a turn or river;³⁰
2. The ability to read your opponents behavior and body language;³¹ and
3. The ability to understand and apply advanced strategic concepts such as semi-bluffing and playing for implied odds.³²

The list above includes only some of the abilities that a skilled poker player possesses and helps illustrate clearly that there is a significant amount of skill involved in playing both traditional and online poker.³³

However, courts have had a mixed reaction as to the question of poker being a game of skill or a game of chance.³⁴ When courts have tried to make the determination of whether poker is a game of skill or of chance the majority of these courts have relied on the dominant factor test.³⁵ Using the dominant factor test, a court will find that a game is based on chance “when an element of chance dominates the distribution of prizes, even though such a distribution is

²⁹ Source unknown

³⁰ Roman V. Yampolskiy, Game Skill Measure for Mixed Games, 27 Proc. World Acad. Sci. Engineering & Tech. 308, 309-310 (2007). The terms “turn” and “river” refer respectively to the fourth and fifth community cards dealt in a hand of Texas Hold-em.

³¹ Id.

³² Id.

³³ Id.

³⁴ Michael A. Tselnik, Note, Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act, 35 Hofstra L. Rev. 1662-63 (2007).

³⁵ Id.

affected to some degree by the exercise of skill or judgment.”³⁶ The main thrust of the dominant factor test is to place all games along a spectrum and determine where they fall, either more towards chance or more towards skill. Recognizing that most casino games will have elements of both chance and skill the important language is whether “an element of chance dominates” the game.³⁷ The courts also may look to certain factors like whether or not a player can learn through experience and how well skilled players do as opposed to unskilled players.³⁸ Following that reasoning, poker players use information and educated guesses based on probabilities as to what odds are necessary to win a given hand, “each hand is simply a process of analyzing a ratio of risk versus reward.”³⁹ The experience one can gain playing poker combined with a known skill set may be enough to lead some courts to find poker is a dominantly skill based game. Despite the majority of states using the dominant factor test to determine whether a game is predominantly one of skill other states have taken a more aggressive stance by banning all games regardless of the skill component.⁴⁰ Although a minority of states have banned all games a large majority of state gambling laws only address games of chance and not games of skill.⁴¹ This leaves a void of uncertainty surrounding hybrid games like poker which is what causes a lot of interpretation problems with regard to the Wire Act and the UIGEA.

³⁶ *In Re Advisory Opinion to the Governor*, 856 A. 2d 320 (R.I. 2004) (quoting *Roberts v. Commc’ns Inv. Club of Woonsocket*, 431 A.2d 1206, 1211 (R.I. 1981).

³⁷ *Id.*

³⁸ Christine Hurt, Article: Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox, 86 *B.U.L. Rev.* 371. 377 (2006).

³⁹ Tselnik *supra* note 26, at 1648 citing David Sklansky, *The Theory of Poker* (4th ed. 2001) See also Sklansky at 245 (“like any other gambling game, poker is a game of risks versus rewards. Any decision you make at the poker table can be thought of as a comparison of the risk involved in a particular play and the possible reward for the play.”).

⁴⁰ Arizona, Arkansas, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, and Tennessee court decisions and statutes have eliminated the need to determine the dominant factor by banning all games and not distinguishing between games of chance and games of skill.

⁴¹ Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, at 8, 23-29 (2001).

In *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox* Hurt summed up the distinction between games of chance and games of skill well in stating that “on one end of the chance/skill spectrum, chance exclusively controls the return of an economic wager. On the other end of the spectrum, the skill of the wagerer controls the return to a greater extent.”⁴² Below, as Figure 1, is a table that Hurt created to illustrate the chance/skill spectrum:

FIGURE 1⁴³

Pure Chance								Skill Mixed with Chance	
"L" Games;	Blackj ack	Derivati ves & Day Trading	Pok er	Sport s Betti ng	Tradin g individual stocks	Insider sports betting	Insid er Tradi ng	Long- Term Passive Stock owners hip	Long- Term Active Stock Owners hip
Lottery									
					Profiteer				
Chance speculation					ing				Investi ng
Entertain									Utility

⁴² Id at 34.

⁴³ Hurt, *supra* note 38, at 378. This figure outlines the chance/skill spectrum.

ment

This table shows poker as a hybrid game involving elements of both skill and chance and certainly does not classify poker as a game dominated by chance.⁴⁴ In Hurt's article she went on to say that "in no point in the spectrum does the element of chance disappear, as even in contests of skill, the impact of chance can never be eliminated."⁴⁵ This concept is very applicable to poker, anyone around a poker table for a while has heard about a "bad beat,"⁴⁶ chance can never be completely eliminated in poker or any gambling activity. But, due to the skilled nature of poker the better player will win in the long run.

Other casino games (beside blackjack and poker, which are listed in the above table) can also be placed into Figure 1, games of pure chance including roulette, craps, keno, bingo, and slots⁴⁷ would be on the far left of Hurt's chart because they rely solely on chance and there is no skill or strategy to them. However, poker can be differentiated from pure chance games in that a skilled poker player has a greater probability of making money in the long run based on his skill and experience, whereas your odds of winning do not change in pure chance games.⁴⁸ Poker also involves playing against other individuals rather than the casino, where the odds of the games are certainly in the houses favor and no amount of skill will change those odds. Tselnik clearly stated the distinction between making money at skill games like poker and trying to win money playing pure chance games when he wrote "the most skillful roulette player cannot overcome the

⁴⁴ Id.

⁴⁵ Hurt, *supra* note 38, at 378.

⁴⁶ A bad beat occurs when one player has an overwhelming statistical advantage over another player and yet because of chance the weaker player wins the hand. (ex. Player 1 has a 95% chance of winning the hand over player 2 but due to chance or luck player 2 wins the hand).

⁴⁷ Robert C. Hannum & Anthony N. Cabot, *Practical Casino Math* 61 (2nd ed. 2005).

⁴⁸ Id.

decided advantage of a casino, while skillful poker participants can outwit other players on a level field. Simply put, since the odds are not stacked against poker players, skillful play trumps the “luck factor” en route to an annual profit.”⁴⁹

In attempting to define what constitutes a game of skill it is helpful to look at a definition provided by the Alabama Supreme Court: “Skill – in the context of activities... is merely the exercise, upon known rules and fixed probabilities, of “sagacity,” which is defined as “quickness or acuteness of sense perceptions; keenness of discernment or penetration with soundness of judgment; shrewdness; [the] ability to see what is relevant and significant. Thus, an activity that results in an award based upon the exercise of these qualities in conjunction with definite rules and probabilities that can be calculated by the bettor is not prohibited.”⁵⁰ This quote reiterates, to some degree, the elements of a skillful poker player that were listed above and it shows that some courts are willing to look at games like poker as a game dominated by skill rather than chance and therefore not a game prohibited by law. Additionally, other courts have specifically found that poker is a game of skill. California found that poker tournaments are games of skill using the dominant factor test,⁵¹ Pennsylvania has also found that poker was predominately a game of skill in *Commonwealth v. Watkins*,⁵² and the Montana Supreme court found poker to be a game of skill defining it as “a game played by individuals with one player pitting his skills and talents against those of the other players.”⁵³ Moreover, the Washington Supreme Court found

⁴⁹ Tselnik supra note 34, at 1645.

⁵⁰ *Opinion of the Justices*, 692 So.2d 107, 111 (Ala. 1997).

⁵¹ See *Bell Gardens Bicycle Club v. Dep’t of Justice*, 42 Cal. Rptr. 2d 730, 749-51 (Cal. Ct. App. 1995).

⁵² *Commonwealth v. Watkins*, No. CP-19-CR-0000746-2008 (Pa. Ct. Com. Pl. Jan. 14, 2009), available at <http://www.scribd.com/doc/109151/PA-Judge-Thomas-A-James-Jr-Opinion-On-Commonwealth-of-PA-vs-Walter-Watkin>.

⁵³ *Gallatin County v. D & R Music & Vending, Inc.*, 676 P.2d 779, 781.

that the state's lottery statutes didn't bar poker because poker was a game that involved substantial skill.⁵⁴

Despite the findings of courts such as California, Montana, Pennsylvania, and Washington many other states have decided that poker is a game of chance and have banned it altogether. These states include Colorado,⁵⁵ Nebraska,⁵⁶ New York,⁵⁷ North Carolina⁵⁸, and Illinois.⁵⁹ Although there have been a great deal of cases that discuss, and have ultimately decided whether poker is a game of skill or chance, the courts that have found poker to be predominately a game of chance have not conducted any sort of analysis as to the factors and skills that go into playing poker at a high level.⁶⁰ The lack of information and analysis by these courts may have been due to a general lack of information regarding poker at the time of those decisions. But, as the popularity of poker continues to grow and the revenue generated from online poker gets larger there should be more data available to the courts and ultimately this additional data may prove to be a deciding factor in future cases.

In the introductory comments to this paper there were several stats showing how quickly online poker gained popularity and how profitable a market there was for online gambling. It was not surprising that people gravitated toward online gambling considering the number of sites, the availability of playing online poker, and the convenience online play offers. In fact, despite the varying court decisions regarding the legality of online poker the industry continued

⁵⁴ See *State ex rel. Schillberg v. Barnett*, 488 P.2d 255,257 (Wash. 1971).

⁵⁵ *Charnes v. Central City Opera House Ass'n* 773 P.2d 546 (Colo. 1989)

⁵⁶ *Indoor Recreation Enters., Inc. v Douglas*, 235 N.W.2d 398 (Neb. 1975).

⁵⁷ *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. City Crim. Ct. 1995).

⁵⁸ *State v. Mchone*, 90 S.E.2d 539, 539-40 (N.C. 1955).

⁵⁹ *People v. Mitchell*, 444 N.E.2d 1153, 1155 (Ill. App. Ct. 1983).

⁶⁰ Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 *T.M. Cooley L. Rev.* 443 461-62(2005).

to grow.⁶¹ Although the question in front of the courts always involved whether poker was a game dominated by skill or chance that question became somewhat more difficult to answer in the online context and opponents to the legality of online poker claim that many of the skill components involved with poker are greatly diminished in the online context.⁶²

These claims are misguided because the skills involved in traditional poker do in fact translate to the online version of the game.⁶³ Each of the various skills can be used in an online context; the math involved is the same and the ability to read betting patterns also remains the same. Perhaps the only skill that cannot be transferred to the online game is the player's ability to read an opponent's body language because players are not in the physical presence of each other. Although this point is valid it is not enough to state that the skill component of online poker is diminished and the game becomes dominated by chance. One of the biggest reasons that skilled players win in the long run is because they use their understanding of mathematics and probabilities to increase their odds of winning over an extended period of time and that does not change in the online version of the game. As an additional counterpoint to Conon's article there are some resources available to online players that are not available to traditional poker players. One such resource is tracking software which records other players betting tendencies and betting history.⁶⁴ Although this may not be a perfect substitute for being able to pick up on the physical tells of other players at a table it is certainly a valuable tool to a skilled player that can use the knowledge gained from the software to his advantage.

⁶¹ Grohman *supra* note 19, at 37.

⁶² See Jonathan Conon, Comment: Aces and Eights: Why the Unlawful Internet Gambling Enforcement Act Resides in "Dead Man's" Land in Attempting to Further Curb Online Gambling and Why Expanded Criminalization is Preferable to Legalization, 99 *J. Crim. & Criminology* 1157 (2009).

⁶³ See *supra* text accompanying notes 30-32.

⁶⁴ See e.g., Poker-Edge.com, Dramatically Increase Your Poker Profits By Stalking Your Opponents' Play, <http://www.poker-edge.com/index.php> (last visited April 5, 2010).

Online poker still requires a great deal of skill and the skilled players will still maintain an edge over novice or unskilled players. In fact, a study was done into artificial intelligence as it could apply to poker and this study showed how a skilled online poker player using various techniques could maintain an edge over other players online.⁶⁵ Taking this a step further the researcher pitted skilled players against a computer programmed to calculate the probabilities and always make to “correct” move.⁶⁶ The researchers involved in building the computer program described poker as “a game of imperfect information, where multiple competing agents must deal with probabilistic knowledge, risk assessment, and possible deception, not unlike decisions made in the real world.”⁶⁷ Darse and the other researchers recognized almost immediately that many of the real world poker skills translated directly into the online game.⁶⁸ The computer program that these researchers created was called Loki⁶⁹ and although the program was successful initially “online opponents would detect patterns and weaknesses in the program’s play, and they would alter their strategy to exploit them.”⁷⁰ The results that these researchers found directly supports the contention that skilled players can adapt their skill set to the online environment and continue to have success over less skilled opponents, or in this case a less skilled computer.⁷¹

There are several contending views as to the legality of online poker and as to whether poker is a game of skill or chance, but the tide seems to be turning toward the view that poker involves a great deal more skill than chance. Although the United States has not come to a

⁶⁵ Darse Billings et al., Opponent Modeling in Poker, <http://www.cs.ualberta.ca/darse/papers/AAA198.pdf>

⁶⁶ Id. (The correct move is defined as being determined by hand strength, pot odds, and overall probability of success in a given hand).

⁶⁷ Darse Billings et al., The Challenge of Poker, 1 (June 22, 2001), available at <http://www.cs.ualberta.ca/darse/Papers/AIJ02.pdf>.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

uniform decision as to whether online poker is legal or not it is clear that the millions of U.S. citizens are going to continue to test their skill on the Internet.

III. FEDERAL AND STATE EFFORTS TO LIMIT AND CONTROL ONLINE GAMBLING ACTIVITY

As online gambling grew in popularity it triggered several key policy concerns within the federal government.⁷² The first is that the ease and accessibility of online gambling sites “could exacerbate the temptations facing compulsive gamblers.”⁷³ The next policy concern was age verification, online it is much more difficult to verify the players age than it would be in a traditional casino environment.⁷⁴ Third, there is a fear that online casinos invite the potential for fraud due to the lack of regulation,⁷⁵ and finally, the government is concerned with the potential for money laundering due to the “volume, speed, and international reach of Internet transactions and offshore locations” along with the “high level of anonymity” of the offshore online casinos.⁷⁶ Later in the text it will be shown that the latter concern may have actually been made worse by the enacting the UIGEA.

The federal government has tried to introduce bills or apply existing ones (see the Wire act) that would limit Internet gambling or remove it altogether as early as the 1990s when the first online casinos popped up.⁷⁷ One of the first attempts to curb online gambling activity came in the form of a proposed amendment to the Wire Act that would have banned all forms of online

⁷² U.S. GEN. ACCOUNTING OFFICE, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES, 1-2 (Rep. No. GAO – 03089) (2002). <http://www.gao.gov/news.items/d0389.pdf>.

⁷³ *The “Internet Gambling Prohibition Act”*: Hearing on H.R. 4777 Before the H. Comm. on the Judiciary and the Subcomm. on Crime, Terrorism, and Homeland Security., 109 Cong. (2006).

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 3-4.

⁷⁶ *Id.* at 4.

⁷⁷ See Rodefer, *supra* note 41, at 34-35.

gambling.⁷⁸ Additional proposals, including the UIGEA, focused on stopping the flow of funds to online casinos by limiting credit card companies and financial institutions ability to transfer money to any known online casino, but this approach was also ineffective.⁷⁹ Despite the large governmental interest in regulating this area the predecessors to the UIGEA were defeated⁸⁰ and it was not until the passage of the UIGEA that the government had a bill, other than the Wire Act, to try and oppose the ever expanding online gambling world.⁸¹ Although the U.S. was almost completely void of online casino's following the DOJ's hard-line stance regarding online gambling it did little to deter online casinos from sprouting up offshore.⁸² Worldwide gambling generates revenues of approximately \$260 billion and due to gambling's acceptance in many markets outside the U.S. over eighty countries have expressly legalized gambling.⁸³ By March of 2005 the online casinos running outside the United States were:⁸⁴

- Antigua (536)
- Costa Rica (474)
- Kahnawake Mohawk, Canada (401)
- Curacao (343)
- Gibraltar (111)
- United Kingdom (70)
- Belize (60)

⁷⁸ Id. at 36

⁷⁹ See McBurney, *supra* note 6, at 348-49.

⁸⁰ Id.

⁸¹ See Ohr statement, *supra* note 73 at 3.

⁸² Judy Xanthopoulos, Poker Player's Alliance, Internet Poker Industry and Revenue Analysis Final Report 30, app. A, <http://www.pokerplayersalliance.org/pdf/InternetPokerFinalReport.pdf>.

⁸³ See 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).

⁸⁴ Id.

While the DOJ's position may not have had the desired impact of banning all online gambling activities their position did manage to make some impact on the online gambling community within the U.S., almost all online casinos moved off shore, and most credit card companies and payment processors for the online casinos voluntarily blocked U.S. citizens from being able to process wagers using their services.⁸⁵ However, the DOJ's position was not enough to counteract the growing market for online gaming so the Wire Act was used to try and deter American players from participating in online gaming.⁸⁶

A. THE WIRE ACT

Although the federal government has historically left the regulation of gambling to the states they took the position that online gambling was, and is, illegal under the Wire Act.⁸⁷ This Act prohibits the use of "a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers... on any sporting event or contest."⁸⁸ Despite the fact that the Wire Act could not have contemplated online gambling because it predated the invention of the Internet the federal government maintained the position that the Wire Act allows for prosecutions of all online gambling.⁸⁹ The DOJ also took the position that the Wire Act, as originally written in 1961, criminalized all forms of online gambling, although the authority for this is somewhat unclear (this ambiguity is mentioned below with regard to *People v. World Interactive Gaming Corp.*).⁹⁰ However, an important problem with the Wire Act, and the

⁸⁵ *Peter J. Schoolidge, Gambling Blindfolded: The Case For a Regulated Domain For Gambling Web Sites*, 10 *Gaming L. Rev.* 252, 253 (2006).

⁸⁶ *Id.*

⁸⁷ 18 U.S.C. 1084 (2000 & Supp. 2004)

⁸⁸ *Id.*

⁸⁹ See Letter from Jon P. Jennings, Acting Assistant Att'y Gen., Department of Justice, to Patrick J. Leahy, Ranking Minority Member, Comm. on the Judiciary, U.S. Senate (June 9, 1999), <http://www.usdoj.gov/criminal/cybercrime/s692ltr.htm>.

⁹⁰ Stewart *supra* note 4, at 7

UIGEA, is that it is limited to those “engaged in the business of betting or wagering.”⁹¹ There were several cases involving the application of the Wire Act to online gambling activities that helped to shed light on the opposing views of the applicability this Act to online gaming.

In *Re MasterCard*⁹² two men wanted the court to void large debts they incurred by using their credit cards to gamble on an online casino.⁹³ The plaintiffs attempted to use the Wire Act as a predicate offense in a Racketeer Influenced Corrupt Organizations Act (“RICO”) claim to discharge their debt.⁹⁴ However, the fifth circuit upheld the reasoning of the lower court that stated “the Wire Act concerns gambling on sporting events or contests,”⁹⁵ and the Wire Act did not apply to non-sports gaming over the Internet, including online casinos.⁹⁶ District Court Judge Duvall found that “a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest.”⁹⁷ In fact, there are no federal laws that do specifically outlaw online poker.⁹⁸ Additionally, in *United States v. Barborian* the defendant gambled as much as one thousand dollars per day, often exceeding eight hundred dollars per wager, but it was held that he was not in violation of the act because the plain meaning of the words required that he be in the “business of betting or wagering.”⁹⁹ This decision also limited the ability of federal prosecutors to use the Wire Act to stop online gambling.

⁹¹ 18 U.S.C. § 1084(a)

⁹² *In re MasterCard Int’l Inc. Internet Gambling Litig.*, 313 F.3d 257, 263 (5th Cir. 2002)

⁹³ *Id.*

⁹⁴ *Id.* at 261-262.

⁹⁵ *Id.* at 262

⁹⁶ *Id.* at 475.

⁹⁷ *Id.*

⁹⁸ Allyn Jaffrey Shulman, *Legal Landscape of Online Gaming Has Not Changed*, http://www.cardplayer.com/poker_news/article/3272.

⁹⁹ *United States v. Barborian*, 528 F. Supp. 324 (D.R.I. 1981).

Although the MasterCard case seemingly removed online gambling from the reach of the Wire Act several cases held the opposite opinion. In *The United States v. Cohen*¹⁰⁰ the court interpreted the Wire Act in another way, upholding the trial court's conviction of the defendant for violating the Act.¹⁰¹ In that case the defendants ran an online sports betting business in Antigua called the World Sports Exchange.¹⁰² The defendant's company catered to U.S. citizens that would wire money to Antigua and then place their bets through the phone or over the Internet.¹⁰³ In upholding the conviction the second circuit explained that the operators of the online site "knowingly transmitted information assisting in the placing of bets" and that their intent to violate the laws of the U.S. was irrelevant. The Cohen decision was important because prior to that case the prosecutions of Internet gambling were few and far between. One case that was successfully prosecuted came out of New York. In *People v. World Interactive Gaming Corp*¹⁰⁴ the New York court was able to prosecute the defendant under both state law and the Wire Act by applying the language of the Wire Act to a non-sports casino.¹⁰⁵ Although, in an interesting note to that case the DOJ stated that there was some ambiguity as to the applicability of the Wire Act in that case. Perhaps that ambiguity helped lead the MasterCard court to the opposite holding of both Cohen and World Interactive Gaming.

However, more recently in *United States v. Lombardo* the court revisited the application of the Wire Act and convicted the defendant by distinguishing the meaning of the Wire Act from the holding of the MasterCard Case.¹⁰⁶ In *Lombardo* the court found that the act was not limited to sports betting and wagering and that the lack of such language in the second and third

¹⁰⁰ 260 F3d. 68 (2d Cir. 2001).

¹⁰¹ 260 F3d. 68 (2d Cir. 2001).

¹⁰² Id. at 70.

¹⁰³ Id. at 76.

¹⁰⁴ 714 N.Y.S. 2d 844, 852 (N.Y. Sup. Ct. 1999)

¹⁰⁵ Id.

¹⁰⁶ *United States v. Lombardo*, 639 F. Supp. 2d 1271

elements of the statute showed a direct intention by Congress to encompass more than simply sports betting and wagering.¹⁰⁷ The recent decision in the Lombardo case is at odds with the holding in *MasterCard* and certainly strengthens the government's position that online gambling is illegal and that they can prosecute under the Wire Act. The Lombardo court also cites to the Cohen decision as a way of showing that there is precedent for using the Wire Act to stop online gambling. However, the differing decision in *MasterCard*, Cohen, and most recently in Lombardo highlight the tension that exists throughout the country as to whether online gambling is prohibited by the Wire Act. This tension exists due to the varying federal court holdings and because of the various State approaches to online gambling. Cohen and Lombardo certainly strengthen the position that online gambling is illegal but they do not provide black letter law that can be applied throughout the country. Issues regarding federalism and express legislation from pro gambling States will continue to cause controversy.

B. THE TRAVEL ACT

Due to the lack of force the Wire Act had after the *MasterCard* and *Barborean* decisions the government looked to the Travel Act as another way to try and restrict online gambling.¹⁰⁸ The Travel Act, unlike the Wire Act, requires a predicate offense in order to apply it to an online gambling violation,¹⁰⁹ and it criminalizes “whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to distribute the proceeds of any unlawful activity...”¹¹⁰ The Act goes on to define unlawful activity as “any business enterprise involving gambling.”¹¹¹ In *United States v. BetOnSports* the Wire Act was

¹⁰⁷ Id.

¹⁰⁸ 18 U.S.C §1952 (2006).

¹⁰⁹ Id.

¹¹⁰ 18 U.S.C §1952(a) (2006).

¹¹¹ 18 U.S.C §1952(b) (2006).

used as the predicate felony for the application of the Travel Act to stop BetOnSports from doing business in the U.S.¹¹² The BetOnSports case illustrated how the government was able to meet the two pronged test of gaining a conviction under the Travel act, but it certainly didn't fill the void of regulation left in the area of online gambling. The prosecution was able to show: One, an underlying violation of a state anti-gambling law; and that "mail or any facility" clause of the Act was triggered by gambling activity.¹¹³

A decision in *United States v. Nader* also had a serious impact on the application of the Travel Act as it pertained to online gambling.¹¹⁴ The court found that the use of a telephone was a facility in intrastate commerce, within the meaning of the act, when used to advance an illegal activity and it was a violation of the Travel Act.¹¹⁵ Prior to this decision the government had taken the position that gambling on the Internet took place both at the place the bet was received and where the bet was made.¹¹⁶ But post *Nader*, if this reasoning is applied to the Internet the government would only need to show an underlying violation of a state gambling law to gain a conviction within the Travel Act and the issue of where an online act occurred would be irrelevant.¹¹⁷ Despite the apparent "victories" in BetOnSports and *Nader* the federal government still needed a stronger act to combat online gaming. So, the next bill that the federal government passed in an attempt to curb online gambling and its perceived ill effects was the UIGEA.

C. ISSUES INVOLVING THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

¹¹² See *U.S. v. BetOnSports PLC*, No. 4:06CV01064 (CEJ) slip op. at 9 (E.D. Mo. Nov. 9, 2006).

¹¹³ Grohman, *supra* note 19, at 46.

¹¹⁴ *United States v. Nader* 542 F3d 713 (9th Cir. 2008).

¹¹⁵ *Id.* at 722

¹¹⁶ See Statement of Kevin V. DiGregory, Deputy Assistant Att'y Gen., Criminal Division, Before the H.Subcomm. on Crime, Comm. on the Judiciary, U.S. H.R., Concerning Gambling on the Internet (June 24, 1998), <http://www.usdoj.gov/criminal/cybercrime/kvd0698.htm>.

¹¹⁷ Grohman, *supra* note 19, at 46.

The Unlawful Internet Gambling Enforcement Act became law in 2006,¹¹⁸ and many of the concerns the drafters wanted to address in this act were discussed above.¹¹⁹ The core of the UIGEA sought to make it a felony for a person “(1) engaged in the business of betting or wagering to (2) knowingly accept money (3) in connection with unlawful gambling.”¹²⁰ The UIGEA aims to stop online gambling by preventing money transfers from U.S. citizens to any online gambling site.¹²¹ One of the biggest problems regarding the enforceability of the UIGEA is the ambiguous term “unlawful Internet gambling,”¹²² and despite the best efforts of the lawmakers that drafted the UIGEA there are serious concerns as to the ability to enforce the Act against those that gamble online.¹²³ In the same way that the Travel Act requires a predicate offense to trigger a violation, the UIGEA also requires that some underlying offense be committed to prosecute.¹²⁴

Two important notes involving the UIGEA with regard to enforceability are: (1) individual gamblers are not subject to the UIGEA and (2) it doesn’t unambiguously ban all forms of Internet gambling.¹²⁵ The lack of a total ban on all Internet gambling had led some proponents of online gaming to believe that some areas of gambling are legal, especially those claimed to require a higher degree of skill.¹²⁶ In Alexander’s article an opposing view was presented that the UIGEA is “arguably broad enough to encompass not just games of chance but

¹¹⁸ See text supra note 26.

¹¹⁹ See text supra, footnotes 70-73

¹²⁰ See Gerd Alexander, Article: The U.S. On Tilt: Why the Unlawful Internet Gambling Enforcement Act is a Bad Bet., p 17. *Duke L. & Tech. Rev.* 6 (2008), (citing 31 U.S.C. § 5366).

¹²¹ Blankenship, supra note 115 at 486.

¹²² See Michael Blankenship, Note, The Unlawful Internet Gambling Enforcement Act: A Bad Gambling Act? You Betcha!, 60 *Rutgers L. Rev.* 485, 500 (2008).

¹²³ See Mark Aubuchon, Note, The Unlawful Internet Gambling Enforcement Act of 2006: A Parlay of Ambiguities and Uncertainties Surrounding the Laws of the Internet Gambling Industry, 7 *Appalachian J.L.* 305, 312 (2008).

¹²⁴ 31 U.S.C. § 5363.

¹²⁵ Id.

¹²⁶ Id.

hybrid games in which chance is present, such as poker,”¹²⁷ but the statutory language supporting this view is not readily apparent. Although, the UIGEA does not define “game[s] subject to chance” and despite the language used by congress (the lack of the word “predominantly”¹²⁸) some opponents of legalizing poker feel that hybrid games and even games dominated by skill may be banned by the UIGEA.¹²⁹

The term “gambling” has taken on a variety of meanings throughout the history of the United States and has been associated with lotteries¹³⁰, bookmaking¹³¹, and skill based “contests” like poker. In the context of the UIGEA unlawful Internet gambling is “placing, receiving, or otherwise knowingly transmitting a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable federal or state law.”¹³² The Problems with the UIGEA definition reside in the fact that it relies on pre-existing laws that have proven to be unclear and inadequate in providing a clear picture as to what is and is not illegal gambling on the Internet.¹³³ The UIGEA has also excluded several forms of gambling from its reach which causes further confusion as to how comprehensive the act was meant to be.¹³⁴

Two such exemptions the UIGEA has carved out are for fantasy sports and for betting on horses.¹³⁵ Parallels can be drawn between participants in fantasy sports and those that play online poker; each believes that their game and their ability to win rest on their skills when tested

¹²⁷ Alexander, supra note 118 at 27.

¹²⁸ Id.

¹²⁹ Id at 28.

¹³⁰ See *Darlington Theares, Inc. v. Coker*, 2 S.E. 2d 782, 786 (S.C. 1939) (referring to the term “lottery” as a “species of gaming”).

¹³¹ 38 Am. Jur. 2D Gambling §31 (1999) (

¹³² 31 U.S.C. §5362(10)(A) (2006).

¹³³ Aubuchon, supra note 121 at 306.

¹³⁴ 31 U.S.C. §§5363(1)(E), 5362 (10)(C)-(E).

¹³⁵ Id. §5362(1)(E)(ix).

against the skills of the other players.¹³⁶ The uncertainty regarding the legality of online poker and the presence of the fantasy sports exemption to the UIGEA cause many Internet gambling advocates to believe that online poker may also be legal.¹³⁷ Further to this point, another exemption to the UIGEA has been made based on the Interstate Horseracing Act (“IHA”).¹³⁸ Although this exception has been addressed by the DOJ, and they have stated that the exemption provided for the IHA did not make online horseracing bets legal.¹³⁹ But, should it become clear that the IHA exemption does allow for the placement of bets online proponents of other forms of online gambling, poker in particular, will certainly have a stronger argument for exempting their game.¹⁴⁰

Turning the focus back toward one of the main goals of the UIGEA (the ban on money transfers to online gaming sites) it is important to look at some of the negative consequences as a result of these goals. Although the UIGEA attempts to ban all money transfers from being made to online casinos it is failing in that task. In fact, “the law did not make it impossible or illegal for Americans to bet online, but it did make it trickier for players to get their cash to the offshore casinos that run the Internet sites.”¹⁴¹ Although it may be trickier for players to get their money transferred to online gambling sites “the majority of Internet gamblers do not use direct transacting practices from their own U.S. banks accounts to online casinos, but rather take advantage of offshore third-party payment processors like PayPal or Neteller, commonly referred

¹³⁶ See, e.g. Jon Boswell, Note, Fantasy Sports: A Game of Skill that Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law, 25 *Cardozo Arts & Ent. L.J.* 1257, 1265 (2008).

¹³⁷ See Poker Players Alliance FAQ #4, <http://www.pokerplayersalliance.org/about/faq/#faq7>.

¹³⁸ 31 *U.S.C.* § 5362(10)(D).

¹³⁹ See I. Nelson Rose, The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed, 10 *Gaming L. Rev.* 537, (2006)

¹⁴⁰ See Conon, *supra* note 62, at 1160.

¹⁴¹ Gary Rivlin & Matt Richtel, D’Amato Never Folds: Former Senator, a Poker Aficionado, Lobbies for Online Gaming, *N.Y. Times*, Mar. 5, 2007, at C1.
http://query.nytimes.com/gst/fullpage.html?res=9B0DE0DD1431F936A35750C0A9619C8B63&sec=&spon=&page_wanted=2

to as “e-wallets”,” and these e-wallets easily allow gamblers to circumvent the UIGEA.¹⁴² E-wallets have become extremely popular and have proved to be a very big burden for U.S. financial institutions to have to try and monitor.¹⁴³ Nicholas Wajda’s¹⁴⁴ article pointed out the popularity and common practice of using e-wallets for gambling online due to the backlash of the credit card companies restricting direct transfers to online casinos in response to the UIGEA.¹⁴⁵ Any U.S. citizen with a credit card can transfer funds to an e-wallet, which will in turn be sent to an online casino (for a small transaction fee), which is also almost completely beyond the banking institutions control and outside the reach of the UIGEA.¹⁴⁶ These e-wallets are located almost exclusively offshore and it is highly unlikely that the UIGEA will be able to regulate or prosecute these companies.¹⁴⁷ Not only has the UIGEA been unsuccessful in achieving its goal of stopping money from being transferred to offshore online gambling sites but the opposite effect has occurred. The UIGEA has created a new, unregulated market for transferring money to these online casinos. As an example Fulltilt Poker, which allows U.S. customers to deposit money via privately run e-wallets, has reported a six hundred percent increase in profit by continuing to serve U.S. customers.¹⁴⁸

The UIGEA was enacted to try and protect U.S. citizens from the perceived dangers associated with online gambling and poker. However, the unregulated offshore market, inadvertently created by the UIGEA, for e-wallets and online casinos may in fact be hurting

¹⁴² Brant M. Leonard, Note, Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens. 57 *Drake L. Rev.* 515 9 (2009).

¹⁴³ *Id.* at 536.

¹⁴⁴ See Nicholas M. Wajda, Note, Over-Playing a Weak Hand: Why Giving Individual States a Choice is a Better Bet for Internet Gambling in the United States, 29 *T. Jefferson L. Rev.* 313, 322 (2007).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 328.

¹⁴⁷ *Id.*

¹⁴⁸ Aubuchon, *supra* note 121 at 312.

Americans far more than it is helping them.¹⁴⁹ The UIGEA may have been able to stop the publicly traded financial institutions and publically traded e-wallets from accepting money related to online gambling but the UIGEA created a very large market for privately owned e-wallets that is not regulated at all.¹⁵⁰ Alexander summed this point up well in stating that “It is ironic then, that practical effect of U.S. policy has been to increase market share for these unregulated e-casinos, which are potentially more harmful than their publically-traded and regulated counterparts,”¹⁵¹ and it is easy to see how the unregulated e-wallets can cause a great deal of problems, the same problems the UIGEA was created to address.¹⁵² For example, the licenses required to work for some of these companies are far less regulated than any such licenses in the U.S.,¹⁵³ some countries take licensure in another country as prima facie evidence of suitability.¹⁵⁴ Despite the best efforts of lawmakers it is clear that the UIGEA is not achieving its desired goal and U.S. citizens continue to gamble online without much difficulty.

D. STATE’S RIGHT WITH REGARD TO REGULATING GAMBLING WITHIN THEIR BORDERS

In *United States v. Edge Broadcasting Co.*, the Supreme Court endorsed the view that states had the right to govern gambling activity because gambling was not constitutionally protected.¹⁵⁵ States, using their police power to regulate gambling, have almost total authority in

¹⁴⁹ Alexander, *supra* note 118 at 34-35.

¹⁵⁰ See Allyn Jaffrey Shulman, *Funding Online Accounts After NETeller*, CARDPLAYER.COM, Feb. 4, 2007, <http://www.cardplayer.com/author/article/news/129/8251>.

¹⁵¹ Alexander, *supra* note 118 at 38.

¹⁵² See text *supra*, footnotes 72-75.

¹⁵³ Online Gambling Regulation Act 2001 § 4 (Isle of Man), available at <http://www.gov.im/lib/docs/infocentre/acts/ogra2001.pdf>; Directorate of Offshore Gaming, Regulations Concerning Interactive Gaming and Interactive Wagering § 14 (Antigua and Barbuda); Kahnawake Gaming Commission, Regulations Concerning Interactive Gaming § 29 (1999); Alderney Gambling Control Commission, Alderney eGambling Regulations § 6 (2006), available at <http://www.gamblingcontrol.org/docs/13.pdf>.

¹⁵⁴ Kahnawake Gaming Commission, Regulations Concerning Interactive Gaming § 32 (1999).

¹⁵⁵ 509 U.S. 418, 426 (1993)

that regard.¹⁵⁶ The ruling in *Edge Broadcasting* calls attention to the question of how the UIGEA and other federal acts should affect the states' right with regard to online gambling.¹⁵⁷ In fact, based on the ruling in *Edge Broadcasting* it can be argued that the UIGEA has already impinged on the state's rights to regulate their gambling activity. Although the UIGEA does not prohibit intrastate gaming as long as the state regulates the online activity the line as to where bets are placed and received has become very blurred.¹⁵⁸ Additionally, a Texas state court explained that "a statute that prohibits recording bets in Texas [could not] be used against a gambling business which records bets [overseas], even if the bets are called in from Texas."¹⁵⁹ The ruling in this case shows that states themselves have blurred the line as to what is legal with regard to online gambling and that determination would differ from state to state.¹⁶⁰ Looking further into this holding it seems plausible that the holding can be read to mean that states reserve the right to allow bets to be placed and received beyond their own borders. However, the UIGEA has clear language opposing the view of the Truesdale court¹⁶¹ and there is a clear inconsistency here that needs to be resolved with regard to the States rights to regulate online gambling.

The exact nature of how the UIGEA affects each state's rights may be unclear but some states have taken a proactive and clear stance on the legality of Internet gambling within their borders and some states have recently passed legislation affirmatively allowing online gambling.¹⁶²

¹⁵⁶ *Id.*

¹⁵⁷ See Alexander, *supra* note 118.

¹⁵⁸ Kraig P. Grahann, Betting on Prohibition: The Federal Government's Approach to Internet Gambling, 7 *Nw. J. Tech. & Intell. Prop.* 162, 167 (2009).

¹⁵⁹ Charles Doyle, Internet Gambling: Overview of Federal Criminal Law (Cong. Res. Service, Nov. 29, 2004), (citing *United States v. Truesdale*, 152 *F.3d* 443, 469-449 (5th Cir. 1998)).

¹⁶⁰ Alexander, *supra* note 118, at 24.

¹⁶¹ See Tselnik *supra* note 34 at end note 172.

¹⁶² Poker Player's Alliance, April 2010 News letter,

IV. CONCLUSION

There has been a great deal of debate as to the legality of online gambling and the role online poker should play. Several states have offered their opinions either through the courts or through legislation and there seems to be a clear trend towards legalizing poker as a game of skill. However, federal statutes have not followed that trend, and Federal acts including the Wire Act and the UIGEA are in desperate need of updating and federal lawmakers need to come to a decision as to whether they will allow online gambling or ban it completely. Right now the state of online gaming and online poker falls squarely within a grey area of the law and acts like the UIGEA don't do anything to help shed light on the legality Internet gaming.