

2007

All In, But Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States

Benjamin C. Wickert

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Gaming Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Benjamin C. Wickert, All In, But Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States, 10 *Vanderbilt Journal of Entertainment and Technology Law* 215 (2020)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol10/iss1/4>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Entertainment & Technology Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

All In, But Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States

ABSTRACT

In recent years, gambling on the Internet has evolved into a multi-billion dollar enterprise. The industry has been particularly entrenched in the United States, whose citizens at one time accounted for up to one-half of all Internet gambling revenues. However, the landscape of Internet gambling in the United States changed drastically in 2006, when President George W. Bush signed into law the Unlawful Internet Gambling Enforcement Act (UIGEA). The crucial provision of the UIGEA is its prohibition of the acceptance of payments, made by United States banks and creditors, to purveyors of unlawful Internet gambling enterprises. By targeting United States financial institutions instead of individual gamblers, the UIGEA attempts to indirectly prohibit Internet gambling within U.S. borders.

The UIGEA, however, is not without both legal and pragmatic problems. This Note seeks to illustrate those problems and to predict how the UIGEA will continue to affect the Internet gambling industry. First, the Note provides a background of prior attempts at regulation of Internet gambling, both at the state and federal level. Second, it engages in a textual analysis of the UIGEA, recognizing potential legal arguments both for and against the law. Third, the Note touches on how the UIGEA has affected an ongoing trade dispute between the United States and Antigua and Barbuda. Finally, the Note recognizes potential enforcement problems raised by the UIGEA, even if all of its provisions are legally sound.

TABLE OF CONTENTS

I.	BACKGROUND.....	219
	A. <i>Pre-UIGEA State Regulation of Online Gambling in the United States</i>	220
	B. <i>Pre-UIGEA Federal Regulation of Gambling in the United States: The Wire Act and its Progeny</i>	221
	C. <i>The First (Failed) Attempt at Legislation: The Internet Gambling Prohibition Act</i>	222
	D. <i>The Cohen Crack-Down: Early Days of Enforcement</i>	224
	E. <i>Antigua Takes on the United States in Front of the WTO</i>	225
II.	ANALYSIS.....	226
	A. <i>The Unlawful Internet Gambling Enforcement Act</i>	226
	1. Is Poker a Game “Subject to Chance”?.....	227
	2. Section 5363(2): Intermediate Payment Systems.....	233
	3. The UIGEA’s Ambiguity: What is “Unlawful Internet Gambling”?	235
	4. Antigua: Scoring a Victory on the International Front	236
III.	CONCLUSION.....	238

On October 13, 2006, President George W. Bush signed into law the Unlawful Internet Gambling Enforcement Act of 2006 (the UIGEA, or the Act).¹ The Act, principally sponsored by Senator Jon Kyl and House Representatives James Leach and Robert Goodlatte, prohibits online gambling enterprises’ acceptance of payments from banks and creditors in the United States.² Additionally, the Act authorizes the entities that regulate U.S. financial institutions—the Secretary of the Treasury and the Federal Reserve Board—to promulgate regulations by which the financial institutions must comply.³ The legal implications of the UIGEA are changing daily.

In recent years, the popularity of gambling in the United States has exploded.⁴ Poker, blackjack, and sports wagering—

1. Heather Timmons & Eric Pfanner, *U.S. Law Causing Turmoil in Online Gambling Industry*, N.Y. TIMES, Nov. 1, 2006, at C3. *See generally* Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C.A §§ 5361-67 (West Supp. 2007).

2. *See infra* Part II.A.

3. 31 U.S.C. § 5364 (2000).

4. *See* AM. GAMING ASS’N, 2007 STATE OF THE STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT 2 (2007), available at <http://www.americangaming.org/assets/>

activities once carried out only in “brick and mortar” casinos—can now all be played on the Internet.⁵ The explosion of Internet gambling was due, in large part, to the remarkable ease with which players could participate. Initially, a player simply deposited funds electronically, via debit card or other intermediate electronic payment system.⁶ After setting up an account and making a deposit, a player was ready to gamble.⁷ There were no smoke-filled casinos and no cocktail waitresses; instead, the same high stakes were available in the comfort of one’s own home.

Despite the huge popularity of Internet gambling within the United States, almost all Internet gambling websites are incorporated outside of the country.⁸ As such, U.S. regulation of those companies has been next to impossible, and U.S. citizens have essentially been free to gamble online to their hearts’ content. Congress, characterizing Internet gambling as a pervasive national problem, felt action needed to be taken before the problem spiraled out of control.⁹

Enter the UIGEA. In a tactical maneuver, perhaps made to limit debate on the subject, Congress passed the Act as part of the Security and Accountability for Every Port Act of 2006 (the SAFE Port Act).¹⁰ Congress’s earlier attempt at anti-gambling legislation in 2000 failed, for a variety of reasons discussed in this note.¹¹ By attaching the UIGEA as a rider on the SAFE Port Act, Congress would not be denied the opportunity to pass the gambling legislation it had so vehemently worked to enact for the past decade. Regardless of the tactics or motivations of Congress, the UIGEA is now on the books.

files/aga_2007_sos.pdf (noting that, in 2006, gross gaming revenues for the U.S. commercial casino industry totaled \$32.42 billion).

5. See, e.g., Wild Jack Gaming, <http://www.wildjack.com/blackjack.php> (online blackjack casino) (last visited Oct. 22, 2007); Sports Interaction, <http://sportsinteraction.com/sportsbook/index.cfm> (online sports book) (last visited Oct. 22, 2007).

6. See, e.g., “How to Deposit Money into an Online Poker Account,” <http://www.thepokerbank.com/making-a-deposit.html> (last visited Oct. 2, 2007).

7. See *id.* (“[T]his process is very simple and took me less than a minute to complete.”).

8. See H.R. REP. NO. 109-522, pt. 1, at 6 (2006) (citation omitted).

9. See *id.* at 10 (“Because of the uniquely interstate and international nature of the Internet, [legislation] is necessary, and provides the States and the Federal government with the tools needed to reduce the prevalence of Internet gambling—while providing additional tools to enforce these prohibitions.”).

10. Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, §§ 801-03, 120 Stat. 1884, 1952-61.

11. See H.R. REP. NO. 109-522, pt. 1, at 6 (recognizing that state governments typically regulate gambling).

This Note will first give a brief history of gambling laws in the United States prior to the UIGEA. Much of the gambling legislation in the U.S. is a matter of state law; as such, this Note will briefly address some of the Internet-specific gambling laws of several states. It will also discuss the purported enforcement problems state attorneys general have encountered in enforcing Internet gambling laws—one of the chief reasons cited by Congress as demonstrating the need for federal Internet gambling legislation.

This Note will also address other federal laws enacted prior to the UIGEA that purported to address Internet gambling. The United States Department of Justice (DOJ) has consistently cited one law in particular—the Wire Act of 1961—as the principal authority that makes Internet gambling illegal in the United States. Next, this Note will examine one of the high-profile enforcement actions the United States has taken against an Internet gambling company under the Wire Act. This Note will then analyze the role the Wire Act has under the UIGEA.

The Note will also address the potential implications the UIGEA has on the United States' free-trade policies. The U.S. is currently waging a battle in front of the World Trade Organization (WTO) against an unlikely adversary—the tiny country of Antigua and Barbuda.¹² Many Internet gambling companies are headquartered in the island country—the smallest WTO member—and thus, will take a tremendous loss if U.S. customers are removed from its market. This Note, without delving deeply into trade law or policies, will address the potential problems a recent WTO ruling might have on the viability of the UIGEA.

The bulk of this Note, however, will be devoted to a textual analysis to the UIGEA. Many of the Act's definitions are incredibly ambiguous, which raises questions as to the Act's scope. As a result, several prominent Internet gambling websites have chosen to fight the Act and remain in the U.S. market. This Note will examine in detail the viability of the legal arguments these sites have raised and predict how a court might rule if faced with the issue.

Finally, this Note will account for the potential enforcement problems raised by the Act, and how gamblers may, perhaps legally, subvert the government's mission of eliminating online gambling in the U.S. As new developments surrounding the UIGEA are arising

12. *Antigua Seeks EU Support on WTO Case Against US Online Gambling Laws*, POKERPAGES, Feb. 11, 2007, <http://www.pokerpages.com/poker-news/news/antigua-seeks-eu-support-on-wto-case-against-us-online-gambling-laws--29524.htm>.

daily, this Note will attempt to predict future developments related to the Act.

I. BACKGROUND

Internet gambling has taken its foothold in the United States as one of the fastest-growing and most popular pastimes of web surfers. In particular, sites featuring poker games have enjoyed tremendous success.¹³ ESPN's telecast of the World Series of Poker, the widespread advertising for poker sites on television, and the ease with which players can sign-up and play online contributed significantly to the boom of online gambling.¹⁴ In the last few years, online gaming has peaked:

Gambling on the Internet has become an extremely lucrative business. In recent years, industry revenue and the number of gambling websites have risen dramatically. In 1997, Internet gambling industry revenues were estimated to be \$445 million; in 2001 those estimates grew to \$1.6 billion a year. Internet gambling is now estimated to be a \$12 billion industry, with approximately \$6 billion coming from bettors based in the United States. It has been reported that there are as many as 2,300 gambling sites, offering everything from sports betting to blackjack and poker. Most of these virtual casinos are organized and operated from off-shore locations, where the websites operate free from both State and Federal interference.¹⁵

While polls show that only four percent of Americans gamble online, this number nonetheless represents a figure much larger than merely two years ago.¹⁶

In fact, seventy percent of online gamblers admit they began playing within the last two years.¹⁷ Perhaps reflective of a largely web-based culture, a great percentage of online gamblers have been found to be very active on the Internet, using it as a tool to conduct

13. See Wikipedia, Online Poker, http://en.wikipedia.org/wiki/Online_poker (citing the value of ParadisePoker.com to be \$340 million in 2004, and the initial public offering of Party Gaming, the parent company of PartyPoker, to have exceeded \$8 billion in 2005) (last visited Oct. 22, 2007).

14. Much of this spike in popularity of online poker can be traced to the success of Chris Moneymaker, an accountant-turned-professional player who won the World Series of Poker in 2003. Chris Moneymaker Biography, <http://www.chrismoneymaker.com/poker/bio> (last visited Sept. 26, 2007). Moneymaker had earned the \$10,000 entry fee to the World Series by winning a qualifying "satellite" tournament on the poker site PokerStars.com. *Id.*

15. H.R. REP. NO. 109-552, pt. 1, at 6.

16. AM. GAMING ASS'N, 2006 STATE OF THE STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT 21 (2006), available at http://www.americangaming.org/assets/files/2006_Survey_for_Web.pdf.

17. *Id.* at 24.

their daily activities.¹⁸ Gambling on the Internet has become an international phenomenon that showed no signs of stopping in the United States—until the enactment of the UIGEA.

A. Pre-UIGEA State Regulation of Online Gambling in the United States

States have customarily regulated gambling under the purview of the Tenth Amendment.¹⁹ In fact, several states have expressly prohibited Internet gambling, including Illinois, Indiana, Louisiana, and Nevada.²⁰ Other states have taken aggressive steps to prosecute Internet gambling sites, even absent express statutory prohibition.²¹

In enacting the UIGEA, Congress explicitly stated that it did not intend to alter states' power to regulate online gambling.²² Rather, Congress cited the enforcement problem facing state attorneys general in their attempts to prevent Internet gambling as a chief reason for enacting the UIGEA.²³ Attempts by attorneys general to prosecute Internet gambling under the ambit of consumer fraud laws have met widespread frustration.²⁴ State attorneys general report that "citizens are often unaware that gambling on the Internet is illegal, even if those same persons are aware that their State of residence does not allow gaming."²⁵ Additionally, Florida claims that it cannot regulate Internet gambling because of the sprawling nature of the Internet. Thus, the Florida attorney general opined that "any

18. *Id.* (noting that most online gamblers are "Internet savvy" individuals, many of whom also use the Internet to manage their bank accounts, get directions, and purchase airline tickets).

19. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); James D. Thayer, Note, *The Trade of Cross-Border Gambling and Betting: The WTO Dispute Between Antigua and the United States*, 2004 DUKE L. & TECH. REV. 13, ¶ 10, <http://www.law.duke.edu/journals/dltr/articles/pdf/2004DLTR0013.pdf>.

20. See 720 ILL. COMP. STAT. ANN. 5/28-1 (West 2003); IND. CODE ANN. § 35-45-5-2 (LexisNexis 2004 & Supp. 2006); LA. REV. STAT. ANN. § 14:90.3 (2004); NEV. REV. STAT. ANN. § 465.093(1)(a) (LexisNexis 2001).

21. See Scott Olson, *Betting No End to Internet Gambling*, 4 J. TECH. L. & POL'Y 2, paras. 13-16 (1999) (detailing charges for deceptive trade practices, false advertising, and consumer fraud brought by Minnesota against an internet gambling business).

22. See 31 U.S.C.A. § 5361(b) (West Supp. 2007) ("No provision of this subchapter shall be construed as altering, limiting, or extending any . . . State law . . . prohibiting, permitting, or regulating gambling within the United States.").

23. See H.R. REP. NO. 109-552, pt. 1, at 7 (2006).

24. *Id.*; see also Olson, *supra* note 21, at paras. 14-16 (outlining the Attorney General of Minnesota's efforts to prosecute internet gambling websites).

25. H.R. REP. NO. 109-552, pt. 1, at 7 (citing H.R. REP. NO. 107-591, pt. 1, at 6 (2002)).

effort to regulate use of the Internet is better suited to federal regulation than to patchwork attention by the individual states.”²⁶

*B. Pre-UIGEA Federal Regulation of Gambling in the United States:
The Wire Act and its Progeny*

The frustration expressed by state attorneys general fueled, at least in part, the enactment of the UIGEA. Although gambling typically is a state-regulated activity, federal interest in regulating gambling has “long been concerned with the prevention of organized crime and with assisting the states to enforce their own laws.”²⁷ Consistent with this purpose, the Federal law that opponents of Internet gambling most commonly cite is the Wire Act of 1961 (the Wire Act).²⁸

The Wire Act prohibits anyone “engaged in the business of betting or wagering” from utilizing a “wire communication facility” to place “bets or wagers on any *sporting event or contest*.”²⁹ As one commentator notes, “the Wire Act, like all other federal statutes prior to the UIGEA, makes no express mention of Internet gambling.”³⁰

The DOJ has a “long-standing position that under the Wire Act of 1961 ‘betting and wagering *businesses* that transmit bets or wagers on sporting events or contests over the Internet’ are breaking the law.”³¹ Accordingly, some courts have held that Congress did not intend the Wire Act to apply to individual bettors, but rather to larger bookmaking operations.³² Moreover, the “sporting event or contest”

26. Olson, *supra* note 21, at para. 17 (quoting Op. Fla. Att’y Gen. No. 95-70 (Oct. 18, 1995)).

27. Thayer, *supra* note 19, at ¶ 10.

28. Olson, *supra* note 21, at para. 18; see 18 U.S.C. § 1084 (2000).

29. Olson, *supra* note 21, at para. 18 (quoting 18 U.S.C. § 1084(a)). A “wire communication facility” is defined as:

[A]ny and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.

18 U.S.C. § 1081 (2000). Thus, “since the Internet involves the transfer of pictures over the phone or cable lines, it would be deemed a ‘wire communication facility’ under the statute.” Olson, *supra* note 21, at para. 18 n.71.

30. See Olson, *supra* note 21, at paras. 18-19.

31. Thayer, *supra* note 19, at ¶ 10 (quoting *Internet Gambling Prohibition Act of 1999: Hearing on H.R. 3125 Before the Subcomm. On Telecommunications, Trade and Consumer Protection of the H. Comm. on Commerce*, 106th Cong. 36 (2000) (statement of Kevin V. Di Gregory, Deputy Assistant Att’y Gen.)).

32. See *United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir. 1972) (“The [Wire Act] deals with bookmakers—persons ‘engaged in the business of betting or wagering.’”); *accord*

language seems to limit the Act's application to betting on sports or games; other generalized betting, such as lotteries, seemingly would not fall under the purview of the Act.³³ Additionally, legislative history strongly indicates that the purpose of the Wire Act was to "prohibit bookmaking on sports."³⁴

Therefore, it is unclear whether the Wire Act would even provide an enforcement mechanism against online gambling.³⁵ The DOJ has indicated that there is "some confusion as to whether the Wire Act applies only to sports betting, and that Congress should, therefore, amend the law to explicitly cover all forms of betting and gambling."³⁶ Moreover, other federal laws that are related to gambling activities generally provide little guidance in the regulation of *Internet* gambling.³⁷ Consequently, Congress decided it needed another arrow in the quiver for the fight against Internet gambling.³⁸

C. The First (Failed) Attempt at Legislation: The Internet Gambling Prohibition Act

The UIGEA was not Congress's first attempt at expanding the scope of federal power to restrict online gambling. In 1997, Senator Jon Kyl and House Representative Robert Goodlatte introduced bills to "amend the Wire Act to clarify that Internet gambling is included as an illegal communication activity, unless allowed by individual

United States v. Baborian, 528 F. Supp. 324, 328 (D.R.I. 1981) ("Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets, and not mere betting.").

33. Olson, *supra* note 21, at para. 18.

34. *Id.* (citing H.R. REP. NO. 87-967 (1961)) (stating that the purpose of the Wire Act was to "aid in the suppression of *organized* gambling activities by prohibiting the use of wire communication facilities" (emphasis added)).

35. See Thayer, *supra* note 19, at ¶ 10.

36. *Id.* (citing *Internet Gambling Prohibition Act of 1999: Hearing on H.R. 3125 Before the Subcomm. On Telecommunications, Trade and Consumer Protection of the H. Comm. on Commerce*, 106th Cong. 36 (2000) (statement of Kevin V. Di Gregory, Deputy Assistant Att'y Gen.)).

37. See Olson, *supra* note 21, at para. 19; see, e.g., 18 U.S.C. § 1952(a)-(b) (2000) (disallowing use of "any facility in interstate or foreign commerce, with intent to . . . further any unlawful activity," including "any business enterprise involving gambling"); 18 U.S.C. § 1955(b)(1) (2000) (criminalizing the actions of five or more persons who enter into an illegal gambling business for a continuous period of time); 28 U.S.C. § 3702 (2000) (prohibiting a person from gambling "on one or more competitive games in which amateur or professional athletes participate").

38. See H.R. REP. NO. 109-412, pt. 1, at 2 (2006) ("New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.").

states.”³⁹ The resultant law was to be called the Internet Gambling Prohibition Act (the IGPA).⁴⁰

The IGPA sought to amend the Wire Act, given the latter’s purported lack of mechanisms tailored specifically to combat Internet gambling.⁴¹ As discussed above, one of the limitations of the Wire Act is that it makes no mention of the Internet and is seemingly restricted to sports bookmaking.⁴² The IGPA sought to rectify this and other limitations, prohibiting “any person engaged in a gambling business knowingly to use the Internet or any other interactive computer service to place, receive, or otherwise make a bet or wager.”⁴³ Furthermore, the IGPA defined the phrase “bets or wagers” as the “risking of anything of value (besides a *de minimis* amount), with the understanding that a person will receive something of value based on an outcome which is predominantly subject to pure chance.”⁴⁴ The IGPA seemingly purported to expand the scope of federal regulation to all games of chance on the Internet; consequently, online casinos and poker rooms would thus fall under the purview of the IGPA.⁴⁵

Despite apparent bicameral, bipartisan support, the IGPA officially died in the House in 2000.⁴⁶ Allegedly responsible for the failure in the House was none other than Jack Abramoff.⁴⁷ At the time, Abramoff represented an online lottery site that stood to go out of business if the IGPA passed.⁴⁸ “Amid [Abramoff’s] frenzied lobbying, a potentially influential letter . . . began circulating on

39. Olson, *supra* note 21, at para. 20; see Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong., 143 CONG. REC. S2560 (daily ed. Mar. 19, 1997) (statement of Sen. Kyl); accord H.R. 2380, 105th Cong., 143 CONG. REC. E1633 (1997) (daily ed. Sept. 3, 1997) (statement of Rep. Goodlatte).

40. See S. REP. NO. 106-121, at 1 (1999). There was a second Senate version of the IGPA in 1999, even though the 1997 version had passed the Senate “by a unanimous poll,” because “the House did not complete action on the legislation due to the lateness of the session” in 1997. *Id.*

41. See *id.* at 10.

42. See *supra* Part I.B.

43. S. 692, 106th Cong. § 2(a) (as reported by S. Comm. on the Judiciary, July 26, 1999).

44. Olson, *supra* note 21, at para. 21 (citing S. 474, 105th Cong. § 2 (as reported by Senate)).

45. For a discussion of the relevance of the similar “games of chance” provision in the UIGEA, see *infra* Part II.A.1..

46. See Susan Schmidt & James V. Grimaldi, *How a Lobbyist Stacked the Deck*, WASH. POST, Oct. 16, 2005, at A01.

47. See *id.* Abramoff is the former Washington lobbyist who pleaded guilty in 2006 to a variety of federal conspiracy and wire fraud charges related to the funding of casinos. Walter P. Roche & Richard B. Schmitt, *Lobbyist Guilty in Plea Deal; Abramoff to Help Bribery Probe in Congress*, CHI. TRIB., Jan. 4, 2006, at 1.

48. Schmidt & Grimaldi, *supra* note 46, at A01.

Capitol Hill. It was purportedly signed by [Florida Governor] Jeb Bush.”⁴⁹ The letter allegedly stated: “While I am no fan of gambling, I see this bill as a violation of states’ rights and I am looking to prevent this encroachment.”⁵⁰

Though the letter was exposed as a forgery, it still had a profound impact on the House vote.⁵¹ Congressman Goodlatte, one sponsor of the IGPA, “became worried that amendments might be introduced during the debate that could kill the bill.”⁵² He then placed the bill on the House suspension calendar, usually reserved for non-controversial bills that do not generate much debate.⁵³ Nevertheless, several House members abstained from voting on the bill and enough voted against it in order to bring about its defeat.⁵⁴ When all was concluded, the first attempted federal measure purporting to regulate Internet gambling had failed.

D. The Cohen Crack-Down: Early Days of Enforcement

With the failure to pass the IGPA, the federal government’s most publicized crackdown on Internet gambling implicated the Wire Act. In 1998, well before the online gambling boom had reached the U.S., federal authorities arrested Jay Cohen, a young American businessman, for operating a gambling company out of the island country of Antigua and Barbuda (Antigua).⁵⁵ Cohen’s company, the World Sports Exchange (WSE), solely involved bookmaking on sports in the U.S.⁵⁶ The WSE “required that its new customers first open an account with WSE and wire at least \$300 into that account in Antigua. A customer seeking to bet would then contact WSE either by telephone or internet to request a particular bet.”⁵⁷

Cohen was convicted in federal court of violating the Wire Act and, in 2001, the Second Circuit upheld Cohen’s conviction.⁵⁸ The court held that by establishing two forms of wire facilities—internet and telephone—Cohen violated the prohibition on “transmission” of

49. *Id.*

50. *Id.*

51. *See id.*

52. *Id.*

53. *See id.*

54. *See id.* The bill failed by a 245 to 159 margin. *Id.*

55. *United States v. Cohen*, 260 F.3d 68, 70-71 (2d Cir. 2001).

56. *Id.* at 70.

57. *Id.*

58. *Id.* at 71, 78.

betting information found in the Wire Act.⁵⁹ In so holding, the court did not distinguish between Cohen's transmission of information by telephone and transmission by Internet, recognizing that each would place his conduct within the purview of the Wire Act.⁶⁰

Cohen finished serving a seventeen-month prison sentence in 2004.⁶¹ Cohen is supposedly the first "foreign-based individual" operating a gambling business in a country "where gambling is legal and regulated" to be convicted under the Wire Act.⁶² Interestingly enough, WSE never ceased operations while Cohen was tried, convicted, or serving his prison sentence.⁶³ In fact, Cohen could have avoided prosecution altogether had he remained in Antigua; his original business partners remain on the island and still operate WSE.⁶⁴ In any event, Cohen's case was the first highly-publicized action by the U.S. against an online gambling operation.

E. Antigua Takes on the United States in Front of the WTO

Antigua, the tiny island country in which Cohen lived and operated WSE, has become a haven for online gambling operations. By 1997, more than twenty Internet gambling businesses had taken root in Antigua.⁶⁵ Two years later, after Antigua's government instituted a licensing program, 3,000 people were employed by Antigua's gambling and betting industry.⁶⁶ At that point, Antigua was home to 119 licensed Internet gambling and betting operations.⁶⁷ Also by the same year, the government of Antigua was receiving more

59. *Id.* at 76; see 18 U.S.C. § 1084(a) (2000) (prohibiting use of "a wire communication facility for the *transmission* . . . 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") (emphasis added).

60. *See id.* ("We need not guess whether the provisions of § 1084 apply to Cohen's conduct because it is clear that they do.")

61. Free Jay Cohen, <http://www.freejaycohen.com/index.html> (last visited Sept. 26, 2007).

62. *Id.*

63. *See id.*

64. *See* Ed Koch, 'Net Gaming Operator Cohen Freed from Prison, LAS VEGAS SUN, Mar. 23, 2004, available at <http://www.lasvegassun.com/sunbin/stories/sun/2004/mar/23/516573962.html>.

65. Thayer, *supra* note 19, at ¶ 4 (citing First Submission of Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 28, WT/DS285 (Oct. 1, 2003), available at http://www.antigua-barbuda.com/business_politics/pdf/Antigua_First_Submission.pdf).

66. *Id.* (citing First Submission of Antigua and Barbuda, *supra* note 65, at ¶ 30).

67. *Id.*

than \$7.4 million dollars each year in licensing fees, which made up more than ten percent of the nation's gross domestic product.⁶⁸

Understandably, Antigua had reason to panic when *Cohen* was decided. Any U.S. restrictions on offshore online gambling operations—or their operators, as in *Cohen*—certainly posed a threat to the island. Viewing the U.S. policy as a threat to its economy and free trade, Antigua requested that a WTO panel be established to hear its grievances against the U.S.⁶⁹ This Note will briefly analyze the WTO's most recent ruling and the potential implications it might have on the UIGEA, but will not discuss international trade law on a more detailed level.

II. ANALYSIS

As with any statutory legal analysis, the text of the statute is the beginning point. As such, this Note will first analyze in detail what the UIGEA actually prohibits. The textual analysis will start by analyzing the key terms as provided in the definitions section of the Act. As part of the textual analysis, this Note will examine the legislative history, purpose, and other driving forces behind the UIGEA. As the analysis will demonstrate, the critical terms employed in the Act will inevitably give rise to ambiguities and potential enforcement problems.

Following the textual analysis, this section will shift to potential diplomatic and trade problems raised by the UIGEA. As stated above, the Act could potentially have substantial free-trade implications for the U.S.⁷⁰ Moreover, given that many of the affected gambling sites are based outside of the U.S., there is a possibility of non-compliance or non-reciprocity. Finally, this part will predict the potential enforcement problems associated with the Act.

A. The Unlawful Internet Gambling Enforcement Act

Section 5363 of the UIGEA begins: “No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling . . . (1) credit . . . (2) an electronic fund transfer . . . (3) any check . . . or similar instrument . . . or (4) the proceeds of any other

68. *Id.*

69. First Submission of Antigua and Barbuda, *supra* note 65, at ¶ 22; *see also infra* Part II.A.4 (discussing in detail these trade developments).

70. *See supra* Part I.E.

form of financial transaction”⁷¹ On its face, the Act seeks to prohibit the acceptance of payment used to fund all types of unlawful Internet gambling. However, several questions arise regarding definitions within the Act. First of all, what constitutes a person “engaged in the business of betting or wagering”? That is, what is a “bet” or a “wager”? Moreover, what is “unlawful” Internet gambling? The UIGEA fails to give precise definitions for these terms; as such, analysis of the terms necessarily implicates sources outside the Act.

1. Is Poker a Game “Subject to Chance”?

The first clause of § 5363 addresses persons “engaged in the business of betting or wagering.”⁷² The Act defines a “bet or wager” as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game *subject to chance*.”⁷³ The “contest” and “sporting event” elements of the definition clearly purport to prohibit acceptance of payment by businesses engaged in sports betting. However, the “game subject to chance” part of the definition gives rise to great ambiguity and debate because the Act does not define what a “game subject to chance” actually is. If poker is a game subject to chance under the Act, Internet poker sites will be “engaged in the business of betting or wagering.”⁷⁴ Conversely, if, under the Act, poker is not a game subject to chance but rather a game of skill, then Internet poker sites will not be “engaged in the business of betting or wagering.”⁷⁵ Thus, whether poker is a “game subject to chance” is a critical threshold determination as to whether Internet poker sites fall within the auspices of the UIGEA.

Nowhere does the Act explicitly mention poker or an attempt to regulate poker. Additionally, the legislative history of H.R. 4777, one of the House precursors to the Act, contemplated the illegality of conducting a lottery over the Internet, yet made no explicit mention of any game, including poker, as being a “game subject to chance.”⁷⁶

71. 31 U.S.C.A. §§ 5363(1)-(4) (West Supp. 2007).

72. *Id.* § 5363.

73. *Id.* § 5362(1)(A) (emphasis added).

74. *See id.* § 5363.

75. *See id.* This conclusion is based on the assumption that Internet poker sites are not also maintaining other gambling operations, such as sports wagering, that would fall within the “contest of others” or “sporting event” categories of “bet or wager” found in § 5362(1)(A) section of the Act. If that were the case, whether poker is a game subject to chance would be moot, and the site would be engaged in the business of betting or wagering regardless.

76. *See* H.R. REP. NO. 109-552, pt. 1, at 13 (2006).

Robert Goodlatte, the Republican senator who sponsored H.R. 4777, stated that H.R. 4777's purpose was "to make it clear that the prohibitions [in the Wire Act] include Internet gambling and the use of other new technologies."⁷⁷ However, this proposed amendment to the Wire Act was omitted from the UIGEA as enacted.⁷⁸

One industry giant has recognized the potential poker loophole in the UIGEA. PokerStars.com, the world's second-largest Internet gambling company, has staunchly maintained that poker is a game of skill, not a game of chance.⁷⁹ Since the passage of the UIGEA in October 2006, PokerStars.com is one of the few poker sites that has continued to solicit and accommodate its U.S. customers.⁸⁰ PokerStars.com notified its subscribers by e-mail stating, "PokerStars.com has received extensive expert advice from within and outside the US, which concluded that these provisions do not alter the US legal situation with respect to online poker."⁸¹

Because the Act does not define a "game subject to chance," a court would have to look outside the statute itself to make such a determination. As articulated above, gambling has traditionally been a state-governed activity.⁸² According to a substantial body of state cases, the test for whether a game is one of chance or one of skill is "not whether it contains an element of chance or an element of skill, but which of these is the *dominating element* that determines the result of the game."⁸³ Under this dominating element test, there is

77. Rep. Bob Goodlatte, Weekly Report: Putting a Stop to Internet Gambling (Feb. 17, 2006), http://www.house.gov/goodlatte/weekly_report_2004_2006/021706.html.

78. The House merged H.R. 4777, sponsored by Rep. Goodlatte, and H.R. 4411, sponsored by Rep. Leach, after the bills were reported out of the House Financial Services and the House Judiciary Committees. See H.R. REP. 109-412, pt.1 (2006); H.R. REP. 109-412, pt.2 (2006); H.R. REP. 109-552, pt. 1 (2006).

79. Tali Tsipori, *PokerStars' Stars Still Shine*, ISR. BUS. ARENA, Oct. 19, 2006. PokerStars.com, however, is not the only online gambling company to maintain this position. Cal Spears, president of poker site PocketFives.com, has stated, "Online poker is a game of skill, not a game of chance. It needs to be treated as such rather than placed in the same breath as online blackjack and craps." *News in Brief about the Gaming World: House of Representatives Passes Bill that Would Outlaw Online Gambling*, 10 GAMING L. REV. 341, 341 (2006). FullTiltPoker.com, another website still trying to do business with U.S. customers, stated: "As poker is a game of skill rather than pure chance, we hope that it will not be affected by" the UIGEA. Posting of FullTiltPoker to FullTiltPoker Blog, <http://www.fulltiltpoker.com/poker-blog/2006/10> (Oct. 2, 2006).

80. Cf. Tsipori, *supra* note 79 (noting that the CEO of PartyGaming.com said PokerStars.com, its top competitor, was "very brave . . . to think that [it was] not going to be next to be indicted, arrested, and pursued").

81. *Id.*

82. See *supra* text accompanying notes 19-26.

83. *Indoor Recreation Enters., Inc. v. Douglas*, 235 N.W.2d 398, 400 (Neb. 1975) (emphasis added); accord *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973); *Longstreth v.*

great uncertainty as to where poker would fall on the chance-skill spectrum. It is indisputable that poker, by its very nature, involves a certain degree of luck: players are dealt cards and place bets based on, at least in some respect, the expectation of a favorable subsequent card. However, as the name of the “dominating element” test implies, what matters is whether the luck involved in poker *predominates* over any other skill that allows one player to prevail over another on a consistent basis, or vice-versa.⁸⁴

There are strong arguments that skill predominates over luck in a poker game. Professor Christine Hurt has advanced an argument comparing poker to blackjack, characterizing poker as the far more “skilled” game:

Arguably, the game of poker requires more skill than the game of blackjack. In blackjack, the size of the wager is determined at the beginning of the game, and so the return is predetermined. In poker, the amount of the wager increases during the game, and part of the skill is not only knowing when to continue playing and when to fold, but how much to continue betting when not folding. The expected return of a poker hand changes not only with the dealt hand and the other cards played, but also with the size of the pot. Poker is played against other players, not against the house, so a great deal of skill is involved in reading the other players, bluffing, and not revealing one's strategy.⁸⁵

Professor Hurt's analysis illustrates important traits of poker that heavily implicate skill. That poker is played against human opponents, for instance, weighs heavily in favor of poker as a game of skill.⁸⁶ In blackjack, players compete not against each other but against the “house” (the dealer, acting on behalf of the casino).⁸⁷ The house must receive another card (“hit”) or refrain from doing so (“stay”) based on predetermined rules.⁸⁸ As such, a blackjack player typically chooses whether to hit or stay based on what the dealer is

Cook, 220 S.W.2d 433, 437 (Ark. 1949); *In re Allen*, 377 P.2d 280, 281 (Cal. 1962); *Steely v. Commonwealth*, 164 S.W.2d 977, 978 (Ky. 1942); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961); *State v. Ricciardi*, 114 A.2d 257, 258-59 (N.J. 1955); *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904); *Progress Vending, Inc. v. Dep't of Liquor Control*, 394 N.E.2d 324, 328-29 (Ohio Ct. App. 1978); *D'Orio v. Startup Candy Co.*, 266 P. 1037, 1038 (Utah 1928); *State v. Hahn*, 586 N.W.2d 5, 10-11 (Wis. Ct. App. 1998).

84. *Cf. Morrow*, 511 P.2d at 129-30 (noting that “[s]kill or the competitors' efforts must sufficiently govern the result” for something to be a game of skill).

85. Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 382 (2006) (citation omitted).

86. *See id.*

87. *See id.*

88. *See* *Blackjack: Rules of the Game*, <http://www.blackjackinfo.com/blackjack-rules.php> (last visited Sept. 27, 2007) (noting that generally a dealer must continue to take cards until his total is seventeen or greater).

showing, as compared to the player's own cards.⁸⁹ Thus, the principal skill of a blackjack player is determining whether to hit or stay in a given situation. After the player makes that determination, she is reduced to the role of hoping the cards fall her way.

Conversely, as Professor Hurt indicates, poker involves far more complicated strategies than does blackjack. The fundamental difference between the two games is that in poker, often the best hand does not win. For example, player *A* may place a large bet in order to get player *B* to fold his hand, even though, perhaps to the supposition of *A*, *B* is holding better cards. Likewise, *B* might recognize *A*'s bluff, and "call" him on it (match the bet). Absent any knowledge of the opponent's cards, such determinations are necessarily based in large part on non-chance factors, such as the ability to read another person's bluffs or recognize his strategy. In poker terminology, these indicators are referred to as "tells."⁹⁰

Nonetheless, despite the skill necessary to make such plays, luck often plays a substantial role in poker. Suppose, in the situation above, player *B* calls player *A*'s bet at a point where each player will be dealt two more cards; even if *B* has a ninety percent probability of winning the hand at this point, *A* can still defeat *B* if *A* draws cards that make his hand better than *B*'s. In that example, *B* correctly surmised that his cards were better than *A*'s, yet he still ended up losing. The converse of this argument is that the law of probability will nonetheless render *B* the winner ninety percent of the time. *A*'s lucky draw is the exception, not the rule. One critic explained the role of luck in poker:

Let's take a good player. No, let's take a great player. Make him the greatest hold'em player who ever lived. Suppose his chances are 10 times greater than those of Joe Average, even though the chasm between great and average is probably not anywhere near that deep. With that kind of edge, our hero figures to win a 3,000-player event once every 300 times. If he has a 60-year poker-playing career, he ought to win the World Series of Poker once every five lifetimes. An average player, by comparison, figures to win all the marbles only once in 50 lifetimes.⁹¹

89. See generally *id.* (discussing a player's options, such as hitting, standing, or splitting).

90. See Play Winning Poker, Top Ten Poker Tells, <http://www.playwinningpoker.com/articles/03/10.html> (recognizing such cues as trembling hands, wavering voice, body posture, and chip stacking as indicators of a player's hand) (last visited Sept. 27, 2007).

91. Lou Krieger, *Three Hundred is a Long Time*, CARD PLAYER MAG., Dec. 17, 2004, available at <http://www.cardplayer.com/magazine/article/14415>.

This theory explains why some poker players will experience greater success than others over time.⁹²

However, many of the “human” factors that make poker a game of skill are eliminated when the game is played on the Internet. Players are obviously not face-to-face, so detection of physical or psychological tells is impossible. Conversely, online players still may determine how to bet or what cards to play based on another player’s non-psychological tendencies. For example, a player may bet the same amount when he has a good hand; an experienced player can pick up on such a tendency, regardless of whether the game is played in person or on the Internet. Also, a player can still calculate the odds of a certain card falling his way in an online game. Thus, many of the strategies and tactics that suggest poker is a game of skill remain intact during online play. Nonetheless, poker clearly takes on a different character when played on the Internet; by eliminating physical and psychological factors, online play removes much of the skill involved in an in-person game.

Most states have adopted the dominating element test, or some variation of it, in determining whether poker is a game of skill or one of chance.⁹³ Given the relatively sound arguments on both sides, it is unsurprising that states are thus far split on the issue.⁹⁴ Recently, a court in England addressed the issue and found poker to be a game of chance.⁹⁵ Derek Kelly, the proprietor of a poker game at a private club, was found to have violated a licensing requirement for operators

92. *Id.* But see Chuck Humphrey, *Is Poker in the U.S. a Game of Skill?*, GAMBLING L. U.S., <http://www.gambling-law-us.com/Articles-Notes/online-poker-skill.htm> (last visited Sept. 27, 2007) (stating that while certain skills play a large role in successful poker play, they “just do not outweigh the elements of chance caused by the fall of the cards and the erratic, unpredictable play of a large number of opponents”).

93. See Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is it Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197, 202 (2003) (observing that most states have adopted a “predominance test,” under which poker falls into a “gray area” of luck and skill).

94. *Id.* Compare *Charnes v. Cent. City Opera House Ass'n*, 773 P.2d 546, 551 (Colo. 1989) (en banc) (holding that poker is a form of gambling under Colorado law, despite some elements of skill), and *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995) (upholding a jury verdict that chance predominated over skill in video poker games as reasonable under Massachusetts law), with *Commonwealth v. Club Caravan, Inc.*, 571 N.E.2d 405, 406 (Mass. App. Ct. 1991) (affirming ruling that video poker machines “involved as a matter of law an element of skill” and qualified for licensure as “automatic amusement devices”), and *Op. Colo. Att’y Gen. No. 93-5* (Apr. 21, 1993) (opining that poker is a game of skill under Colorado law).

95. See *Man Guilty in Poker Skills Case*, BBC NEWS, Jan. 16, 2007, http://news.bbc.co.uk/2/hi/uk_news/england/london/6267603.stm (noting that the jury took less than two hours to reject the argument that poker was a game of skill).

of “games of chance.”⁹⁶ The English court rejected Kelly’s argument that poker was a game of skill, which would have precluded him from needing a license to host the game.⁹⁷

If a U.S. court were to adopt the generalized holding of the English court from Kelly’s case—that poker is a game of chance—such a result would be highly problematic for the likes of PokerStars.com. However, Kelly’s case appears to represent a much narrower fact scenario, and can be distinguished from a potential case arising under the UIGEA. England’s 1968 Gambling Act, under which Kelly was prosecuted, “states that games with *any* element of chance, even a minority, are considered games of chance under the statutes.”⁹⁸ Given the preponderance of the dominating element test in U.S. courts, it is unlikely a U.S. court would adopt a holding as strict as that of the English court in Kelly’s case.⁹⁹

Given the great uncertainty regarding whether poker is a game of skill or chance, it is likely that a dispute centering on the issue will reach a federal court. Of all the courts that have applied the dominating element test, it appears none has addressed the specific issue of Internet gambling. At the federal level, this will be an issue of first impression. If a court were to rule that poker is a game of skill, and thus, not a game “subject to chance,” then sites such as PokerStars.com would have free reign to continue business operations with U.S. customers.

Such a decision would have monumental implications and could frustrate Congress’s purpose in enacting the Act.¹⁰⁰ However, if Congress had wanted to define poker as a “game subject to chance,” thus establishing that poker websites are “engaged in the business of betting or wagering,” it could have done so. Had Congress done this, companies like PokerStars.com still could have argued that poker was a game of skill. However, persuading a court to overturn an explicit textual mandate of Congress is a far tougher battle than persuading a court to adopt a particular line of reasoning absent such a mandate. For that reason, in addition to the arguments advanced above, it is

96. *Id.*

97. *Id.*

98. Amy Calistri, *Analysis: The UK Skill vs. Chance Case and the UIGEA*, POKERNEWS, Jan. 15, 2007, <http://www.pokernews.com/news/2007/1/uk-skill-vs-chance-uigea.htm> (emphasis added).

99. *See id.* The prosecutor in the Kelly case, Graham Trembath, told the jury that, “once these cards are shuffled, then you have introduced an element . . . of chance.” *Id.* (alteration in original).

100. *See* H.R. REP. NO. 109-552, pt. 1, at 5 (noting that H.R. 4777 aims to prohibit both “traditional forms of gambling such as online poker” and the “transmission of electronic funds . . . to pay for gambling bets”).

entirely plausible that a court adopting the dominating element test would rule in favor of online gambling companies.

2. Section 5363(2): Intermediate Payment Systems

Section 5362(2) of the UIGEA prohibits acceptance of “an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service.”¹⁰¹ Thus, in addition to prohibiting direct acceptance of credit and checks for unlawful Internet gambling, the Act prohibits acceptance of funds through an intermediate payment business.¹⁰²

Without a doubt, § 5363(2) is one of the most potentially devastating provisions of the Act for online poker sites. In 2001, Visa created a special code that prohibited its cards from being used for online gambling.¹⁰³ Other card companies followed suit soon thereafter.¹⁰⁴ Since 2002, using a credit card simply has not been a viable way to gamble on the Internet.¹⁰⁵ As such, § 5363(1), prohibiting the acceptance of credit from someone gambling on the Internet, has little practical import.

After realizing that they could essentially no longer use credit cards to fund their Internet gambling accounts, online gamblers had to turn elsewhere to place funds into online gambling sites. Responding to that reality, Internet gambling operators began to encourage the use of PayPal, an intermediate payment system, as a

101. 31 U.S.C.A. § 5363(2) (West Supp. 2007).

102. *Id.* §§ 5363(1), 5363(3), 5363(2).

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

104. See Joanna Glasner, *EBay Says No to PayPal Gambling*, WIRED, July 9, 2002, <http://www.wired.com/news/business/0,1367,53703,00.html> (“Many large credit card issuers, such as Bank of America, Fleet, Direct Merchants Bank, MBNA, and Chase Manhattan Bank have already started to block online gaming transactions. More recently, Citibank, which controls approximately 12 percent of the U.S. credit card industry, also joined in.”). See generally U.S. GEN. ACCOUNTING OFFICE, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES (Dec. 2002), available at <http://www.gao.gov/new.items/d0389.pdf> (examining the relationship between U.S. credit card companies and the online gaming industry).

105. This fact casts considerable doubt on Congress’s finding that “Internet Gambling is a growing cause of debt collection problems for . . . the consumer credit industry.” See 31 U.S.C.A. § 5361(a)(3); see also U.S. GEN. ACCOUNTING OFFICE, *supra* note 104, at 25 (reporting that, around 2002, “requests for credit card payments [by Internet casino operators were] denied”).

means to deposit funds.¹⁰⁶ Although PayPal initially agreed to partake in such transactions, it stopped doing so in 2002.¹⁰⁷

After PayPal's departure from the online gambling scene, online gamblers had to find an alternative means of payment yet again. This demand coincided with the exploding growth of Neteller, another intermediate payment system. By early 2007, Neteller had grown into one of "the largest independent online money transfer business[es] in the world with 3 million customers in 160 countries and over \$7 billion in annual transactions."¹⁰⁸ Poker players funding online accounts generated the majority of Neteller's business.¹⁰⁹

Neteller and other similar services would very likely be termed "money transmitting businesses" as listed in § 5363(2) of the UIGEA.¹¹⁰ Section 5365 of the Act authorizes state attorneys general to seek a temporary restraining order or a preliminary injunction against any party engaging in a restricted transaction.¹¹¹ As such, any acceptance of payment by or through Neteller would be prohibited.¹¹² However, despite the Act's fairly straightforward prohibition of Neteller's business in the context of online gambling, there are substantial enforcement problems. Neteller is incorporated in the Isle of Man, not the U.S.¹¹³ The Isle of Man would be unlikely

106. See Glasner, *supra* note 104. PayPal describes its service as a "safer, easier way to pay and get paid online . . . [It] allows anyone to pay in any way they prefer, including through credit cards, bank accounts, buyer credit or account balances, without sharing financial information." About PayPal, <http://www.paypal.com/us/cgi-bin/webscr?cmd=pgen/about-outside> (last visited Sept. 27, 2007).

107. See Glasner, *supra* note 104. EBay, which acquired PayPal in 2002, prophetically attributed its decision to end PayPal's involvement with Internet gambling to an "uncertain regulatory environment surrounding online gaming." *Id.*

108. *Neteller Founders Arrested by FBI, Charged with Money Laundering*, POKERPAGES, Jan. 17, 2007, <http://www.pokerpages.com/poker-news/news/neteller-founders-arrested-by-fbi-charged-with-money-laundering-29454.htm>.

109. See Press Release, U.S. Dep't of Justice, U.S. Charges Two Founders of Payment Services Company with Laundering Billions of Dollars of Internet Gambling Proceeds 2 (Jan. 16, 2007), available at <http://www.usdoj.gov/usao/nys/pressreleases/January07/netellerarrestspr.pdf> (noting that, in 2005, ninety-five percent of Neteller's revenue was "derived from money transfers involving internet gambling companies"); cf. *Neteller Founders Arrested by FBI*, *supra* note 108 (asserting that Neteller's fund services were used extensively by a majority of online poker players).

110. See 31 U.S.C.A. § 5363(2).

111. *Id.* § 5365. The term "restricted transaction" is defined as "any transaction or transmittal involving any credit, funds, instrument, or proceeds described in any paragraph of section 5363 which the recipient is prohibited from accepting under section 5363." *Id.* § 5362(7).

112. See *id.* § 5363(2).

113. NETELLER PLC, ANNUAL PRESS RELEASE 16 (2004), available at http://investors.neteller.com/neteller/upload/NLR_2004_Annual_Release2.pdf.

to enforce a temporary restraining order.¹¹⁴ A preliminary injunction would be equally ineffective because they are typically “issued without a full trial and can be modified at any time by the trial judge.”¹¹⁵ Under the Act, the U.S. government’s best option at preventing Neteller from staying in the online gambling business is likely just to hope gambling sites stop accepting payments from them.

Perhaps it was this fear that led the government to pursue options outside the Act in order to bring down Neteller. On January 15, 2007, the DOJ arrested Neteller’s founders in connection with “the creation and operation of an [I]nternet payment services company that facilitated the transfer of billions of dollars of illegal gambling proceeds from United States citizens to the owners of various [I]nternet gambling companies located overseas.”¹¹⁶ The DOJ recognized that the arrests were “part of [its] effort to combat unlawful [I]nternet gambling through, among other things, the implementation of the federal anti-money laundering statutes.”¹¹⁷ On January 17, 2007, as a result of the arrests, Neteller stopped processing payments related to gambling by U.S. citizens.¹¹⁸

3. The UIGEA’s Ambiguity: What is “Unlawful Internet Gambling”?

The Neteller arrests were a huge blow to online gambling in the U.S. The U.S. government effectively eliminated the largest third party payment processor in the world—without even having to invoke the UIGEA. After the arrests, the DOJ stated that “[b]oth the operation of an [I]nternet gambling operation and the transferring of the proceeds from these businesses overseas are illegal under United States law.”¹¹⁹ Unhelpfully, the DOJ did not specify *what* law made Internet gambling illegal. Moreover, the UIGEA defined “unlawful Internet gambling” as only bets or wagers *already* unlawful under any “applicable Federal or State law in the State . . . in which the bet . . . is

114. See Rose, *supra* note 103, at 540.

115. *Id.*

116. Press Release, U.S. Dep’t of Justice, *supra* note 109, at 1.

117. *Id.* at 3. The Press Release also references the recent “indictments of two offshore internet gambling companies—Worldwide Telesports, Inc., . . . and BetonSports, PLC, a publicly traded holding company that owns a number of Internet sportsbooks and casinos, and its founder, Gary Stephen Kaplan.” *Id.*

118. Press Release, Neteller Group, Neteller PLC Trading Update (Jan. 18, 2007), <http://www.neteller-group.com/press/en/123.htm> (“[T]he Group will cease processing online transactions related to gambling for the [U.S.] market with effect from today in light of the passing of the UIGEA and the uncertainties and likely delays relating to the drafting and implementing of regulations.”).

119. Press Release, U.S. Dep’t of Justice, *supra* note 109, at 2.

initiated, received, or otherwise made.”¹²⁰ That is, the UIGEA itself does not specifically render any sort of Internet gambling illegal.

The question arises: What U.S. law makes Internet gambling illegal or “unlawful”? The government’s argument in the Neteller case relied on Internet gambling being an illegal activity, as would any other enforcement action under the UIGEA.¹²¹ As noted, the principal statute relied upon by the DOJ to prosecute Internet gambling is the Wire Act.¹²² However, the text of the Wire Act indicates confinement to gambling on sports.¹²³ Representative Goodlatte’s House bill attempted to expand the scope of the Wire Act to include “traditional forms of gambling such as online poker,” but this was omitted from the final version of the UIGEA.¹²⁴ Congress therefore passed up the chance to expand the scope of the Wire Act. As a result, it is highly dubious as to whether federal law even prohibits any form of Internet gambling in the U.S.

4. Antigua: Scoring a Victory on the International Front

In 2003, Antigua brought a complaint with the WTO regarding the United States’ Internet gambling policies. Antigua alleged that the U.S. actions against Internet gambling affected the cross-border supply of gambling and betting services.¹²⁵ Antigua also contended that the cumulative impact of the U.S. measures prevented the supply of gambling and betting services from another WTO Member to the U.S. on a cross-border basis.¹²⁶ According to Antigua, the measures at issue were inconsistent with U.S. obligations under the General Agreement on Trade in Services (GATS) provision of the WTO, to which both countries are signatories.¹²⁷

The WTO panel found in favor of Antigua on several grounds. First, the panel held that, among other laws, the Wire Act was inconsistent with the United States’ obligations to provide goods and

120. 31 U.S.C.A. § 5362(10)(A) (West Supp. 2007).

121. See Press Release, U.S. Dep’t of Justice, *supra* note 109, at 2; see also 31 U.S.C.A. § 5363 (prohibiting the “acceptance of any financial instrument for *unlawful* Internet gambling”) (emphasis added).

122. See *supra* text accompanying note 28.

123. See *supra* text accompanying notes 31-34.

124. See *supra* text accompanying notes 77-78.

125. First Submission of Antigua and Barbuda, *supra* note 65, at ¶ 132.

126. *Id.* at ¶ 213; see also *id.* at ¶¶ 10-20 (detailing the origins of the General Agreement on Trade in Services and each party’s relationship with the Agreement).

127. Summary of the Dispute to Date, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 28, WT/DS285 (Oct. 1, 2003), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm

services “no less favorable” than those the U.S. afforded to its own citizens.¹²⁸ Moreover, the panel held that the U.S. failed to demonstrate that the Wire Act fell under the “public morals” exception to the GATS, which would have rendered the Act permissive.¹²⁹

In April of 2005, the WTO Appellate Body overturned the findings of the panel in one respect, and upheld it in another very important respect.¹³⁰ It reversed the panel finding that the U.S. did not demonstrate that the Wire Act could fall within the “public morals” exception of Section XIV(a) of the GATS.¹³¹ However, it upheld the panel’s finding that the U.S. acted inconsistently with the “market access” limitations in Section XVI of the GATS.¹³²

In August 2005, a WTO arbitrator determined that the reasonable period of time for U.S. implementation of the Appellate Body’s findings was April 2006.¹³³ In July 2006, after the passage of the deadline, Antigua requested the establishment of a panel to assess the United States’ potential transgressions, in light of the passage of the UIGEA.¹³⁴

In March 2007, the WTO panel ruled in favor of Antigua once again. The panel decided that the UIGEA’s prohibition on Internet gambling was illegal because it did not similarly prohibit off-site betting on horse and dog racing.¹³⁵ The UIGEA states that “[t]he term ‘unlawful Internet gambling’ shall not include any activity that is allowed under the Interstate Horseracing Act of 1978.”¹³⁶ This carve-out poses a problem under the “market access” limitations of the GATS.¹³⁷ That is, the UIGEA essentially purports to wipe out the entire Antiguan industry but still allows all of the Las Vegas

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *US, Antigua Battle Over WTO Sanctions Level for US Online Betting Ban*, INT’L HERALD TRIB., Sept. 28, 2007, <http://www.iht.com/articles/ap/2007/09/28/business/EU-FIN-ECO-WTO-US-Online-Gambling.php>.

136. 31 U.S.C. § 5362(10)(D)(i) (West Supp. 2007).

137. See First Submission of Antigua and Barbuda, *supra* note 65, at ¶¶ 180-81 (“With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable [sic] than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”) Thus, Member countries must afford treatment just as favorable to other Member countries as it does to its own citizens. Allowing purveyors of horse racing businesses to sidestep the UIGEA, as the allegation goes, violates the “market access” limitations.

companies to offer their services under the Interstate Horseracing Act.¹³⁸

As a result of the WTO panel's March 2007 ruling, Antigua has requested that the WTO impose \$3.4 billion in commercial sanctions on the U.S.; not surprisingly, the U.S. is vigorously disputing the fine.¹³⁹ However, even in the face of a favorable U.S. ruling on monetary sanctions, it is unlikely that Antigua can stop the United States' enforcement of the UIGEA by itself. As one of the WTO's smallest members, Antigua simply does not have the economic power to cause the U.S. to comply with the panel's ruling. However, as of the final draft of this Note, Antigua has solicited aid from the European Union, which potentially could give economic and political support in its fight against the UIGEA.¹⁴⁰

III. CONCLUSION

In the short time since its passage, the UIGEA has already had a profound impact on Internet gambling in the U.S. Several of the industry's giants have removed all business within the U.S, and their net value has tumbled greatly as a result.¹⁴¹ This includes not only the poker rooms and casinos that once provided a mechanism for online gambling, but also the intermediate payment systems that had allowed players to fund their accounts in the past.¹⁴² In several short months, Internet gambling in the U.S. has made an about-face.

However, any dire predictions that Internet gambling will disappear altogether from the U.S. are myopic. With respect to the casual gambler, the UIGEA will probably continue to accomplish its purpose of eliminating online play. With the exit of Neteller from the intermediate payment market, the viable options for depositing money are now very limited. Until another payment processor similar to

138. See *Antigua Seeks EU Support*, *supra* note 12; see also Interstate Horseracing Act of 1978 § 2, 15 U.S.C. § 3001 (2000) (finding that the policy of the Congress "to regulate interstate commerce with respect to wagering on horseracing").

139. *US, Antigua Battle Over WTO Sanctions Level for US Online Betting Ban*, *supra* note 135.

140. *Id.* Mark Mendel, WTO attorney for Antigua, stated that he hopes to meet with EU Internal Market Commissioner Charlie McCreevy soon, to "explore how [Antigua's] WTO trade dispute case with the US could benefit from expanded EU support." *Id.*

141. See, e.g., Aaron Todd, *Party Poker Mucks U.S. Hand*, October 13, 2006, <http://www.casinocitytimes.com/news/article.cfm?contentID=161766> (commenting on PartyPoker.com's removal from U.S. market and noting that the site had controlled forty-one percent of online poker revenues worldwide, of which seventy-seven percent came from the U.S. in 2005).

142. See *supra* Part II.A.2.

PayPal or Neteller steps into the market, there are very few ways for online gamblers to deposit money into an online gambling account. It seems that a cash or money order, or holding a foreign bank account, is the only viable option for depositing money onto an online gambling site.

As for the hard-core online gambler, however, the UIGEA provides little more than an inconvenience in his quest to gamble online. If a player wants to gamble online badly enough, he will deposit money in a foreign bank. Moreover, because the U.S. government brought down Neteller under money laundering charges, not via the UIGEA, it is hard to believe that an imitation company will not take the chance that the UIGEA does not apply to its services.¹⁴³ The U.S. online gambling market is simply too lucrative for one company not to take such a chance.

The UIGEA has also indisputably created a mess for the U.S. on the international front. The latest WTO ruling has, on its face, dealt a blow to the U.S. with respect to international trade. Nonetheless, Antigua must solicit substantial aid from the European Union—or another source—to give it leverage against the U.S. on the international trade front. Otherwise, the WTO ruling might have little practical effect.

Despite its ambiguities, potential for enforcement problems, and potential for trade violations, the UIGEA has already made a profound impact across the online gambling universe. By explicitly preventing U.S. financial institutions from supplying money to Internet gambling sites, the UIGEA has handcuffed a great majority of U.S. participants in Internet gambling. One member of Congress has taken note of the impact of the UIGEA, and has introduced legislation that would effectively repeal the UIGEA and its purported ban on Internet gambling.¹⁴⁴ Nonetheless, as of the final draft of this

143. See *supra* text accompanying notes 128-130.

144. See News Release of Congressman Barney Frank (April 26, 2007), <http://www.house.gov/frank/netgambling0407.html>. Congressman Frank's bill, in addition to effectively repealing the UIGEA, purports to create "a federal regulatory and enforcement framework to license companies to accept bets and wagers online from individuals in the U.S., to the extent permitted by individual states, Indian tribes and sport leagues." *Id.*

Note, the UIGEA is the law of the land. As such, it remains to be seen whether the Internet gambling industry can regain its once-strong foothold in the U.S.

*Benjamin C. Wickert**

* J.D. Candidate, Vanderbilt University Law School, 2008; B.S., Journalism, Ohio University, 2005. The author would like to thank Professor Larry Helfer, who assisted in research for this Note.