

## NOTES

### THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT: A BAD GAMBLING ACT? YOU BETCHA!

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#### I. INTRODUCTION

Imagine visiting your favorite gambling Web site to place a five to ten dollar bet on a beloved poker game with some faraway friends at the other end of the online poker table. The only reason you visit the site is due to your lack of financial means, or ability to go to a Las Vegas or an Atlantic City casino. Now, imagine winning a small hand and trying to put the winnings in your bank account, but quickly discovering that the transaction is rejected. You can no longer collect your winnings. Even worse, imagine being branded an “Internet gambler” by the federal government, a rather ugly label. You sadly realize you no longer can gamble online because you fear the federal government may go after you and your small wager. This situation has become a grave reality for the estimated twenty-three million Americans who gamble online each year.<sup>1</sup>

On October 13, 2006, President George W. Bush signed into law the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA),<sup>2</sup> which prohibits the acceptance of payment of wagers by financial institutions.<sup>3</sup> In order to quickly pass the law, Congress tacked the

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1. See Shailagh Murray & James V. Grimaldi, *House Passes Bill to Restrict Internet Poker; Legislation Would Forbid Use of Electronic Payments*, WASH. POST, July 12, 2006, at A01.

2. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (Supp. 2007).

3. See *id.* § 5363.

UIGEA into an unrelated port security bill, entitled the Security and Accountability for Every (SAFE) Port Act of 2006.<sup>4</sup>

The UIGEA bans Internet gambling in the United States by forcing financial institutions to prevent financial payments of wagers from bank accounts and other financial instruments.<sup>5</sup> Specifically, the UIGEA's purpose is "to prohibit wire transfers to Internet gambling sites or the banks which represent such sites."<sup>6</sup> Congress found that "Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers."<sup>7</sup> Further, Congress found that there should be "[n]ew mechanisms for enforcing gambling laws on the Internet" because the old laws are inadequate to enforce gambling prohibitions or Internet regulations<sup>8</sup>—thus, Congress enacted the UIGEA. The bill went into effect in July 2007,<sup>9</sup> and Congress was required to establish the rules for financial institutions prior to that date.<sup>10</sup>

Before the UIGEA was signed into law, there was a great deal of ambiguity surrounding the federal prohibition and regulation of Internet gambling.<sup>11</sup> Indeed, there are few cases that have interpreted any Internet gambling legislation and jurisdictional issues. Yet, after the UIGEA's enactment, there still remain questions regarding its legitimacy and overall effectiveness. Is the new Act constitutionally principled? Is Internet gambling an area where the federal government should enter, thus subverting state gambling laws?<sup>12</sup> Will such an expansive law work to stop Internet gambling?<sup>13</sup>

By focusing on the UIGEA's recent enactment and its constitutional reach across state boundaries, this Note argues that the Act itself can be viewed as impermissible because there are better solutions for combating "morally wrong" problems associated

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4. H.R. 4954, 109th Cong. (2006). Congress placed UIGEA in Title VIII of the SAFE Port Act. *See id.*; *see also* 31 U.S.C. § 5361 (Supp. 2007).

5. *See* 31 U.S.C. §§ 5361-5367.

6. *Id.* § 5361(a)(2).

7. *Id.* § 5361(a)(1).

8. *Id.* § 5361(a)(4).

9. *See id.* § 5364 (discussing the 270 days that federal regulators had to develop regulations to inhibit financial transactions to Internet gambling Web sites).

10. *See id.*

11. Nicholas W. Allard & David A. Kass, *Law and Order in Cyberspace: Washington Report*, 19 HASTINGS COMM. & ENT. L.J. 563, 609-10 (1997).

12. *See* Beau Thompson, *Internet Gambling*, 2 N.C. J. L. & TECH. 81, 101-02 (2001).

13. *See, e.g.*, Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 433 (2006) ("Because of the nature of the Internet, legislative attempts to prohibit Internet gambling are unlikely to be effective . . .") (quoting Internet Gambling Licensing and Regulation Commission Act, H.R. 1223, 108th Cong. (2003)).

with online gambling. Part II discusses the history of gambling laws in the United States and the prohibition of financial payment of Internet wagers. Further, this Note discusses the history of the UIGEA and the federal government's argument for banning Internet gambling in Part III. Part IV discusses other countries and their regulation or nonregulation of domestic online gambling, and the recent World Trade Organization ruling against the United States, a ruling that may have broad consequences. Next, Part V examines federal and state taxation and its relationship to Internet gambling. Finally, Part VI lays out three distinct options the United States could adopt to improve current laws that purport to monitor Internet gambling. Each option could effectively combat underage Internet gambling while taking "a piece of the action."

In sum, this Note adopts a somewhat novel approach to the government's quandary. The government should mandate control through taxes and regulation based on the foreign and North Dakota models rather than a complete prohibition within the United States. Congress should therefore reconsider its Internet gambling policy and take a more amenable approach.

## II. BACKGROUND ON REGULATION OF INTERNET GAMBLING IN THE UNITED STATES

Prior to UIGEA's enactment, there were five main statutory regulations that the federal government could have used in attempting to control nontribal Internet gambling.<sup>14</sup> Those statutes included the (1) Wire Act;<sup>15</sup> (2) Interstate Transportation of Wagering Paraphernalia Act;<sup>16</sup> (3) Travel Act;<sup>17</sup> (4) Illegal Gambling Business Act (IGBA);<sup>18</sup> and (5) Professional and Amateur Sports Protection Act.<sup>19</sup> The federal government has successfully used these laws to police and regulate Internet gambling. The 1961 Wire Act is increasingly used by the federal government as its main tool against Internet gambling. But other enumerated laws within the federal government's arsenal have worked just as well to combat Internet gambling.

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

15. 18 U.S.C. § 1084 (2006).

16. *Id.* § 1953.

17. *Id.* § 1952.

18. *Id.* § 1955.

19. 28 U.S.C. §§ 3701-3704.

### A. *Wire Act of 1961*

The Wire Act of 1961 is a federal statute that has been used to prosecute federal Internet gambling cases.<sup>20</sup> The federal government takes the position that the Wire Act governs Internet gambling, even though Internet gambling Web sites are wireless.<sup>21</sup> The government maintains that Internet gambling “occurs in the location it is placed and in the location in which it is received.”<sup>22</sup> The government prosecutes gambling Web site owners using the Wire Act, which states in relevant part:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined . . . or imprisoned . . . .<sup>23</sup>

One court agreed with the government’s position in *United States v. Cohen*.<sup>24</sup> In *Cohen*, the government brought criminal charges against Jay Cohen and twenty-one U.S. citizens for “information assisting in the placing of bets or wagers.”<sup>25</sup> Jay Cohen, president of World Sports Exchange (WSE), “was the only person to contest” the charge.<sup>26</sup> Cohen’s business was based in Antigua, a country where it is legal to bet on sports.<sup>27</sup> World Sports Exchange “targeted customers in the United States, advertising its business throughout America by radio, newspaper, and television.”<sup>28</sup> “[T]he

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20. See U.S. GEN. ACCT. OFF., GAO-03-89, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES 3 (2002) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d0389.pdf> (last visited Feb. 5, 2008).

21. See Hurt, *supra* note 13, at 414.

22. *Gambling on the Internet: Hearing on H.R. 3125 Before the Subcomm. on Crime Comm. on the Judiciary*, 105th Cong. (1998) (statement of Kevin V. DiGregory, Deputy Assistant Att’y Gen., Crim. Div.), available at <http://www.usdoj.gov/criminal/cybercrime/kvd0698.htm> (last visited Feb. 5, 2008).

23. 18 U.S.C. § 1084(a) (2006).

24. 260 F.3d 68 (2d Cir. 2001).

25. *Id.* at 71.

26. *Id.* at 70; James W. Prado Roberts, *Jail Unlikely to Slow Cyber-Gambling: Industry Analysts Think the Operations of Illegal Offshore Web sites Will Find the Payday too Tempting*, ASBURY PARK PRESS (Neptune, N.J.), Aug. 13, 2000, at A3; see *Cohen*, 260 F.3d at 70.

27. See *Cohen*, 260 F.3d at 70.

28. *Id.*

government argued that WSE violated federal laws” by encouraging Americans to create a gambling account.<sup>29</sup>

Cohen, however, asserted that WSE’s business practices were permissible within a Wire Act exception that allows bets to be made from a jurisdiction in which persons are allowed to place bets to a jurisdiction where a business is allowed to accept them.<sup>30</sup> Further, Cohen argued that the Wire Act does not apply to Internet gambling because the Act was enacted prior to the formation of the Internet gambling industry.<sup>31</sup> The jury disagreed, and the district court convicted Cohen of conspiracy and seven counts of violating the Wire Act.<sup>32</sup> The Second Circuit affirmed the decision.<sup>33</sup>

Yet, in *In re Mastercard International, Inc.*,<sup>34</sup> the Fifth Circuit ruled against the government, finding that the Wire Act of 1961 prohibits sports betting, but not nonsports Internet gambling.<sup>35</sup> In *In re Mastercard International*, the plaintiffs sought to discharge their gambling debts by suing the defendant credit card companies.<sup>36</sup> The plaintiffs claimed that the credit card companies facilitated illegal gambling in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>37</sup> The court held, among other things, that purchasing Internet gambling credits for gambling was not illegal, and that the credit card companies had a legal claim to the plaintiffs’ debts.<sup>38</sup>

The U.S. government does not believe that the Fifth Circuit’s ruling is the correct interpretation, and has continued to pursue businesses that have ties to offshore entities related to online gambling.<sup>39</sup> The government has continued to rely on the precedent of *Cohen*, and the Wire Act, to prosecute Internet gambling operators. The prosecutions do not appear to be ending anytime soon.

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29. *U.S. Attorney’s Office Wins First Federal Net Gambling Case*, 4 ANDREWS GAMING INDUS. LITIG. REP. 9 (2000).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Cohen*, 260 F.3d at 78.

34. 313 F.3d 257 (5th Cir. 2002).

35. *Id.* at 263 (“Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal.”)

36. *Id.* at 261.

37. *Id.* at 260-61. “All RICO violations under 18 U.S.C. § 1962 entail ‘(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise.’” *Id.* at 261 (citing *Crowe v. Henry*, 43 F.3d 198, 204 (5th Cir. 1995)) (emphasis omitted).

38. *Id.* at 263.

39. See, e.g., Matt Richtel, *BetOnSports, After Indictment, Folds Its Hand and Decides to Move to Asia*, N.Y. TIMES, Aug. 11, 2006, at C3; *Two Charged in Payments From Wagers on Internet*, N.Y. TIMES, Jan. 17, 2007, at C6.

*B. Interstate Transportation of Wagering Paraphernalia Act*

The Interstate Transportation of Wagering Paraphernalia Act is another law used to combat Internet gambling.<sup>40</sup> It works as an antibookmaking law.<sup>41</sup> According to the legislative history, the purpose of the statute was to criminalize the interstate transportation—except by common carrier—“of any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, adapted, devised or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game.”<sup>42</sup> Further, “[i]t erects a substantial barrier to the distribution of certain materials used in the conduct of various forms of illegal gambling” by cutting off gambling supplies.<sup>43</sup> The law is tangentially and ambiguously related to Internet gambling because the government uses it to prevent Web sites from helping to transport any sort of paperwork related to betting.

*C. Travel Act*

Third, the Travel Act is applicable to Internet gambling because it imposes criminal sanctions on “[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate . . . commerce, with intent to (1) distribute the proceeds . . . or (3) otherwise promote, manage, establish, carry on, or facilitate . . . any unlawful activity.”<sup>44</sup> The key term is “any unlawful activity,” which includes a gambling business’s failure to pay the federal wagering excise tax.<sup>45</sup>

The Travel Act, however, does not directly apply to Internet gambling in jurisdictions where the federal excise wagering tax has been paid.<sup>46</sup> Yet, courts could find an Internet gambling Web site to be the type of facility governed by the Travel Act because it uses telephone lines or by other analogy.<sup>47</sup> Therefore, the Act must be amended in order to prevent regulated Internet gambling from any

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40. 18 U.S.C. § 1953 (2006).

41. *See id.*

42. H.R. REP. NO. 87-968 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2634, 2635.

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

44. 18 U.S.C. § 1952(a).

45. *Id.* § 1952(b).

46. *See* Joel Weinberg, *Everyone’s a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 305 (2006).

47. Christopher Grohman, *Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006*, 1 J. L. & TECH. RISK MGMT. 34, 46 (2006).

prosecution.<sup>48</sup> Thus, regulating and taxing the Internet gambling Web site operators would solve ambiguity surrounding the Travel Act.

#### D. *Illegal Gambling Business Act*

Next, the Illegal Gambling Business Act works to prevent “[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business . . . .”<sup>49</sup> Whereas, an “illegal gambling business” is defined as one that violates a state’s law “in which it is conducted . . . involves five or more persons . . . [and] has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.”<sup>50</sup> In addition, the government has found that “[l]ike the Wire Act, the Illegal Gambling Business Act applies only to gambling businesses, not individual gamblers.”<sup>51</sup> Therefore, the Illegal Gambling Business Act is used to go after Internet gambling operators. The federal government can use it to combat illegal gambling over the Internet by declaring the actions of gambling Web site operators illegal.

#### E. *Professional and Amateur Sports Protection Act*

The Professional and Amateur Sports Protection Act (PASPA) is another instrument in the government’s battle against Internet gambling. This Act governs betting on sports outside a commissioned regulated casino.<sup>52</sup> PASPA states, in relevant part:

It shall be unlawful for—

- (1) a government entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
- (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>53</sup>

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48. *See id.*

49. 18 U.S.C. § 1955(a).

50. *Id.* § 1955(b)(1)(i-iii).

51. GAO REPORT, *supra* note 20, at 14.

52. 28 U.S.C. §§ 3701-3704.

53. *Id.* § 3702.

The federal government can use PASPA to prosecute Internet gambling operators that choose to allow unregulated betting on amateur and professional sports games.

The five main laws are likely to continue to play a role in the U.S. government's crusade to prosecute Internet gambling operators and gamblers. Thus, each will need to be examined by Congress and amended to protect legal Internet gambling. Yet the laws, if amended, must still be able to prosecute illegal Internet gambling operators who violate current regulations on traditional gambling.

### III. HISTORY OF THE UIGEA

The UIGEA was to be the panacea for banning Internet gambling. The current law banning Internet gambling was introduced by United States Representative James Leach as H.R. 4411 on November 18, 2005.<sup>54</sup> Congressman Leach's bill was introduced for a single purpose: "to prevent the use of certain payment instruments, credit cards, and fund transfers for unlawful Internet gambling, and for other purposes."<sup>55</sup> The main goal was to ultimately cut-off the money flow from the banking institutions of gamblers domiciled in the United States, which was used to pay wagers over Internet gambling Web sites.

To please certain constituents, the bill exempted Indian tribal gambling, state lotteries, and horse-betting from the regulations.<sup>56</sup> This was enough to secure passage in the House of Representatives by a 317 to 93 vote on July 12, 2006.<sup>57</sup> Once it passed in the House of Representatives, the bill was sent to the Senate, where former Senate Majority Leader Bill Frist placed it into the unrelated SAFE Port Act.<sup>58</sup> On September 29, 2006, the bill passed the required majority in the Senate, and was subsequently passed along to the president for signature.<sup>59</sup> The Act was finally signed into law on October 13, 2006 by President Bush.<sup>60</sup>

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54. H.R. 4411, 109th Cong. (2006).

55. *Id.*

56. *See id.*

57. *See id.*; *see also* <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04411:@@R> (last visited Dec. 4, 2007).

58. *See* H.R. 4954, 109th Cong. § 803 (2006). Originally, Senator Frist tried to place the bill into a defense bill in early September 2006, S. 2507, 109th Cong. (2006), but failed. *See* Nancy Zuckerbrod, *Frist Targets Internet Gambling*, WASH. POST, Sept. 13, 2006, at A1.

59. *See* SAFE Port Act, H.R. 4954, 109th Cong. (2006).

60. *See* Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (Supp. 2007).



In enacting the UIGEA, the government's apparent goal is to prohibit all Internet gambling within U.S. borders.<sup>61</sup> Preventing the payment of winnings effectively halts the placement of wagers<sup>62</sup> by freezing a gambler's money from being deposited into a winning account or withdrawn from a losing account.<sup>63</sup> For many, the bill's passage was a big success,<sup>64</sup> but for others who view Internet gambling positively, it was a big setback.

This was not the first time Congress attempted to ban Internet gambling;<sup>65</sup> for several years, Congress tried to enact a law similar to the UIGEA, but was never able to pass such sweeping legislation.<sup>66</sup> Congress's first attempt to prohibit Internet gambling came in 1995, but the initial bill went up for a vote on the House floor in 1997.<sup>67</sup> United States Senator Jon Kyl, with the aid of Congressman Jim Leach, has been the biggest proponent of UIGEA in Congress.<sup>68</sup>

These legislators were the first persons in Congress to introduce the 1997 bill that would have extended the Wire Act<sup>69</sup> through the imposition of penalties, not just upon online casino businesses, but also upon Internet gamblers and Internet service providers.<sup>70</sup> The

61. *See id.*

62. *See id.*

63. Usually, gamblers will upload funds onto an Internet gambling company's Web site, make bets, and then cash out any winnings when ready. Most U.S. banks, however, do not allow the use of their credit or debit cards for Internet gambling, and any attempts by Americans to use them will be rejected. *See* GAO REPORT, *supra* note 20, at 24.

64. For example, a Christian advocacy group, Focus on the Family, strongly opposes "all forms of legalized gambling for both moral and pragmatic reasons." CitizenLink, Focus on the Family Position Statement on Gambling, <http://www.citizenlink.org/FOSI/gambling/abp/A000001159.cfm> (last visited Feb. 11, 2007).

65. For instance, in 1997, Senator Jon Kyl of Arizona introduced the Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997). The Internet Gambling Prohibition Act of 1997 criminalized individual gamblers by enlarging the scope of the Wire Act, which allowed federal authorities to end customer Internet accounts. *See* Jenna F. Karadbil, Note, *Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT'L & COMP. LAW 413, 429 (2000) (noting the three enforcement levels: fines, imprisonment, and elimination of the Internet gambling Web site).

66. *See, e.g.*, H.R. 2143, 108th Cong. (2003); Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. (1999) (differing from the Internet Gambling Prohibition Act of 1997 because it did not criminalize individual bettors).

67. *See* Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. (1999).

68. *See* National Thoroughbred Racing Association, [http://www.ntra.com/content\\_pac.aspx?type=pac&style=red&id=18901](http://www.ntra.com/content_pac.aspx?type=pac&style=red&id=18901) (last visited Mar. 1, 2008). The National Thoroughbred Racing Association has published Senator Kyl's press release praising the passage of the UIGEA. *Id.*

69. 18 U.S.C. § 1084 (2006).

70. *See id.* § 1084(a).

Act would have expanded the definition of “betting or wagering,” by clarifying the offering of prizes, as opposed to solely addressing monetary awards.<sup>71</sup> According to this bill, a “betting or wagering” amount must be more than de minimus.<sup>72</sup> Further, the bill would have criminalized online gambling. Congress, however, failed to pass the bill.<sup>73</sup>

Before the 1997 bill, Congress created a commission to study the effects of Internet gambling.<sup>74</sup> The commission’s purpose was “to conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States.”<sup>75</sup> Three years later, the commission publicly released its findings.<sup>76</sup> The report found that Americans loved to gamble online, and that, for many, online gambling is an addiction.<sup>77</sup> This report prompted an onslaught of attempts to ban Internet gambling, and to make examples out of illegal Internet gambling Web site operators.

For instance, the Department of Justice (DOJ) arrested David Carruthers, chief executive officer of one of the largest online sports betting operations, BetOnSports.com, for allegedly violating U.S. gambling laws.<sup>78</sup> The DOJ charged Carruthers with wire fraud in violation of the Wire Act<sup>79</sup> for taking sports wagers over the Internet.<sup>80</sup> The government sought a twenty-two-count indictment against Carruthers and BetOnSports.com for laundering \$250 million.<sup>81</sup> In July 2006, the government and BetOnSports.com settled the civil case.<sup>82</sup> As of March 2007, the case against Carruthers is still

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71. See S. 474, 105th Cong. § 2(3)(B) (amending 18 U.S.C. § 1081).

72. See *id.* § 2(6)(A) (amending 18 U.S.C. § 1081(6)(A)).

73. *Id.*

74. See National Gambling Impact Study Commission Act, Pub. L. No. 104-169, § 1, 110 Stat. 1482 (1996).

75. *Id.* § 4(a)(1).

76. See NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 1-1 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html>.

77. See *id.*

78. See Matt Richtel & Heather Timmons, *Web Casinos Becoming a Riskier Bet for Investors*, N.Y. TIMES, Aug. 21, 2006, at C1 (detailing July 16, 2006 arrest and twenty-two-count indictment).

79. 18 U.S.C. § 1084 (2006).

80. See Richtel, *supra* note 39.

81. See *id.*

82. See Matt Richtel, *U.S. Settles Civil Case Against British Gambling Company*, N.Y. TIMES, Nov. 11, 2006, at C2. BetOnSports.com refused to admit to any wrongdoing in the settlement. *Id.* As part of the settlement, it was forced to open a toll-free number to inform gamblers on how they could reclaim their wagers. *Id.*

pending.<sup>83</sup> But, Carruthers's case is not the most recent case involving Internet gambling violations.

On January 16, 2007, similar charges were filed by the Manhattan U.S. attorney's office against Stephen Lawrence and John Lefebvre, the co-founders of NETeller, a British financial intermediary.<sup>84</sup> The prosecutors charged the founders with laundering billions of dollars illegally.<sup>85</sup> As a result, NETeller closed down its U.S. operation, forcing it to lose sixty-five percent of its business.<sup>86</sup> NETeller's operation works by transferring money from the Isle of Man, where the company is based, to financial accounts outside of the United States.<sup>87</sup> NETeller's departure was a big blow to the U.S. Internet gambling industry because NETeller was a main payment method for wagers on Internet gambling Web sites.<sup>88</sup>

The U.S. government's actions against these companies are examples of the types of draconian measures the government will take to stop Internet gambling.<sup>89</sup> The DOJ will likely continue to send threatening letters to advertisers and broadcasters,<sup>90</sup> and will probably pursue banks and financial institutions that are slow to comply with UIGEA. There appears to be no end in sight, as reports of new arrests are made every few weeks.

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83. See *id.* Gary Kaplan, the founder of BetOnSports.com, was arrested on March 28, 2007 in the Dominican Republic. See Roger Blitz & Daniel Pimlott, *Betonsports Chief Kaplan Under Arrest Online Gambling*, FIN. TIMES USA, Mar. 31, 2007, at 8.

84. See *Two Charged In Payments*, *supra* note 39.

85. See *id.*

86. See *Bail Set For Second NETeller Founder*, REUTERS, Jan. 19, 2007.

87. See *Two Charged In Payments*, *supra* note 39.

88. For instance, NETeller processed over \$7.3 billion in financial transfers, with ninety-five percent of revenues derived from Internet gambling. *Id.* Other examples of ways to transfer money include Click2Pay, Click and Buy, and money bookers. See UltimateBet.com, Banking, Deposit, <http://www.ultimatebet.com/banking/deposit/methods/poker-room-transfers>.

89. Michael Garcia, the U.S. attorney in the NETeller case, stated that “[c]riminal prosecutions related to online gambling will be pursued even in cases where assets and defendants are positioned outside of the United States.” *Two Charged In Payments*, *supra* note 39. In addition, the U.S. government is now pursuing the underwriters of the international companies—HSBC, Credit Suisse, Deutsche Bank, and Dresdner Kleinwort—as part of a “far-reaching attack by federal prosecutors.” Andrew Ross Sorkin & Stephanie Saul, *Gambling Subpoenas on Wall St.*, N.Y. TIMES, Jan. 22, 2007, at C1.

90. Letter from John G. Malcolm, Deputy Assistant Attorney General, Department of Justice, to National Association of Broadcasters (June 11, 2003) (on file with author).

### A. *The New Unlawful Internet Gambling Act*

The UIGEA's passage was a huge success for Congress and those who want to end Internet gambling.<sup>91</sup> It was also a triumph for the DOJ, which was vigilant in lobbying Congress to pass the UIGEA because of concerns that simply regulating Internet gambling would not work.<sup>92</sup>

The UIGEA does not completely ban all sources of gambling. It exempts state lotteries, horse-betting, Indian gaming, and fantasy sports leagues.<sup>93</sup> It does not specifically aim at criminalizing Internet gamblers; rather, it prohibits banks in the United States from allowing any banking tools, such as credit cards, checks, or money orders, to be used to deposit or withdraw money from gambling sites.<sup>94</sup>

#### 1. Prohibition on Financial Payments<sup>95</sup>

Specifically, the UIGEA works by prohibiting the transfer of money from any gambler participating in illicit Internet gambling.<sup>96</sup> It provides, in relevant part, that “[n]o person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling”<sup>97</sup> specific types of financial instruments. These include credit extended through credit cards, electronic fund transfers, and paper checks.<sup>98</sup> The UIGEA is, however, restricted to Internet gambling businesses and operators, but not to gamblers themselves.

This is not an effective way to block money from being transferred from the gambler through the Web site to another gambler or the Web site operator.<sup>99</sup> The Web sites are able to hide the transactions by miscoding a transaction as an entertainment fee, or can “submit[] credit card transactions through another merchant’s

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91. H.R. 4411, 109th Cong. (2006). The bill passed in the House of Representatives by a 317-93 vote. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04411:@@R> (last visited Dec. 4, 2007).

92. *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., Crim. Div., Dep’t of Just.) [hereinafter Malcolm Testimony].

93. See 31 U.S.C. § 5362(10)(B)(iii) (Supp. 2007).

94. See *id.* § 5363.

95. See *id.*

96. See *id.*; see also, e.g., *infra* Appendix A.

97. 31 U.S.C. § 5363.

98. *Id.*

99. See Weinberg, *supra* note 46, at 297.

[credit card] terminal using that merchant's identification number and merchant category code, and pay[] that merchant a percentage of the submitted transactions."<sup>100</sup>

## 2. Civil Penalties<sup>101</sup>

The UIGEA gives "the district courts of the United States . . . original and exclusive jurisdiction to prevent and restrain restricted transactions by issuing appropriate orders in accordance with this section."<sup>102</sup> Further, federal and state law-enforcement officials can obtain judicial orders against Internet intermediaries to withdraw communications facilities used to facilitate Internet gambling.<sup>103</sup>

## 3. Criminal Penalties<sup>104</sup>

The Act provides for up to five years in prison, and fines, for violators.<sup>105</sup> Further, if the actor is found guilty, the operator will be banned from the gambling industry through a permanent injunction "enjoining . . . [the actor] from placing, receiving, or otherwise making bets or wagers or sending, receiving, or inviting information assisting in the placing of bets or wagers."<sup>106</sup> The UIGEA works by turning off the methods for placing wagers. There is no certainty that it will be effective, because most financial institutions that are willing to support Internet gambling Web sites will likely be located in a foreign country. Therefore, the federal government will have a difficult time enforcing any sort of criminal sanction unless the head of the operating Web site or financial institution enters the United States.<sup>107</sup>

## 4. The UIGEA's Jurisdictional Issues

Additionally, jurisdictional issues play an important role in determining whether Congress has the authority to force banks, even foreign-based banks, to comply with its regulations. Congress's regulation of markets and exchanges, like other "instrumentalities of interstate commerce,"<sup>108</sup> is based on the United States Constitution,

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100. GAO REPORT, *supra* note 20, at 26-27.

101. *See* 31 U.S.C. § 5365 (Supp. 2007).

102. *Id.* § 5365(a).

103. *See id.*

104. *See id.* § 5366.

105. *See id.* § 5366(a).

106. *See id.* § 5366(b).

107. The Department of Justice has been active in its prosecution of foreign Web site operators. *See, e.g.*, Richtel & Timmons, *supra* note 78.

108. *See* *Perez v. United States*, 402 U.S. 146, 150 (1971).

which provides, in relevant part, that “Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.”<sup>109</sup> Thus, there must be some sort of jurisdictional nexus that allows the government to force compliance. Typically, a nexus exists when there is *any* conduct in interstate commerce.<sup>110</sup> Moreover, the Supreme Court has upheld antigambling laws in the United States through the Commerce Clause.<sup>111</sup>

The jurisdictional reach for the UIGEA, however, will usually lie outside the United States because the gambling Web sites and presumably the banks are located in foreign countries. Therefore, the United States will have to rely on other countries, or will have to wait until the violator, usually the financial owner, enters U.S. territory.<sup>112</sup> This does not mean, however, that other countries will defer to the rulings of U.S. courts. Instead, Congress has developed the “cut-off payment” method as the most effective way to reach all Americans, and it is jurisdictionally well-established.

### B. *The Main Problems of the UIGEA*

Although the UIGEA successfully passed the bicameral barrier for the first time since Congress’s initial attempt,<sup>113</sup> there remain inherent problems with the UIGEA’s attempt to ban Internet gambling outright.<sup>114</sup> There are three main issues with enforcement of a general prohibition: (1) technology, (2) international network, (3) consumer gambling demands, and (4) state demand for tax revenue.<sup>115</sup> These are relevant to the potential problems with trying to outlaw Internet gambling through the UIGEA.

First, technological innovation is a significant problem because technology is constantly evolving for greater social utility.<sup>116</sup> The Internet’s open infrastructure makes it difficult for the government to police. Presumably, this is the reason Congress resorted to cutting off the payment of wagers rather than directly going after Internet

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109. U.S. CONST. art. I, § 8, cl. 3.

110. *See generally* Gonzales v. Raich, 545 U.S. 1 (2005); Wickard v. Filburn, 317 U.S. 111 (1946).

111. *See* Champion v. Ames, 188 U.S. 321, 363-64 (1903).

112. *See* Richtel, *supra* note 39.

113. S. 474, 105th Cong. (1997).

114. *Internet Gambling: Prohibition v. Legalization: Hearing Before the Nat’l Gambling Impact Study Comm’n* (May 21, 1998) (statement of Tom W. Bell, Dir. of Telecomms. and Tech. Studies, CATO Inst.), *available at* <http://govinfo.library.unt.edu/ngisc/meetings/may2198/bell.pdf>.

115. *See id.*

116. *See* MANUEL CASTELLS, THE INTERNET GALAXY: REFLECTIONS ON THE INTERNET, BUSINESS, AND SOCIETY 100-04 (2003).

service providers.<sup>117</sup> This is a feeble attempt to reign in the exchange of information and money from one network to another network many miles away from its original source. Indeed, gamblers can evade the law through e-money or other clever ways to pass money through the Internet.

Second, the international network of Internet gambling is behind an impenetrable shield of sovereignty.<sup>118</sup> To date, there are over fifty-four international jurisdictions that sanction online gambling.<sup>119</sup> This makes it difficult for the United States to compete with those countries that provide a safe haven for online gambling over their Internet service providers. Moreover, it is an easy outlet for domestic gamblers to circumvent any current regulations.<sup>120</sup> Domestic gamblers can simply mask their Internet protocol (IP) address, and move their money from wagers to international Web sites. Thus, the Internet is a large supplier, open twenty-four hours a day, 365 days a year, and it is impossible to prevent monetary transactions from occurring around the world.

Third, the demand for Internet gambling far exceeds any need to outlaw it. To date, it is estimated that there are more than 1800 worldwide gambling Web sites,<sup>121</sup> with sixty to sixty-five percent of the patrons logging on from the United States.<sup>122</sup> In 2003, revenues from Internet gambling exceeded \$5 billion, and it was estimated, before the passage of the UIGEA, to grow fourfold to over \$25 billion in revenues by 2010.<sup>123</sup> Likewise, a leading Internet gambling site, PartyPoker.com, hosted \$1454 per second in wagers (roughly \$45 billion for a full year).<sup>124</sup>

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117. See Tom W. Bell, *Internet Gambling: Popular, Inexorable, and (Eventually) Legal*, POL'Y ANALYSIS, Mar. 8, 1999, at 7-8; 31 U.S.C. §§ 5361-5367 (Supp. 2007) (allowing internet service providers to block U.S. gamblers' access to off-shore gambling Web sites).

118. See Bell, *supra* note 117, at 10.

119. See Sue Schneider, *The Market: An Introduction*, in INTERNET GAMBLING REPORT V, at 47, 48 (Mark Balestra ed., 2002).

120. See Bell, *supra* note 117, at 10.

121. Lawrence G. Walters, *The Law of Online Gambling in the United States—A Safe Bet, or Risky Business?*, 7 GAMING L. REV. 445, 445 (2003).

122. Kim Komando, *In Battle Against Online Gambling: Don't Bank On It*, CHICAGO SUN-TIMES, Apr. 25, 2005, at 63.

123. CHRISTIANSEN CAPITAL ADVISORS, LLC, WAGERING ON THE INTERNET: STATE OF THE INDUSTRY, <http://www.cca-i.com> [hereinafter CHRISTIANSEN REPORT] (go to "Research" hyperlink; follow "Internet Gambling Estimates" hyperlink) (last visited Mar. 2, 2008).

124. Timothy L. O'Brien, *Is Poker Losing Its First Flush?*, N.Y. TIMES, Apr. 16, 2006, § 3, at 1.

Finally, by outlawing Internet gambling, states lose out on any claim to tax revenues within their borders.<sup>125</sup> Those states likely would want to legalize Internet gambling for tax revenues.<sup>126</sup> However, taxing Internet gambling wagers is a tricky issue because they are not currently taxed the same way the government taxes the earnings of casino-goers. Also, gamblers rarely report that they have earnings from outside the United States.<sup>127</sup> As a result, there is a potential opportunity for the federal government to regulate online gambling through taxation. Therefore, if there exists a way for states to profit from online gambling, and there is a place for gamblers to go, then it will be difficult to prevent online gambling. By examining several inherent problems with UIGEA, Congress can improve its regulation of the industry, and can achieve a reasonable compromise in the Internet gambling debate.

C. *UIGEA Policy: The Federal Government's Arguments for Prohibition*

Opponents of Internet gambling have made various arguments against it.<sup>128</sup> The majority of these arguments stem largely from a morality perspective that dates back to the nineteenth century.<sup>129</sup> The most cited problems include fraud, pathological gambling, money laundering, and underage gambling.<sup>130</sup> The U.S. government has declared these arguments as valid reasons to enforce a national ban on Internet gambling.<sup>131</sup>

1. Fraud

Internet gambling opponents argue that an unregulated gambling industry will “afford[] no protection to customers and no assurance of fairness or honesty in the operation of the gambling devices.”<sup>132</sup> There are various methods by which an individual could

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125. See Joseph J. McBurney, *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, 356 (2006).

126. See Bell, *supra* note 117, at 14.

127. See *id.*

128. See, e.g., Scott M. Montpas, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163, 170-71 (1996) (“[T]he burdens associated with gambling of any kind are well documented. Addiction, diminished job performance, crime, decreased spending on other forms of entertainment, and the regressive nature of gambling each pose serious problems for society.”).

129. See Hurt, *supra* note 13, at 396.

130. See GAO REPORT, *supra* note 20, at 2.

131. See *id.*

132. *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 213 (N.Y. App. Div. 1964).



commit fraud using an Internet Web site.<sup>133</sup> For instance, a person could disguise herself as whomever she wants, anytime she wants, by simply making up a profile. But in order to stop fraud, gambling Web sites have employed credit-reporting databases to help match credit card owners with taxpayer identification numbers.<sup>134</sup> This matching system also works well to stop minors from having easy access to a Web site.<sup>135</sup>

Yet, the federal government's main concern is that Internet gambling operators will take off with a gambler's money or will sell off his private information.<sup>136</sup> Thus, online gamblers are given no protection from the government because they can be easily cheated. In addition to this risk, the government is concerned that an online operator will not give the best odds, or that there can be a computer algorithm that does not set the correct odds.<sup>137</sup> There is also a risk that friends will collude, something illegal in physical casinos, to cheat someone out of his or her winnings.<sup>138</sup> These are strong enough reasons for the government to deem Internet gambling as encouraging fraud.

## 2. Pathological Gambling

The Internet is open twenty-four hours a day, 365 days a year.<sup>139</sup> Thus, an individual with an Internet service provider connection can get online and place a bet whenever he or she wishes. In a government-sponsored report on the impact of Internet gambling, the federal government claimed that "the high-speed instant gratification of Internet games and the high level of privacy they offer may exacerbate problem and pathological gambling."<sup>140</sup> Other countries have found the same to be true. In the United Kingdom, the Department for Culture, Media and Sport funded its own Internet

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133. See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004), available at 2004 WL 2650633, at \*14, \*73 [hereinafter Panel Report] (citing many frauds that could be committed).

134. See Karadbil, *supra* note 65, at 440.

135. *Id.*; see also discussion *infra* Part III.C.4.

136. See Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, Part I ¶ 16 (2004).

137. See Panel Report, *supra* note 133, at \*63.

138. See generally Steven E. Hurdle, Jr., Note, *Cyberbust: The Elimination of Gambling on the Internet*, 2004 UCLA J.L. & TECH. 4 (2004) (describing the mechanics of "electronic cheating").

139. But most traditional casinos stay open the same hours, i.e., twenty-four hours, seven days a week. See, e.g., Harrah's Casino, www.harrahs.com (last visited Mar. 2, 2008).

140. NAT'L GAMBLING IMPACT STUDY COMM'N, *supra* note 76, at 5-5.

gambling survey,<sup>141</sup> which reported that seventy-five percent of individuals who gamble online are “problem” or “pathological” gamblers, compared to just twenty percent of people who visit valid casinos.<sup>142</sup>

Indeed, the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders IV* has defined pathological gambling as an “impulse control disorder.”<sup>143</sup> Accordingly, gambling is psychological when it develops into a constant pattern where the person can no longer keep up interpersonal, vocational, and financial activities.<sup>144</sup>

Although the federal government asserts that pathological gambling is a grave problem within the United States, various studies show that only approximately one percent of the adult population in the United States and Australia have “severe” pathological gambling problems.<sup>145</sup> Moreover, the same argument can be made against the existence of traditional casinos, lotteries, and off-track betting facilities. But these traditional facilities are allowed, and are regulated by state governments<sup>146</sup> rather than the federal government.<sup>147</sup> Thus, the federal government seems to be preaching the ultimate cognitive dissonance: allowing so-called “pathological gambling” within traditional state casinos, state lotteries, and horse and off-track betting parlors, while simultaneously seeking to ban Internet gambling.

### 3. Money Laundering

In addition to the pathological gambling argument, advocates of the UIGEA assert that Internet gambling makes it easy for criminals to launder money through gambling Web sites.<sup>148</sup> Representative Leach, one of UIGEA’s main sponsors, stated that “Internet gambling specifically is a particularly attractive method to launder money

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141. See Sam Coates, *Online Casinos ‘Used to Launder Cash,’* TIMES (London), Nov. 1, 2006, at 9.

142. See *id.*

143. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 312.31 (4th ed. 2000).

144. See *id.* The symptoms can include irritability when trying to stop, complete preoccupation with gambling, and gambling more to recoup losses from other wagers. *Id.*

145. See Gottfried, *supra* note 136, ¶ 27.

146. 15 U.S.C. § 3001(a)(1) (2006) (“[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders.”).

147. See *id.* § 3001(a)(2) (“[T]he Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests.”).

148. See GAO REPORT, *supra* note 20, at 5.

because of the heightened level of anonymity and a virtual lack of governmental regulation.”<sup>149</sup> A recent World Trade Organization (WTO) report stated that “[t]he United States has provided evidence showing that U.S. law enforcement authorities have seen organized crime playing a growing role in Internet gambling.”<sup>150</sup> The federal government wants to fight money laundering because the government believes that it is a strong front for illegal activity.<sup>151</sup> Arguably, the government’s argument is well founded because the Internet creates an easy forum to place a bet and later withdraw the false winnings.<sup>152</sup>

Nevertheless, money-laundering concerns exist in any e-commerce transaction.<sup>153</sup> Every e-commerce Web site can be used by criminals to launder money. Further, cutting off financial institutions from fulfilling wagers may promote anonymous payments of wagers instead of credit card payments.<sup>154</sup> Thus, Congress has essentially prevented financial institutions from supplying crucial information to the government under the Bank Secrecy Act by enacting UIGEA.<sup>155</sup> Congress, presumably, did not intend this result.

#### 4. Underage Access to Internet Gambling

The anti-Internet gambling faction also asserts that Internet gambling is easily accessible to minors, who can place wagers online without any accountability.<sup>156</sup> The government believes that “Internet gambling businesses have no reliable way of confirming that gamblers are not minors who have gained access to a credit card

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149. *Illegal Gambling: Hearing on H.R. 556 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 107th Cong. 2 (2001) (statement of U.S. Rep. James A. Leach).

150. Panel Report, *supra* note 133, at \*77.

151. See NAT’L GAMBLING IMPACT STUDY COMM’N, *supra* note 83, at 5-6 (“To launder money, a person need only deposit money into an offshore account, use those funds to gamble, lose a small percentage of the original funds, then cash out the remaining funds.”).

152. See Hurt, *supra* note 13, at 427.

153. See *id.* at 428.

154. See Susan Ormand, *Pending U.S. Legislation to Prohibit Offshore Internet Gambling May Proliferate Money Laundering*, 10 LAW & BUS. REV. AM. 447, 452-53 (2004).

155. Cf. Andres Rueda, *The Implications of Strong Encryption Technology On Money Laundering*, 12 ALB. L.J. SCI. & TECH. 1, 8-9 (2001).

156. See *Internet Gambling Prohibition Act of 1999: Hearing on H.R. 3125 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 82 (2000) (statement of Kevin V. DiGregory, Deputy Assistant Att’y Gen., Crim. Div., Dep’t of Just.).

and are gambling on their Web sites.”<sup>157</sup> In addition, studies have shown that younger people are more likely to become pathological gamblers.<sup>158</sup> Thus, according to the anti-Internet gambling faction, minors are predisposed to a higher risk of gambling, and are likely to trick an Internet gambling Web site into believing that they are of legal age.

As of 2007, there is no exact means for online gambling Web sites to verify age over the Internet.<sup>159</sup> Although age-verification technology is imperfect, it has dramatically improved in the last few years, and has been extremely successful in the Internet regulation of alcohol and tobacco sales.<sup>160</sup> In some countries where Internet gambling is allowed, there are regulations that assure a gambler is of proper age.<sup>161</sup> In the United States, there is one tool that allows Web sites to prevent Internet gambling among underage individuals, which uses a comprehensive registration procedure involving cross-verification with available databases.<sup>162</sup> Thus, age identification technology is steadily improving, and the United States could learn from other countries that have successfully used the technology to their advantage.

The foregoing social cost arguments, however, are flawed because each one can be used to attack brick-and-mortar casinos or an off-track betting establishments as well.<sup>163</sup> The federal government’s arguments are unconvincing and its comparisons faulty. Once again, Congress is creating cognitive dissonance to the detriment of millions. Congress finds Internet gambling to be morally impermissible, while illogically allowing traditional casinos to operate.

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157. See Malcolm Testimony, *supra* note 92.

158. See, e.g., NAT’L GAMBLING IMPACT STUDY COMM’N, *supra* note 76, at 7-20. HOWARD SHAFFER ET AL., ESTIMATING THE PREVALENCE OF DISORDERED GAMBLING BEHAVIOR IN THE UNITED STATES AND CANADA: A META-ANALYSIS 5 (1997).

159. There are various third-party Web sites that verify age. See, e.g., Birthdate Verifier, <http://www.birthdateverifier.com> (last visited Feb. 12, 2008).

160. See Brad Krevor et. al., *Preventing Illegal Tobacco and Alcohol Sales to Minors Through Electronic Age-Verification Devices: A Field Effectiveness Study*, 24 J. PUB. HEALTH POL’Y 251, 252-53 (2004).

161. See Gottfried, *supra* note 136, ¶ 38.

162. See *Internet Gambling: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. (1998) (statement of Sue Schneider, Chairwoman of the Interactive Gaming Council and Chief Executive Officer of Rolling Good Times OnLine), available at <http://judiciary.house.gov/judiciary/3042.htm> (last visited Feb. 12, 2008).

163. See Hurt, *supra* note 13, at 416.

## IV. INTERNET GAMBLING REGULATIONS IN FOREIGN COUNTRIES

While the United States is trying to ban Internet gambling for a number of reasons,<sup>164</sup> several European countries have taken different approaches to Internet gambling.<sup>165</sup> Currently, there are over eighty countries that permit online gambling.<sup>166</sup>

Rather than banning Internet gambling outright, these countries are controlling the industry through taxation and other regulatory schemes.<sup>167</sup> Yet, the European Commission has indicated that Internet gambling Web sites must not “have less access to bettors than the state-run lottery monopolies that generate billions in tax revenue for most European countries.”<sup>168</sup> As such, Internet gambling is allowed, but it remains highly regulated.

For instance, Italy and Austria have begun to permit “domestic online gambling.”<sup>169</sup> In the United Kingdom, Internet gambling is permissible and popular.<sup>170</sup> One company, 888 Holdings, has increased revenues since the enactment of the UIGEA.<sup>171</sup> In fact, 888 Holdings experienced an increase of \$19 million in revenues for 2006, which the company attributed to geographic diversification.<sup>172</sup> This is one example of a European company leveraging another country’s regulation of Internet gambling.

Foreign countries that allow Internet gambling are at odds with the United States.<sup>173</sup> There is also a danger that the United States will see lawsuits from the European Union as well as from

164. See *supra* Part III.A; see Gottfried, *supra* note 136, ¶ 30.

165. See *Internet Gambling Still Expected to Grow*, FAIRPLAYERS MAGAZINE, Oct. 16, 2006, [http://www.fairplayers.com/en/magazine/hot\\_news\\_fairplayers\\_09.html](http://www.fairplayers.com/en/magazine/hot_news_fairplayers_09.html).

166. See *New Shooter: House Passes Online Gambling Dice to Senate*, TELECOMWEB, July 12, 2006, <http://www.telecomweb.com/tnd/18058.html> (“about [eighty] countries and jurisdictions” are regulating, rather than prohibiting, Internet gambling).

167. See *Internet Gambling Still Expected to Grow Despite the New U.S. Law Against Online Gambling*, SWISS-PRESS.COM, Oct. 17, 2006, <http://www.swiss-press.com/newsFlashartikel.cfm?key=146167>.

168. *Id.*

169. *Id.*

170. See Hurt, *supra* note 13, at 416.

171. *888 Revenue Rises As Focus Shifts*, BBC NEWS ONLINE, Feb. 14, 2007, <http://news.bbc.co.uk/1/hi/business/6360049.stm>.

172. See *id.*

173. Notably, Australia is not at odds with the United States because, in 2001, it passed its own Internet Gambling Act. See INTERACTIVE GAMBLING ACT 2001, DEP’T OF BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY, [http://www.dbcde.gov.au/communications\\_for\\_consumers/internet/online\\_gambling/interactive\\_gambling\\_act\\_2001](http://www.dbcde.gov.au/communications_for_consumers/internet/online_gambling/interactive_gambling_act_2001) (last visited Mar. 16, 2008). The IGA makes it illegal for gambling Web site operators to supply gambling service to Australians. *Id.* It “carries a maximum penalty of \$220,000 per day for individuals and \$1.1 million per day for bodies corporate.” *Id.*

Antigua.<sup>174</sup> For instance, the WTO recently upheld its ruling from a 2004 decision<sup>175</sup> against the United States in a lawsuit brought by Antigua.<sup>176</sup> The WTO panel of judges determined that the United States had violated its treaty obligations by not allowing full access to Internet gambling companies located in Antigua.<sup>177</sup> As a result, Antigua and Barbuda could place tariffs on American goods, or withdraw copyright and trademark protection.<sup>178</sup>

#### V. ALTERNATIVES: TAXES AND INTERNET GAMBLING

There are alternatives to the government's paternalistic charge on gambling Web sites—the federal government could tax the Internet gambling industry. Currently, the federal government taxes the gambling winnings of all gamblers,<sup>179</sup> and allows a deduction for the losses of professional gamblers.<sup>180</sup> A direct tax on Internet gambling winnings does not exist within the Internal Revenue Code.<sup>181</sup> Instead, Congress could tax the Web sites that enter U.S. territory, whether they market or otherwise cater to U.S. citizens. However, it may be difficult to convince the government to switch from the UIGEA to a narrower regulatory scheme that seeks to employ tax revenues and licenses as a deterrent.

Congress is not pursuing the potential tax revenues from what could be a six billion dollar Internet gambling industry.<sup>182</sup> Taxing the Internet gambling industry is a great opportunity for a significant growth in tax revenues. The industry is predicted to grow nearly twenty percent between 2008 and 2010; moreover, the industry swelled 700% between 2001 and 2010.<sup>183</sup> This represents a large amount of money, and a potentially great opportunity for the Department of Treasury.

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174. See Tobias Buck, *EU Watchdog Says US Online Betting Law is 'Protectionist' Gambling Industry*, FIN. TIMES (London), Jan. 31, 2007, at 9 (“European Union’s top financial regulator has accused the US of using a crackdown on online gambling to protect its domestic gaming industry and warned it could trigger legal action before the World Trade Organisation.”).

175. Panel Report, *supra* note 133, at 5.

176. See Warren Giles, *U.S. Ban On Web Gambling Rejected*, WASH. POST, Mar. 31, 2007, at D01.

177. See *id.*

178. See *id.*

179. See I.R.C. § 61 (2006).

180. See *id.* § 165(d).

181. Although no tax on Internet gambling currently exists, a legislative proposal has been introduced in Congress. See Internet Gambling Regulation and Tax Enforcement Act, H.R. 5523, 110th Cong. § 2 (2008).

182. See CHRISTIANSEN REPORT, *supra* note 123.

183. See *id.*

Undoubtedly, Congress has the authority to tax a bet and the winnings from that bet.<sup>184</sup> States are also permitted to tax winnings unless preempted by federal law.<sup>185</sup> Therefore, there is an inimitable opportunity for the federal government to work with the states to find a way to tax Internet gambling without hurting the states. For instance, Congress could share tax revenue with those states that support or have jurisdiction over Internet gambling Web sites. It could promote a positive impact on state funding, similar to the policy that state lotteries give to state education programs. There are two main ways to tax—at the individual and business level.

#### A. Individual Taxation

The easiest way to tax individual gamblers is by taxing their winnings as ordinary income.<sup>186</sup> For instance, lottery and casino winnings are taxed as ordinary income.<sup>187</sup> Moreover, an individual that wins any Internet gambling wagers should be taxed on the sum of his or her sessions for the year.<sup>188</sup> Although there is no tax case about Internet-gambling receipts, a tax court would probably find any winnings from an Internet-gambling casino or lottery to constitute “constructive receipt of income,”<sup>189</sup> i.e., ordinary income.<sup>190</sup>

As the law stands today, an individual must file Form W-2G with the Internal Revenue Service.<sup>191</sup> Any money earned overseas is still considered income, and thus it does not matter where the source of the money originated. Although a winner must declare his or her winnings, it is unlikely that an online gambler would report money

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184. See I. NELSON ROSE & MARTIN D. OWENS, JR., *INTERNET GAMING LAW: GAMBLING AND THE LAW* 216 (2005).

185. *Id.*

186. See I.R.C. § 61(a) (2006).

187. See *id.*; see also *United States v. Maginnis*, 356 F.3d 1179, 1184 (9th Cir. 2004) (holding lottery prizes are taxed as ordinary income).

188. See *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1592 (4th ed. 2000) (defining “session” as “[a] period of time devoted to a specific activity, [such] as to recording music in a studio”). Taxpayers in the United States, except for professional gamblers, are not permitted to total their wins with their losses; rather, they must sum up their total wins from each session and report the sum as income (Other Income, line 21, Form 1040). See I.R.S. Pub. 529, 12 (2006). Losses could be claimed, but only up to the amount of winnings for the year, and then only when the taxpayer elects to itemize deductions instead of taking the allowable standard deduction. See I.R.C. § 165(d).

189. See *e.g.*, *Millard v. Commissioner*, T.C. Memo 2005-192, 2005 WL 2078496, at \*2 (T.C. Aug. 8, 2005) (“Consequently, a cash method taxpayer constructively receives income as of the date that a check is received absent a substantial limitation.”) (citations omitted).

190. I.R.C. § 61(a) (2006).

191. To learn more about the exact requirements for Form W-2G, see Instructions for Forms W-2G and 5754, <http://www.irs.gov/instructions/iw2g/ar02.html#d0e65>.

won over the Internet. Thus, a direct tax could work as a disincentive for Internet gamblers, because their behavior may change if they realize they would be taxed directly on any Internet winnings before withdrawing money. The tax could work by forcing Internet gambling operators to report all winnings to the U.S. government. This way, the federal government could see the money move between the gamblers over the Internet gambling Web sites.

*B. Business Taxation*

Congress should also tax Internet gambling businesses. There are many Internet gambling Web sites that feel “Congress would be wiser to legalize, regulate and tax” online gambling.<sup>192</sup> For instance, Sportingbet founder Mark Blandford believes that if his business were taxed—on the \$70 million in earnings and profits his site gained from U.S. gamblers—at the same rate as Las Vegas casinos, Sportingbet would pay a tax of \$4.4 million in one year.<sup>193</sup> Blandford asserts that his company would pay those taxes if the company could move its business within a regulated U.S. market.<sup>194</sup>

In such a case, the federal government could use its power to tax Internet gambling companies through an excise tax, pursuant to the Federal Excise Wagering Tax.<sup>195</sup> On the other hand, if the federal government pursues foreign companies that violate the Wire Act or the UIGEA, those companies will not comply with reporting bettors’ winnings to the Internal Revenue Service.<sup>196</sup>

In any event, an Internet gambling tax base, multiplied by a certain tax rate, will equal tax revenues for the government. Thus, Congress can increase either the tax rate or the tax base. This means the federal government will be able to increase its tax base while collecting more federal tax revenues. Further, a recent estimate of the possible federal tax revenue from a tax on Internet poker at around \$3.3 billion, with state tax revenue at more than \$4 billion annually.<sup>197</sup> Enforcing the tax would not be any more expensive than trying to prevent financial institutions from stopping payments to Internet gambling operators located within the United States.

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192. Tom Weir, *Online Sports Betting Spins Out of Control*, USA TODAY, Aug. 22, 2003, reprinted in LEGALIZED GAMBLING 78, 79 (David M. Haugen ed., 2006).

193. *Id.*

194. *Id.*

195. I.R.C. § 4401 (2006); see also Weinberg, *supra* note 46, at 322.

196. See ROSE & OWENS, *supra* note 184, at 216.

197. See Shailagh Murray & James V. Grimaldi, *House Passes Bill to Restrict Internet Poker*, WASH. POST, July 12, 2006, at A01.



## VI. RECOMMENDATIONS FOR IMPROVING THE CURRENT LAWS

The explosion of unregulated Internet gambling can be viewed as an ongoing concern for the federal government. The federal government, however, can now do something to prevent further problems. The UIGEA will not stop Internet gambling. Furthermore, one court has stated that “it is undisputed that were [Internet gambling] declared illegal and banned in the United States, the activity would continue in other parts of the world.”<sup>198</sup> Thus, it is important for the government to protect consumers that visit gambling Web sites.

This Note proposes three viable options to improve the monitoring of the Internet gambling industry. First, Congress could simply overturn the UIGEA, and leave the industry to self-regulation through increased protections that prevent underage gambling. Second, the federal government could legalize the industry, following the European model. Alternatively, the government could model a new law after a recently proposed North Dakota law.<sup>199</sup>

A. *Overturn UIGEA*

One option is for Congress to overturn the UIGEA with legislation altering the purpose of the law. Alternatively, Congress could reconsider its decision to prevent financial institutions from paying wagers; overruling this decision will allow a reversion to the pre-UIGEA status quo. There has also been a recent push from Barney Frank, a Democratic congressman from Massachusetts, to repeal the UIGEA.<sup>200</sup> Thus, repealing the UIGEA could become a reality in the near future.

The WTO ruling against the United States may be a strong indication that the United States is not “playing fair” in the world trade arena.<sup>201</sup> The United States has been viewed by Antigua and the WTO as protectionist, because the United States is discriminatory in its legislation against Internet gambling

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198. *In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 485 (E.D. La. 2001).

199. H.B. 1509, 59th Leg. Assem. (N.D. 2005).

200. Scott Van Voorhis, *Barney: Let it Roll; Bill Would End Ban, License New Gambling*, BOSTON HERALD, Apr. 27, 2007, at 18. Congressman Frank believes that “people should be able to do what they want with their own money as long as they are not hurting anybody.” *Id.*

201. See Daniel Pimlott, *WTO Rules Against US in Internet Gambling Case*, FT.COM, Jan. 26, 2007, <http://www.ft.com/cms/s/0/317e9e48-ad61-11db-8709-0000779e2340.html>. (“Mark Mendel, Antigua’s lead counsel in the case, . . . said that ‘America’s prohibition in the provision of gambling services from other countries violates the US commitments to the WTO.’”) The WTO’s ruling was private. See *id.*

operators.<sup>202</sup> Specifically, the WTO found the United States in violation of international trade laws because it allowed domestic Internet gambling on horse-betting, but disallowed competition from foreign companies.<sup>203</sup>

The WTO ruling also has strong implications for the future. It is important for the government to protect the vulnerabilities of pathological and underage gamblers. As an alternative to simply overriding the UIGEA, Congress could give the power to regulate Internet gambling back to the states, as it has with other forms of traditional gambling. In 2001, Nevada, the state with the largest gambling revenues, passed legislation that would have required Web site operators to pay \$500,000 for a two-year license.<sup>204</sup> The legislative proposal, however, would not be implemented until it complied with federal law.<sup>205</sup> Yet, many analysts and the Nevada legislature believed that the law would never be in line with federal law.<sup>206</sup> Although Nevada wanted to legalize Internet gambling, its legislation was ineffective because the federal laws were vague and overbearing. Nevada's efforts might be successful if Congress were to give the states permission to pass their own legislation to control Internet gambling occurring within their borders.

#### B. *Foreign Gambling Law Model*

Internet gambling is still expected to grow in other countries, particularly in Europe and Asia.<sup>207</sup> Some of that growth will likely come from gamblers within the United States, and the government will be powerless to stop those who wish to log-on to foreign gambling Web sites. In enacting the UIGEA, Congress went straight to the source, i.e., the financial institutions through which gambling payments are transmitted.<sup>208</sup> Thus, while an individual may go to a foreign Web site and place a bet, if the individual does not have a foreign bank account to pay for the wagers, then he or she will be unable to complete the transaction.

Foreign governments, however, view Internet gambling in a different way. Foreign countries seem to want, among other things,

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202. *See id.*

203. *See id.*

204. A.B. 466, 71st Leg. (Nev. 2001). The assembly bill was approved by the Nevada governor and signed into law. *Id.*

205. *See id.*

206. *See* Richard Stenger, *Nevada Gambles on Internet Gaming*, CNN.COM, June 5, 2001, <http://archives.cnn.com/2001/TECH/internet/06/05/online.gaming/index.html>.

207. *Internet Gambling Still Expected to Grow*, *supra* note 167.

208. *See* Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5363-5364 (Supp. 2007).

to protect the consumer and underage persons.<sup>209</sup> For instance, Internet gambling has been legal in Australia since 1997.<sup>210</sup> The regulation is strict, but not draconian,<sup>211</sup> and Australia allows traditional betting operations to offer services over the Internet.<sup>212</sup> Australia passed the Interactive Gambling Act of 2001, which made it illegal for licensed operators to provide Internet services to Australian citizens.<sup>213</sup> Yet, Australia permits its gambling public to access Internet gambling sites located in other jurisdictions.<sup>214</sup> Accordingly, Australia does not give full protection to its citizens.

In contrast, the United Kingdom created an independent regulatory body, called the Gambling Commission, with the passage of the Gambling Act of 2005.<sup>215</sup> The Act instituted “an improved, more comprehensive structure of . . . regulation” for gambling laws.<sup>216</sup> The Act was fully implemented in September 2007,<sup>217</sup> and created uniform regulations for Internet gambling, through which companies are able to receive licenses to provide gaming, betting, and lotteries over remote technologies.<sup>218</sup> The Gambling Commission evaluates the remote operators for licenses the same way it evaluates nonremote operators.<sup>219</sup>

The Act also permits British residents to gamble with remote operators located outside the British jurisdiction.<sup>220</sup> Yet, remote

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209. In the United Kingdom, Parliament listed three reasons for enacting its gambling bill:

- (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime; and (b) ensuring that gambling is conducted in a fair and open way; and (c) protecting children and other vulnerable persons from being harmed or exploited by gambling.

Gambling Act 2005, 2005, c.19, Part 1, § 1 (Eng.).

210. ROSE & OWENS, *supra* note 184, at 200.

211. See DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 197 (2005).

212. *Id.*

213. ROSE & OWENS, *supra* note 184, at 200.

214. *Id.*

215. DEP'T FOR CULTURE, MEDIA & SPORT, GAMBLING ACT 2005: INTRODUCTORY NOTE ON IMPLEMENTATION 1, <http://www.culture.gov.uk/NR/rdonlyres/8385C46B-72FA-4588-8C05-ECEE683B912C/O/GamblingAct2005IntroductoryNoteonimplementation.pdf>.

216. *See id.*

217. *Id.*

218. DEP'T FOR CULTURE, MEDIA & SPORT, GAMBLING ACT: REGULATORY IMPACT ASSESSMENT, <http://www.culture.gov.uk/NR/rdonlyres/ECA25E4B-EBFA-4A9C-8D30-3917975F0/GamblingAct2005RIA210405.pdf>.

219. *Id.*

220. *See id.* at 6.

operators will be subject to stricter regulations regarding children,<sup>221</sup> including age verification checks that will be monitored by the Gambling Commission.<sup>222</sup> The Gambling Commission will be responsible for continuously improving the regulations regarding underage gambling and other potential pitfalls.<sup>223</sup>

The United States could follow in the regulatory footsteps of the United Kingdom. The United States could create a commission similar to the Gambling Commission to oversee the licensing of Internet gambling operators. In this way, the United States could benefit from financial collection and regulatory credibility. More and more countries are following the United Kingdom's lead, and the United States could be in line with the international community if it followed suit—and could minimize its disputes with other countries, especially in light of the recent WTO ruling.<sup>224</sup>

### C. *Proposed North Dakota Act Model*

In 2005, the North Dakota Legislative Assembly passed a bill “relating to the licensing and regulating of live poker.”<sup>225</sup> The bill was sponsored by Jim Kasper, a Republican, who originally envisioned making it a constitutional amendment, which would have been subject to a public vote in June 2006.<sup>226</sup> The bill provided for “[t]he attorney general [to] license and regulate the playing of internet live poker at licensed internet live poker establishments in the state.”<sup>227</sup> It also called for “a license fee for each person that operates an internet live poker site and an annual licensing fee of ten dollars for each player who plays internet live poker at a site.”<sup>228</sup> The bill proposed an oversight commission of five individuals, selected by the legislative council and attorney general, whose job it would be to

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221. *See id.* at 1.

222. *Id.*

223. *Id.*

224. *See* Eric Pfanner, *Online Gambling a New Arena for U.S.-E.U. Trade Conflicts*, INT'L HERALD TRIB., Apr. 25, 2005. For a discussion of the WTO ruling, see *infra* Part VI.A.

225. H.B. 1509, 59th Leg. Assem. (N.D. 2005). The bill passed in the North Dakota House of Representatives by a vote of 49-43. Tom Rafferty, *Making Their Wagers*, BISMARCK TRIB., Mar. 9, 2005.

226. H.R. Res. 3035, 59th Leg. Assem. (N.D. 2005). The bill won passage in the North Dakota House of Representatives by a vote of 50-44. *See* Rafferty, *supra* note 225.

227. H.B. 1509, 59th Leg. Assem. § 1 (N.D. 2005).

228. *Id.* § 2.

oversee the live poker on the Internet.<sup>229</sup> Finally, the bill intended to tax the “adjusted gross proceeds”<sup>230</sup> by the following:

- a. Eight percent on the first one million dollars;
- b. Six percent on the second one million dollars;
- c. Four percent on the third one million dollars;
- d. Two percent on the next five million dollars;
- e. One-half of one percent on the next fifty million dollars; and
- f. One-fourth of one percent on any amount in excess of fifty-eight million dollars.<sup>231</sup>

Yet, the bill was unable to get past the bicameral hurdle.<sup>232</sup> The bill’s failure was attributed to a letter written by Laura Parsky, a deputy assistant attorney general in the Criminal Division of the Justice Department, to North Dakota’s Attorney General Wayne Stenehjem.<sup>233</sup> Parsky’s letter stated that the DOJ believed that federal law “prohibits gambling over the Internet, including casino-style gambling.”<sup>234</sup> The letter likely influenced the North Dakota Senate’s decision to reject the bill.

Although the North Dakota bill was not enacted, it is a model upon which the federal government could build.<sup>235</sup> Indeed, it has drawn the attention of overseas gambling Web site operators like Nigel Payne, the chief executive officer of Sportingbet.<sup>236</sup> Payne was a supporter of the bill, and even admitted that his company would start doing more business in North Dakota.<sup>237</sup> According to Payne, if his company moved to North Dakota, it would generate over \$10

229. *See id.*

230. The term “adjusted gross proceeds” is defined as “any sums wagered in an internet live poker hand which may be retained by the licensed internet live poker establishment as compensation.” *Id.*

231. *Id.*

232. The bill was defeated in the North Dakota Senate by a 44-3 vote. H.B. 1509, 59th Legis. Assem. (N.D. 2005), *available at* <http://www.legis.nd.gov/assembly/59-2005/bill-actions/ba1509.html> (last visited Feb. 15, 2007).

233. *See* Letter from Laura Parsky, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Wayne Stenehjem, Attorney Gen., State of North Dakota (Mar. 7, 2005); Garry Boulard, *Trade Rules Gamble with State Laws*, STATE LEGISLATURES, Oct./Nov. 2005, at 19, *available at* [https://www.ncsl.org/programs/pubs/slmag/2005/05SLOctNov\\_TradeRulesGamble.pdf](https://www.ncsl.org/programs/pubs/slmag/2005/05SLOctNov_TradeRulesGamble.pdf).

234. Parsky letter, *supra* note 233.

235. The bill contemplated just Internet poker, which is limited to card games. *See* H.B. 1509, 59th Leg. Assem. § 1(2) (N.D. 2005). Yet, this Note proposes that Congress expand the definition to include all Internet gambling.

236. *See* Rafferty, *supra* note 225.

237. *See id.*

million in tax revenues for the state.<sup>238</sup> This was not, however, persuasive enough to get the resolution passed in North Dakota.

## VII. SOLUTION

In order to improve current Internet gambling laws, Congress should adopt a hybrid Internet gambling policy using a mix of foreign regulatory models and the recent North Dakota bill. In this manner, Congress could prevent underage gambling, fraud, and illicit black-market transactions through its taxing power. Thus, Congress should legalize the Internet gambling industry. This is the best result for all parties involved, including those whom are currently exempt from the UIGEA.<sup>239</sup>

For instance, American Gaming Association (AGA)<sup>240</sup> director Frank Fahrenkopf stated “his group wanted a federal commission to study whether the technology exists to go after under-age gambling on the Internet while regulating and taxing above-board Web sites.”<sup>241</sup> Fahrenkopf also believes the legislation was passed because of the “[t]he politics of the moment.”<sup>242</sup> Such opposition shows that the Act is unwanted even within the traditional gambling community.

This opposition could be problematic for the government because the government could miss an important opportunity to work with the AGA. The AGA’s opposition will not help in regulating Internet gambling. The United States government should adopt a taxation and licensing scheme that would enforce agreements with Internet gambling Web sites. Further, if the United States wishes to completely end online gambling, it should enter into an international pact with other governments<sup>243</sup> because “[u]nless there is some uniform policy against gambling among the different countries, there will always be gambling sites on the Internet.”<sup>244</sup> Yet, this idea will

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238. *See id.*

239. Likewise, the bill exempts gambling at Indian casinos and horse tracks. *See* 31 U.S.C. § 5362(10) (Supp. 2007).

240. *See* American Gaming Association, <http://www.americangaming.org/about/overview.cfm>, (last visited November 16, 2007) (“AGA represents the commercial casino entertainment industry by addressing federal legislative and regulatory issues affecting its members and their employees and customers. . .”).

241. *See Internet Gambling Still Expected to Grow*, *supra* note 167.

242. Anna Palmer, *Online-Gambling Interests Lose 10-Year Fight*, *LEGAL TIMES*, Oct. 9, 2006, at 13.

243. *See* Mark D. Schopper, Comment, *Internet Gambling, Electronic Cash & Money Laundering: The Unintended Consequences of a Monetary Control Scheme*, 5 *CHAP. L. REV.* 303, 306 (2002).

244. Scott M. Montpas, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 *U. DAYTON L. REV.* 163, 182 (1996).

not work because other countries that permit Internet gambling will be reluctant to enforce a uniform ban on Internet gambling.<sup>245</sup> Consequently, the UIGEA will likely force more people to go to the “black market.”<sup>246</sup> Various Web sites will continue to exist in countries unwilling to enforce an act like the UIGEA, and individuals will continue to gamble through these Web sites in order to place and pay for their online wagers abroad.<sup>247</sup>

“Black market” gambling could consist of changing Internet protocol addresses, using Asian intermediaries that cannot be traced, or simply going to a “bookie’s Web site.”<sup>248</sup> Individuals will use anonymous electronic financial intermediaries that are not subject to the same enforcement in recordkeeping requirements as the usual financial intermediaries.<sup>249</sup>

Regulating this type of activity could be expensive. Thus, the best hope for the United States government to “ban” Internet gambling is the taxation and licensing scheme followed by several European countries, and proposed by North Dakota. This way, the DOJ could monitor gaming activities to ensure that people would not lose out, or be cheated from, their gambling winnings. Further, just as investors are protected by statutes,<sup>250</sup> the government could enforce the laws, while profiting from what would otherwise be illegal gambling revenues.

If the federal government modeled Internet gambling regulations after the aforementioned countries and the proposed North Dakota Act, the United States could curb illegal Internet gambling. In effect, the government would appease opponents by showing them that good can come out of “morally bad” gambling. Further, the government may push more regulation on the Internet gambling industry, forcing the industry to self-regulate. The industry will likely be more vigilant in preventing underage gamblers and addicts because it will be a necessary part of obtaining a license. Therefore, this Note proposes a singular model that will be effective in collecting tax revenues and

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245. *See id.*

246. “Black market” typically refers to stolen goods. *See* Jim McTague, *Going Underground: America’s Shadow Economy*, Jan. 6, 2005, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=16532>. The most appropriate term for avoiding regulations and taxes is “underground economy.” *Id.*

247. Philip Palmer McGuican, *Stakes Are High in Battle to Bar Internet Gambling*, NAT’L L.J., Nov. 3, 1997, at B8.

248. *See* Editorial, *Super(ciliousness) Instead of Raising Tax Revenue from Football Betting, the Government Chooses to Prosecute Morality*, L.A. TIMES, Feb. 4, 2007, at 5.

249. *See* Schopper, *supra* note 243, at 304-05.

250. *See, e.g.*, 15 U.S.C. § 10 (2006) (enabling statute for Securities Exchange Act of 1934 and the use of Rule 10b-5).

preventing any inherent, “morally bad” behavior associated with Internet gambling.

#### VIII. CONCLUSION

Congress’s cursory enactment of the Unlawful Internet Gambling Enforcement Act was the wrong move to stop Internet gambling. In order to improve current Internet gambling laws, Congress should develop a more amenable approach to deterring Internet gambling by combining the strategy of European countries with North Dakota’s recently proposed legislation.<sup>251</sup> Furthermore, Congress could use other preventative methods to control fraud and pathological gambling by fashioning a remedy that melds both legal and public policy in the regulation of the Internet gambling industry. Doing so would discourage pathological gamblers, while allowing the government to benefit from the tax revenue of those who would illegally gamble anyway.

Indeed, it is unclear whether there is any benefit to banning Internet gambling when compared with the cost of regulating the Internet gambling industry. It is understandable that, given the threat of terrorism and other potentially criminal activities, Congress should continue to prevent money laundering. But Congress should not try to ban the Internet gambling industry, because people will use novel means to circumvent the law—the same way individuals were able to circumvent Prohibition. Therefore, the best solution is to adopt a hybrid method to prevent the social and economic costs of a total ban and substantially increase federal tax revenues. Thus, while a blanket ban would be difficult and expensive to enforce, controlled regulations could be highly beneficial for the government and the public.

In sum, legalizing and regulating Internet gambling is the best stance the U.S. government could adopt to reduce any threat posed by Internet gambling. The UIGEA’s asserted benefits do not justify its cost on financial institutions and consumers. The government should enforce a regulatory scheme that forces Internet gambling operators to follow stringent standards while paying taxes. Congress could also transform the industry into a “pay-to-bet” scheme that would force Internet casinos to maintain a license.<sup>252</sup> This is the best situation for the United States because it increases tax revenues and forces Internet gambling Web sites to eliminate morally offensive underage gambling. New regulation will solve the question of the UIGEA’s constitutionality without subverting any state regulations.

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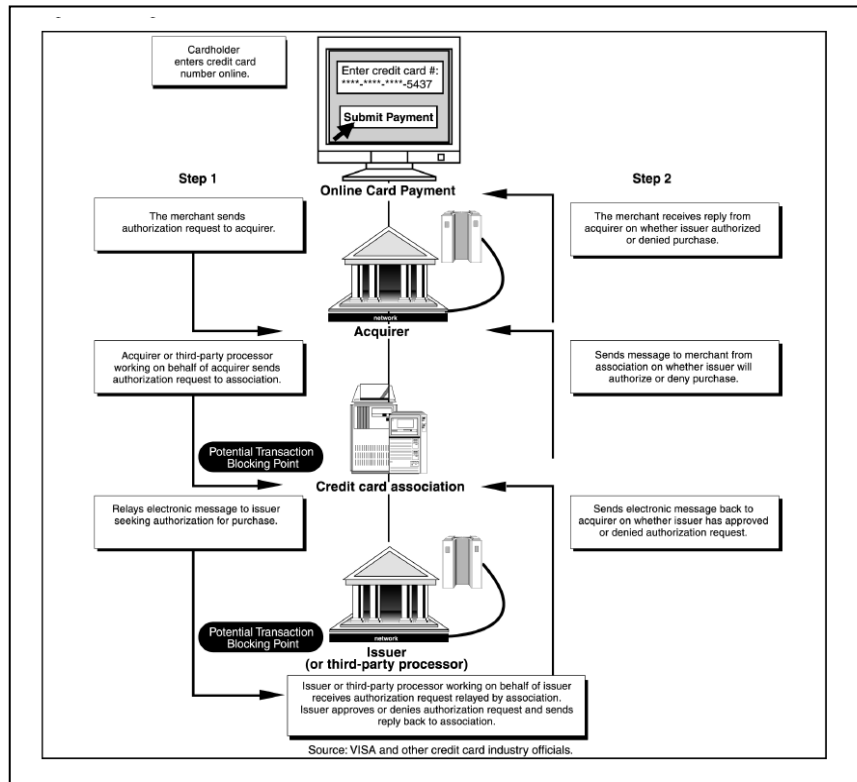
251. See discussion *supra* Part VI.B-C.

252. See *supra* Part VI.



For these reasons, this type of regulation should be adopted in lieu of the current regime under the UIGEA.

Appendix A: Blocking a Credit Card Transaction<sup>253</sup>



253. GAO REPORT, *supra* note 20, at 23.