THE U.S. ON TILT: WHY THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT IS A BAD BET

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ABSTRACT

The United States federal government's attempts to curb Internet gambling are beginning to resemble a game of whack-a-mole. The Unlawful Internet Gambling Enforcement Act of 2006 (the "UIGEA" or "Act") represents its most recent attack on Internet gambling. This iBrief first looks at U.S. attempts to limit Internet gambling and how those efforts have affected gambling law and business. It then discusses how the UIGEA works and highlights some of its major limitations. This iBrief argues that the UIGEA will not only fail to rein in online gambling, but that the U.S. federal government is treading an improvident course towards prohibition and will undermine U.S. policy concerns. Finally, this piece concludes by recommending that the U.S. abandon its current course and regulate online gambling.

INTRODUCTION

¶1 In 2005, approximately fifteen to twenty million United States ("U.S.") gamblers placed bets online.[2] The U.S. online gambling market was estimated at six billion dollars, representing half of the world's online gambling revenues.[3] At the same time, the U.S. government has been the world's staunchest opponent of online gambling.[4] Under both the Clinton and Bush administrations, the Department of Justice has fought its growth.[5]

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

[3] Associated Press, *Experts*: *Online-Gambling Ban Won't Work*, FOXNEWS.COM, Oct. 25, 2006, http://www.foxnews.com/printer_friendly_story/0,3566,224839,00.html [hereinafter Experts on Ban].

[4] *See*, *e.g.*, *id.*

[5] *See* Megan E. Frese, Note, *Rolling The Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Free Speech?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 547, 612 (2005).

Additionally, legislators have spent the better part of a decade attempting to enact anti-Internet gambling laws.[6]

¶2 On October 13, 2006, President George W. Bush signed into law the UIGEA.[7] Senator Bill Frist (R-Tenn) attached the legislation to an unrelated port-security bill just moments before it was voted on.[8] The UIGEA's unexpected enactment created industry hysteria.[9] Stock prices of publicly-traded e-casinos[10] plummeted, wiping out over approximately seven billion dollars of market value.[11] Some of the most prominent e-casinos pulled out of the U.S. market entirely.[12] Since then, the mass media has churned out wide-ranging commentary on the Act; from complete dismissals of its viability to comparisons with Prohibition.[13]

¶3 This *iBrief* is divided into three parts. Part one traces the development of Internet gambling law. Part two analyzes the UIGEA, discussing its function and highlighting some of its major limitations. Part three discusses the implications of the Act; arguing that the Act will push online gambling further underground and, in so doing, undermine U.S policy concerns. The *iBrief* concludes by recommending a better way for the US to regulate online gambling. Importantly, this piece makes a wide-ranging examination of a broad legal landscape. It simply touches upon complex legal issues that may call for more in-depth treatment. Rather than resolve all of these questions, the author's goal here is merely to illustrate an imprudent U.S. policy by examining the various components involved.

I. INTERNET GAMBLING PRE-ACT

A. Gambling Online

¶4 An internet user, or "gamer," can participate in various gambling activities in a virtual environment ("e-casino"). For example, one can bet

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[6] *Id.* at 557-59.
[7] Eric Pfanner & Heather Timmons, *U.K. Seeks Global Rules for Online Gambling*, N.Y. TIMES, Nov. 2, 2006, http://www.nytimes.com/iht/2006/11/02/technology/IHT-02gamble.html.
[8] Nelson Rose, *Congress Makes Sausages*, 11 GAMING L. REV. 1 (2007).
[9] *See* Experts on Ban, *supra* note 3.
[10] The author uses the term "e-casino" in reference to gambling websites of all types, or operators thereof.
[11] Pfanner & Timmons, *supra* note 7.
[12] *See id.*
[13] *See, e.g.*, George F. Will, *Prohibition II: Good Grief*, NEWSWEEK, Oct. 23, 2006, *available at* http://www.newsweek.com/id/72444; Allyn Jaffrey Shulman, *Legal Landscape of Online Gaming Has Not Changed*, CARDPLAYER.COM, Oct. 5, 2006, www.cardplayer.com/poker_news/article/3272.

on sports, horseracing, and casino-style games.[14] A gamer can even participate in real-time poker tournaments with players from around the world.[15]

¶5 In order to gamble online, the user must download the proper software from the e-casino's website onto his/her personal computer.[16] The user then creates a personal account providing her name, home address, a valid e-mail address, date of birth and other personal information.[17] The user then accesses the e-casino's virtual "lobby" wherein she must set up an electronic cash account from which wagers will be drawn and in which winnings will be deposited.[18]

¶6 Among various account-funding alternatives, such as personal checks and credit cards, U.S. gamblers primarily use e-wallets.[19] An e-wallet is an online account in which money can be deposited and used in commercial transactions.[20] The e-wallet drafts on a consumer's bank, credit card or debit account and routes the funds to the merchant; in this case, an e-casino. However, these funds can also be used in transactions unrelated to gambling.[21] The most widely used e-wallets facilitate billions of dollars in commerce annually, and are based and regulated offshore.[22] Once a player has set up and funded her e-wallet, it is time for the games to begin.

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[14] *E.g.*, BoDog, http://www.bodoglife.com/poker/. (last visited Apr. 12, 2008).
[15] *Id.*
[16] In the strict interest of research, the author set up accounts with three separate e-casinos in order to formulate general guidelines for setting up an online gambling account. BoDog, http://www.bodoglife.com/poker/ (last visited Apr. 12, 2008); PokerStars, http://www.PokerStars.com (last visited Apr. 12, 2008); Doyles Room, http://www.Doylesroom.com (last visited Apr. 12, 2008).
[17] *Id.*
[18] *Id.*
[19] Michael Clarke, *Card Clampdown On Gamblers*, THISISMONEY, Mar. 21, 2006, http://www.thisismoney.co.uk/credit-and-loans/article.html?in_article_id=407775&in_page_id=9.
[20] *See* Chuck Humphrey, *New Online Gambling Funding Prohibition Law*, GAMBLING-LAW-US, Sept. 30, 2006, http://www.gambling-law-us.com/Articles-Notes/specific-points-UIEGA.htm; *see also* DuluthPoker.com, http://www.duluthpoker.com/deposit-options/. (last visited Apr. 12, 2008).
[21] *See id.*
[22] Aaron Todd, *NETeller Exit Impacts U.S. Internet Gambling Market*, ONLINECASINOCITY, Jan. 18, 2007, http://online.casinocity.com/news/news.cfm?ArticleId=70015.

B. The Legal Framework of Internet Gambling

¶7 Historically, gambling regulation has primarily been left to the states. Accordingly, gambling laws vary widely from state to state.[23] For example, while Utah completely outlaws gambling, it's neighbor, Nevada, hosts a plethora of gaming attractions.[24] While there are several federal gambling laws, most are designed to support state law in the face of interstate or international gambling.[25] In general, liability under federal gambling statutes is triggered when the gambling activity has violated an underlying state law.[26] Only fairly recently has Congress taken a more assertive role, legislating over specific forms of gambling, such as sports, horseracing, and lotteries.[27]

¶8 Despite the Internet's novelty, pre-existing federal law has proven adequate to prosecute offshore e-casino operators, but only in limited circumstances. For example, while courts have found online sports gambling to be impermissible under the Wire Act, [28] there is no federal law explicitly outlawing online poker.[29] The Wire Act essentially prohibits businesses from engaging in the transmission of sports bets or wagers over the telephone or other wired devices in jurisdictions where such activity is illegal.[30] As a result, law-makers have attempted to expand legislation to deal explicitly with all forms of Internet gambling.[31]

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[23] *See, e.g.*, Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1576 (1999).
[24] *Id.*
[25] Charles Doyle, INTERNET GAMBLING: OVERVIEW OF FEDERAL CRIMINAL LAW (Cong. Res. Service, Nov. 29, 2004).
[26] *See id*.
[27] Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, at 8, 23–29 (2001), http://web.archive.org/web/20040303190351/http:/ag.state.nv.us/hottopics/int_gamb_nv.pdf (last visited Apr. 12, 2008).
[28] *See generally*, U.S. v. Cohen, 260 F.3d 68 (2d. Cir. 2001). In *U.S. v. Cohen*, the DOJ successfully prosecuted Jay Cohen, the founder of a multi-million dollar online sports book based in Antigua. During a trip to the U.S., Cohen was arrested at the John F. Kennedy Airport and charged with violating the Wire Act of 1961. In holding against Cohen, the court assumed that the nature of the wires used to transmit the bets was irrelevant. *See id.* at 76; *see also* 18 U.S.C. § 1804 (2006).
[29] *See* Schulman, *supra* note 13.
[30] *See* 18 U.S.C. § 1084.
[31] *See infra* Part I.C.

¶9 Over the past decade, the federal government has articulated four major policy concerns with Internet gambling.[32] First, the Internet provides easy access to gambling, which "could exacerbate the temptations facing compulsive gamblers."[33] Second, whereas a gambler's age can be physically examined at a traditional brick-and-mortar casino, it is much more difficult to verify the gambler's age online.[34] Third, due to the lack of regulation of the online gambling industry, e-casinos have an incentive to defraud gamblers; either by rigging the odds to favor the e-casino or by outright theft of bets.[35] Fourth, given the "volume, speed, and international reach of Internet transactions and offshore locations of [e-casinos]" in addition to the "high level of anonymity" enjoyed by e-casino operators, federal officials believe that online gambling is uniquely susceptible to money laundering.[36] These four issues underlie the federal government's approach towards online gambling.

C. Early Government Action

¶10 Beginning in the mid-90s, several bills were introduced in Congress to crack down on Internet gambling.[37] One such bill would have amended the Wire Act to expressly ban all forms of Internet gambling.[38] Other bills focused on preventing credit card companies and other financial institutions from transferring money in connection with gambling deemed unlawful under existing federal or state law.[39] The bills were defeated largely because of disputes over whether interactive interstate horseracing and interactive state lotteries—huge lobbying interests—would be exempt.[40]

¶11 The Department of Justice ("DOJ") also took a hard stance against online gambling, relying primarily on a questionable theory that the Wire

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[32] U.S. GEN. ACCOUNTING OFFICE, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES, 1–2 (Rep. No. GAO-03089) (2002) [hereinafter GAO REPORT] http://www.gao.gov/new.items/d0389.pdf.

[33] *The "Internet Gambling Prohibition Act": Hearing on H.R. 4777 Before the H. Comm. on the Judiciary and the Subcomm. on Crime, Terrpros, amd Homeland Security.*, 109th Cong. (2006) [hereinafter Ohr Statement] (statement of Bruce G. Ohr, Chief of Organized Crime and Racketeering Section, U.S. Dept. of Justice).

[34] *Id* at 3.

[35] *See id.* at 3–4.

[36] *Id.* at 4.

[37] *See* Rodefer, *supra* note 27, at 34–35.

[38] *See id.* at 36 ("The Internet Gambling Prohibition Act in 1997 and 1999 . . . sought an outright federal ban on e-gaming . . . .").

[39] *See id.* at 34–35.

[40] *See* Joseph J. McBurney, Note & Comment, *To Regulate or to Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry's Future in the United States*, 21 CONN. J. INT'L L. 337, 348–49 (2006).

Act, as originally enacted in 1961, criminalized *all forms* of Internet gambling.[41] In 2003, the DOJ issued letters to the National Association of Broadcasters and other media groups advising that providing advertising for e-casinos may be considered aiding or abetting illegal gambling operations.[42] Months later, dozens of major media companies were issued subpoenas.[43]

¶12 The DOJ managed to upset multi-million dollar advertising deals between media outlets and e-casinos, and, with little more than legal posturing, collected millions in fines and settlements.[44] Initially, media companies were not willing litigate the matter.[45] But in August of 2004, Casino City, the largest website devoted to online gambling, sued the DOJ on First Amendment grounds to establish its right to accept advertisements for Internet gambling.[46] The court dismissed the case on the basis that Casino City lacked standing as it had neither received a cease-and-desist letter nor a subpoena from the DOJ.[47] Although the case was dismissed on appeal, [48] Casino City reportedly never was issued a subpoena thereafter.

¶13 Significantly, there are apparently no cases in which the DOJ prosecuted a lawsuit against a media company on charges related to online gambling advertising.[49] Eventually, the online gambling industry established a circumvention and advertisements resurfaced on prominent media outlets.[50] Rather than advertise an e-casino's dot-com site, where a customer could gamble for real money, advertisers now promoted the e-casino's dot-net sister-site, where gambling for real money was not available, and which had hyperlinks to the dot-com site.[51] The media outlet

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[41] *See* Ohr Statement, *supra* note 33 at 3.
[42] Frese, *supra* note 5, at 554.
[43] *Id.* at 555.
[44] *See id.*
[45] *See id.*
[46] *Id.* at 550.
[47] Spencer E. Ante, *Casino City Is Upping Its Bet*, BUSINESSWEEK, Feb. 18, 2005, http://www.businessweek.com/technology/content/feb2005/tc20050218_1299_tc024.htm (last visited Apr. 12. 2008).
[48] Chuck Humphrey, *Advertising Internet Gambling*, GAMBLING-LAW-US, Feb. 27, 2005, http://www.gambling-law-us.com/Articles-Notes/advertising-online-casinos.htm.
[49] *See* Joseph Lewczack, *Safe Bet?*, PROMO MAGAZINE, Jan. 1, 2006, http://promomagazine.com/legal/marketing_safe_bet/ (last visited Apr. 12, 2008).
[50] *Id.*
[51] *Id.*

was now technically advertising non-gambling activity and advertising for online gambling became ubiquitous once more.[52]

1. In Re MasterCard and The Wire Act

¶14 *In Re MasterCard* tested the DOJ's theory that the Wire Act prohibited all forms of online gambling.[53] In that case, a class of gamblers sued their creditors to free themselves of debt accrued while gambling online.[54] The plaintiffs alleged, *inter alia*, that the debts were the result of gambling activity that was illegal under the Wire Act and thus uncollectible by creditors.[55] District Court Judge Duvall dismissed the case finding that "a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest."[56] The court probed further into the legislative history of the Wire Act, noting that recently proposed amendments to the Wire Act sought to expand its coverage to forms of gambling beyond sports-betting, including all games of chance.[57] The judge viewed this as a Congressional admission that the Wire Act was indeed limited in scope.[58] The Fifth Circuit affirmed on appeal.[59] While circuit courts may disagree on the meaning of any statute, the Fifth Circuit's ruling tremendously weakened the DOJ's position that all forms of gambling were illegal pursuant to the Wire Act.

¶15 Nevertheless, the DOJ's aggression and Congress' persistent push for prohibitive legislation succeeded in creating a hostile U.S. terrain. There are virtually no e-casinos based in the U.S.,[60] and major credit card companies and domestic payment processors have voluntarily undertaken to block online wagers.[61] This was a nominal victory, however, as U.S. gamblers are readily served by offshore e-casinos. Furthermore, in place of credit card companies, gamblers turned to e-wallets,[62] many of which are located and regulated offshore.[63]

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[52] *Id.*
[53] *See* In Re MasterCard Int'l. Inc., 132 F.Supp.2d 468, 479–481 (E.D. La. 2001).
[54] *Id.* at 475.
[55] *Id.*
[56] *Id.* at 480.
[57] *Id.*
[58] *See id.* at 480–81.
[59] In Re MasterCard Int'l. Inc., 313 F.3d 257 (5th Cir. 2002).
[60] Peter J. Scoolidge, *Gambling BlindFolded: The Case For a Regulated Domain For Gambling Web Sites*, 10 GAMING L.REV. 252, 253 (2006).
[61] *Id.* at 254.
[62] *See* Clarke, *supra* note 19.
[63] *See* Experts on Ban, *supra* note 3.

¶16 Online gambling continued to expand exponentially through 2005.[64] But in 2006, the U.S. took the gambling world by surprise by enacting the Unlawful Internet Gambling Enforcement Act ("UIGEA"). The section that follows analyzes the Act.

II. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

¶17 Essentially, the UIGEA seeks to cut off the flow of funds from U.S. gamblers to e-casinos.[65] To that end, it mainly targets two actors: e-casinos and financial institutions. The interplay of sections 5363 and 5366 makes it a felony for a person (1) engaged in the business of betting or wagering to (2) knowingly accept money (3) in connection with unlawful gambling.[66] The crime is punishable by up to five years in prison.[67] Furthermore, federal regulators are required to draft regulations designed to compel financial institutions to identify and block restricted gambling transactions.[68] Noncompliant financial institutions are subject to civil penalties.[69]

¶18 The Act requires gambling to be *unlawful* under existing federal or state law to trigger criminal liability.[70] Therefore, the Act's criminal provisions rely on the violation of one or more of the patchwork of existing state and federal gambling laws, some of which also require a predicate offense.[71]

A. Federal Law Triggers of Criminal Liability Under § 5363

¶19 There are two types of federal laws which would trigger the "unlawful gambling" prong of § 5363. The first does not require a predicate offense, while the second does require a predicate offense. The Wire Act is an example of the first type in that it directly prohibits sports betting. Comparatively, the Illegal Gambling Act ("IGBA") and the Travel Act require a predicate violation of a separate federal or state law. Specifically, the IGBA makes it a crime to conduct a gambling business that *violates state law*[72] and the Travel Act prohibits interstate or overseas travel that

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[64] *See id.*
[65] 31 U.S.C. §§ 5363, 5366 (2006).
[66] *Id.*
[67] 31 U.S.C. § 5366.
[68] 31 U.S.C. § 5364(a).
[69] 31 U.S.C. § 5365.
[70] 31 U.S.C. § 5363.
[71] *Id.*
[72] 18 U.S.C. § 1953 (2006).

furthers the operation of an *unlawful* business enterprise.[73] Similarly, the new UIGEA requires such a predicate offense.

¶20 To illustrate, in *U.S. v. BetOnSports*, an offshore sports e-casino was permanently enjoined from doing business in the U.S.[74] By operating a sports-gambling business, BetOnSports was in clear violation of the Wire Act.[75] That violation triggered a Travel Act violation as it rendered BetOnSports an "illegal gambling business."[76] Under these facts, the new Act would be applied in much the same way; that is, BetOnSports.com knowingly accepted bets in connection with sports gambling deemed unlawful under the Wire Act. However, in cases where a gambling business is not sports-related, federal law will not trigger the new Act as most of the applicable federal laws themselves require a predicate violation. Ultimately, satisfying the "unlawful gambling" prong of section 5363 will depend principally on state law violations.

B. State Law triggers of § 5363

¶21 Where state law clearly prohibits Internet gambling, an offshore e-casino's operation would be unlawful under § 5363 of the Act. While, "there are only a handful of states that expressly ban Internet gambling,"[77] all states have general anti-gambling statutes.[78] Despite "the presumption that [these statutes] do not apply if part of the [gambling] activity takes place overseas,"[79] courts have found them adequate to prosecute offshore e-casinos under federal law.[80] In theory, the facts in both *BetOnSports* and *People v. World Interactive Gaming Corp.* would have satisfied the "unlawful gambling" prong of § 5363.[81]

¶22 The court in *BetOnSports* concluded that the defendant e-casino had violated a Missouri state law which "outlaws gambling and the promotion of gambling outside of heavily regulated river boat casinos."[82] That state

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[73] 18 U.S.C. § 1952 (2006).
[74] *See* U.S. v. BetOnSports PLC, No. 4:06CV01064 (CEJ) slip op. at 9 (E.D. Mo. Nov. 9, 2006).
[75] *Id.*
[76] *See id.*
[77] Chuck Humphrey, *Internet Gambling Funding Ban*, GAMBLING-LAW-US, Oct. 13, 2006, http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm.
[78] Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 538 (2006).
[79] *Id.*
[80] *See, e.g.*, U.S. v. BetOnSports PLC, No. 4:06CV01064 (CEJ) slip op. at 9 (E.D. Mo. Nov. 9, 2006).
[81] *See id.*
[82] *Id.*

law violation further triggered liability under the Illegal Gambling Business Act.[83] Under similar facts, the state law violation would have provided the necessary trigger for the UIGEA.

¶23 In *People v. World Interactive Gaming Corp*, the court found an e-casino in violation of a New York statute that prohibits gambling within New York State. Crucially, the court determined that the location from which the online bet was made was where the gambling occurred.[84] There, the state law violation further invoked the Travel Act, as it would have the UIGEA.[85]

¶24 One gaming law practitioner believes the analysis in *World Interactive* should be broadened, reasoning that if gambling is said to take place on both ends of the Internet connection, then e-casinos are doing business in the location from which the players make their bets.[86] Thus, the e-casino is illegally operating without a license "whether or not the state has adopted a specific Internet anti-gambling law."[87] On the other hand, a Texas state court explained that "a statute that prohibits recording bets in Texas [could not] be used against a gambling business which records bets [overseas], even if the bets are called in from Texas."[88] Ultimately, the courts have looked closely to the statutory language in deciding whether state law was violated, indicating that rulings on the issue would vary across the states.[89]

1. What about Poker?

¶25 "Online poker has grown dramatically from $82 million in annual revenue in 2000 to over $2 billion in 2005."[90] Neither the Act nor any other federal statute explicitly addresses poker.[91] The issue of how the Act affects Internet poker is important and hinges both on state law and how the Act will be interpreted by courts.

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[83] *See id.* at 8, 9.
[84] Doyle, *supra* note 25, at 12. (citing People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 849 (N.Y. App. Div. 1999)).
[85] *Id.*
[86] *See* Humphrey, *supra* note 77.
[87] *Id.*
[88] Doyle, *supra* note 25, at 12. (citing United States v. Truesdale, 152 F.3d 443, 469–449 (5th Cir. 1998)).
[89] *See supra* Part II.B.
[90] David O. Stewart, *An Analysis of Internet Gambling and Its Policy Implications*, AGA 10th Anniversary White Paper Series, at 3, available at http://www.americangaming.org/assets/files/studies/wpaper_internet_0531.pdf (last visited Apr. 12, 2008).
[91] *See* Shulman, *supra* note 13; *see also* Is Poker in the U.S. a Game of Skill?, Gambling-Law-US, http://www.gambling-law-us.com/Articles-Notes/online-poker-skill.htm (last visited Apr. 12, 2008).

¶26 Conceptually, there are three types of games. The first type is games of chance, in which all of the variation is determined by chance, such as lotteries. The second type is games of skill, in which none of the outcomes are determined by chance, such as chess, checkers and go. The third type is a hybrid of the two, in which skill and chance mix in various concentrations, but in most of which the short-run domination by chance washes out in the long run, leaving as winners those who are good at understanding probability and/or good at deception. The vast majority of state gambling laws covers only games of chance—not games of skill.[92] When confronted with a hybrid, most courts apply the predominance test to determine if the game will be treated as one of skill or chance.[93] The predominance test asks whether skill or chance predominates in determining the outcome of a game.[94] Whether poker would be deemed skill-dominated under the test is uncertain.[95] First, it would be implausible to argue that in any one hand of poker skill always dominates chance. Second, the author has not identified any studies evaluating the weight that skill has in the outcome of any one poker tournament or cash game, or over many tournaments or cash games.[96] Lastly, only limited case law exists on the issue.[97] Predictably, many e-casinos maintain that poker is a game of skill, implying that their websites are legal in most jurisdictions.[98] However, "[t]here are some states that do not allow wagering even on games of skill."[99]

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[92] *See* State Gambling Law Summary, Gambling-Law-US, http://www.gambling-law-us.com/State-Law-Summary/ (last visited Apr. 12, 2008) (stating that in jurisdictions where the Dominant Factor Test is applied, games of skill generally are permissible).
[93] *See* Is Poker in the U.S. a Game of Skill?, *supra* note 91.
[94] *Id.*
[95] *See id.*
[96] "The main . . . difference between [cash games and tournaments] is that in cash games you can always rebuy but in tournaments each player starts with a finite number of chips." Annie Duke, Q&A, UltimateBet, http://www.annieduke.com/articles.php?articleID=91&section=qa (last visited Apr. 12, 2008). Thus, it is possible in a cash game for a majority of the players to win (provided that at least one player loses a lot). The same is not true for tournaments, where usually only the top finishers will be winners. *See id.*
[97] *See* Is Poker in the U.S. a Game of Skill?, *supra* note 91 ("There have been some passing references to poker as a game of skill in a few cases.").
[98] *See*, *e.g.*, Poker 4 America, Official Online Poker Room Statements Regarding U.S Law, http://www.poker4america.com/Official-Poker-Room-Statements.html (last visited Apr. 12, 2008) ("PokerStars believes that poker is a game of skill enjoyed by millions of players and we remain committed to providing [U.S. customers] a safe and fun environment in which to play.").
[99] *See* Is Poker in the U.S. a Game of Skill?, *supra* note 91.

¶27 The UIGEA is arguably broad enough to encompass not just games of chance but hybrid games in which chance is present, such as poker. Recall that § 5363 applies to persons engaged in the "business of betting or wagering."[100] The term "bet or wager" is defined as the risking of something of value on the outcome of a contest, sports event, or a *game subject to chance*.[101] The statute neither provides a definition for, nor examples of, a "game subject to chance" and, notably, does not use the more popular phrase "game of chance".[102] The former phrasing—game subject to chance—is much broader. Indeed, even games requiring much skill are subject to some degree of chance. In games like blackjack, draw, poker, and bridge, the outcome of any single hand is determined substantially by chance, but the outcome of a series of repeat iterations seems not to be. Thus, it appears that even games that may be predominated by skill would be covered under the Act's definition of "bet or wager."

¶28 Furthermore, in the following subparagraph of the Act, betting includes "the purchas[ing] of the opportunity to win a lottery that is *predominantly* subject to chance."[103] This language ostensibly endorses the predominance test in the case of lotteries. Congress easily could have referred to "games *predominantly* subject to chance" in its definition of "bet or wager." Arguably, the term "predominantly" was omitted in an attempt to encompass hybrid games. Therefore, the Act probably covers poker even if poker would be deemed a game of skill under the predominance test. Perhaps not coincidentally, legislation has been introduced that would exempt all "games of skill," including poker, from liability under any federal law.[104]

C. No Accepting Bets. But What About Placing and Transmitting Them?

¶29 The Act's criminal provision applies only to one who "knowingly *accepts*" a bet, i.e., the e-casino.[105] It does not apply to a player who places a bet.[106] The Act also fails to impose criminal liability on the banks, credit card companies, and e-wallets that transmit wagered funds from the bettor

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[100] 31 U.S.C. § 5363 (2006).
[101] 31 U.S.C. §§ 5363, 5362(a)(1)(A).
[102] *See id.*
[103] 31 U.S.C. § 5362(1)(B).
[104] Bob Pajich, *Bill That Would Legalize Online Poker Introduced*, CARDPLAYER.COM, June 7, 2007, http://www.cardplayer.com/poker-law/article/2238/bill-that-would-legalize-online-poker-introduced.
[105] 31 U.S.C. § 5363 (emphasis added).
[106] *See* Rose, *supra* note 78, at 539.

to the e-casino.[107] These financial intermediaries—collectively referred to in the Act as Financial Transactions providers ("FTPs")[108]—are further unlikely to be convicted of aiding or abetting.[109] Professor Nelson Rose observes: "For a law designed to stop the flow of money, it is bizarre to make it a crime only to receive the funds, but not to send them or transmit them."[110]

¶30 Civil action may be brought against FTPs.[111] At the time this *iBrief* was written, the Department of Treasury and the Federal Reserve Board missed the deadline for drafting regulations requiring FTPs to implement policies and procedures to identify and block prohibited transactions.[112] However, once the regulations are in place, both U.S. and offshore FTPs must comply with these regulations, or they will be subject to civil injunctions.[113]

¶31 The forthcoming regulations will not likely have a significant effect on major credit card companies, as most already have mechanisms that obstruct online gambling transactions.[114] The regulations likely will make such systems mandatory for all domestic FTPs.[115]

¶32 The Act also allows federal regulators to exempt certain transactions in consideration of practical limitations.[116] For instance, requiring banks to analyze "40 billion checks a year would be a largely manual process."[117] "If checks are not exempt, this would break banks as it would be too costly to enforce." But "[i]f checks *are* exempt, players could simply send a check to an online site."[118] Exempting checks may not appear to be such a big loophole. Paper checks are, after all, disfavored among bettors due to the hassle of mailing them and waiting for them to post to one's account. But "[i]f checks are not within the purview of the law" it is unclear whether e-checks, which present much less of an obstacle than paper checks, will be subject to regulation.[119]

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[107] *But see* 31 U.S.C. § 5367 (2006) (applying criminal liability to a financial transactions provider if it had both actual knowledge and control of the e-casino).
[108] 31 U.S.C. § 5362(4).
[109] *See* Rose, *supra* note 78, at 539.
[110] *Id.*
[111] 31 U.S.C. § 5365.
[112] *Id.*
[113] 31 U.S.C. § 5365(b)(2)(B).
[114] *See* Doyle, *supra* note 25, at 3.
[115] *See* Rose, *supra* note 78, at 539.
[116] 31 U.S.C. § 5364(b)(3).
[117] *See* Shulman, *supra* note 13.
[118] *Id.*
[119] *Id.*

¶33 Furthermore, U.S. gamblers primarily use offshore e-wallets to transfer their bets.[120] The e-wallet business model makes it difficult for a U.S. financial institution to distinguish a gambling transaction from a non-gambling transaction.[121] Thus, it will be left to e-wallets and other offshore FTPs to voluntarily comply with U.S. regulations.[122] It is very unlikely that all offshore financial intermediaries will walk away from a twelve billion dollar industry in order to avoid U.S. civil sanctions.[123] An obvious enforcement alternative would be to create a "blacklist" of noncompliant offshore FTPs with which U.S. financial institutions are prohibited from engaging in any transaction.[124] Such an approach, however, could lead down a slippery slope. One expert asks whether "federal regulators [would] then prohibit U.S. banks from sending funds to an overseas bank, which forwards the money to [an e-wallet]."[125] Blocking all transactions, lawful and unlawful alike, seems a fairly draconian, expensive, and unsustainable alternative.

III. ONLINE GAMBLING POST-ACT

A. Disparate Pressure on Publicly-Traded Companies

¶34 The passing of the Act devastated many publicly-traded online-gambling companies.[126] PartyGaming, "which rake[d] in nearly $4 million a day from its 19 million customers, fell 57 percent . . . . Sportingbet, which owns sportsbook.com and ParadisePoker.com, lost 60 percent[;] 888 was down 33 percent[;] and Austria's bwin.com fell 24 percent."[127] Ever beholden to their shareholders, publicly-traded e-casinos stopped serving

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[120] *See* Humphrey, *supra* note 20.
[121] *See supra* Part I.A; Ray Suarez, *President Bush Signs Law Banning Internet Gambling*, PBS, Oct. 16, 2006, http://www.pbs.org/newshour/bb/business/july-dec06/gambling_10-16.html (interviewing Keith Whyte, executive director of the National Council on Problem Gambling, and Lawrence Walters, attorney for online gambling companies).
[122] *See* Rose, *supra* note 78, at 539 ("But, while [domestic banks] will comply, [offshore e-wallets] might not, because [they are] not subject to U.S. regulations.").
[123] *See* Dana Gale, *The Economic Incentive Behind the Unlawful Internet Gambling Enforcement Act*, 15 Cardozo J. Int'l & Comp. L. 533, 535 (2007).
[124] *See* Mike, Brunker, *Will Ban End Internet Gambling? Don't Bet on It*, MSNBC.COM, Oct. 17, 2006, http://www.msnbc.msn.com/id/15240569.
[125] *See* Rose, *supra* note 78, at 539.
[126] *See* Associated Press, *Online Gambling Shares Fall as Congress OKs Bill*, FOXNEWS.COM, Oct. 3, 2006, http://www.foxnews.com/printer_friendly_story/0,3566,217039,00.html [hereinafter Congress OKs Bill].
[127] *Id.*

U.S. customers after the Act was passed.[128] Many perceived the Act as a clear proclamation that online gambling was now prohibited.[129] Still, some questioned whether the Act had real teeth.[130] The abrupt withdrawal of public companies freed up market share which was subsequently seized by privately-held e-casinos that do not answer to shareholders and thus could afford to test the Act's true bite.[131]

¶35 Additionally, after the Act passed, NETeller, the most widely-used publicly-traded e-wallet, continued serving U.S. customers.[132] The DOJ later arrested two of its retired founders in the U.S. Virgin Islands on money laundering charges related to NETeller's role in facilitating online wagers.[133] Shortly after the arrests, NETeller pulled out of the U.S. market and later settled charges with the DOJ, [134] but not before it's stock price plummeted.[135] E-casino websites have since been directing their U.S. patrons to use e-passporte.com, a privately-held e-wallet, since publicly-traded e-wallets are no longer available.[136] Other privately-owned e-wallets have emerged in response to NETeller's withdrawal.[137]

¶36 After all of this, the Act and the DOJ's efforts may not have even slowed down online gambling in the U.S.[138] Even if an overall decline in online gambling can be shown, it still would not follow that those who are

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[128] *See* Experts on Ban, *supra* note 3.
[129] *See* Congress OKs Bill, *supra* note 126.
[130] *See* Shulman, *supra* note 13.
[131] *See* Experts on Ban, *supra* note 3.
[132] *See* Bob Pajich, *NETeller Resolves Investigation With U.S. Government*, CARDPLAYER.COM, July 18, 2007, http://www.cardplayer.com/poker-news/article/9307/neteller-resolves-investigation-with-u-s-government.
[133] Associated Press, *Internet Company Founder Released on Bail by U.S. Virgin Islands Judge*, iht.com, Jan. 18, 2007 http://www.iht.com/articles/ap/2007/01/18/business/CB-FIN-Virgin-Islands-Online-Gambling.php.
[134] Bob Pajich, *Full Statements from NETeller and USAO Here*, CardPlayer.com, July 18, 2006, http://www.cardplayer.com/poker-law/article/2464/full-statements-from-neteller-and-usao-here. Two of NETeller's founders also pleaded guilty to charges. *Id.*
[135] Experts on Ban, *supra* note 3.
[136] *See, e.g.*, NETeller Alternatives, http://www.netelleralternatives.com (providing a list of alternatives to NETeller and other publicly traded e-wallets who have stopped serving U.S. customers).
[137] *See* Allyn Jaffrey Shulman, *Funding Online Accounts After NETeller*, CARDPLAYER.COM, Feb. 4, 2007, http://www.cardplayer.com/author/article/news/129/8251. It was reported that YouTeller "appear[ed] to be falsely claiming to be certified by the UK Financial Services Authority." *Id.*
[138] *See* Todd, *supra* note 22 ("The UIGEA doesn't seem to have really impacted how much people gamble.").

in need of protection the most—underage and problem gamblers—were impeded. The consequence has been to deny gamers the preferred services of publicly-traded e-casinos and e-wallets.[139] A couple of questions follow: What will be the practical effect of this shift in the major players? And what impact will it have on U.S. policy concerns?

B. The Replacement of Publicly-Traded Companies with Privately-Owned e-Casinos Undermines U.S. Policy Objectives.

¶37 Approximately eighty countries regulate online gambling.[140] "Many of the world's largest [e-casinos] are listed on the London Stock Exchange or the Alternative Investment Market."[141] In 2005, the U.K. established the Gambling Commission as part of an aggressive reform of its gambling regulations.[142] The Gambling Commission has the primary objectives of keeping crime and corruption out of gambling, ensuring gambling activities are offered in a fair environment, providing information and support to problem gamblers and preventing underage gambling.[143] Other countries, including Australia, regulate online gambling and require e-casinos to implement similar protections for consumers.[144]

¶38 In contrast, most privately-owned e-casinos are not subject to comparable oversight. In a study conducted by the U.S. General Accounting Office, 56% of e-casinos failed to list a licensing country on their websites and 62% failed to list a contact location.[145] Congressman Bob Goodlatte, a long-time proponent of Internet gambling prohibition, emphasized that "these offshore, fly-by-night Internet gambling operators are unlicensed, untaxed and unregulated . . . ."[146] It is ironic then, that the practical effect of U.S. policy has been to increase market share for these unregulated e-casinos, which are potentially more harmful than their publicly-traded and regulated counterparts.

¶39 Public e-wallets have similarly been replaced with private e-wallets which can be dangerous to consumers. According to one expert, "[t]here

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[139] *See id.* (describing the "shrinking options" of payment processors).
[140] *See* Gale, *supra* note 123.
[141] *Id.* at 17.
[142] *See* Explanatory Notes to Gambling Act 2005, ¶ 8, http://www.opsi.gov.uk/acts/en2005/2005en19.htm (last visited Apr. 12, 2008).
[143] *Id.*, ¶ 13.
[144] *See* Gale, *supra* note 123, at 25.
[145] *See* GAO REPORT, *supra* note 32, at 51–52.
[146] *The "Internet Gambling Prohibition Act": Hearing on H.R. 4777 Before The Subcommittee on Crime, Terrorism and Homeland Security*, 109th Cong. (2006), (testimony of Bob Goodlatte, United States Congressman), http://judiciary.house.gov/HearingTestimony.aspx?ID=382 [hereinafter Goodlatte Testimony].

are always third-party processors popping up that are really fly-by-nights . . . [T]hese are small companies in Central America, Latin America, and even the Middle East." [147] In several cases, e-wallets have operated for a few months and suddenly disappeared with the casinos' and players' money . . . ."[148] Further, these unregulated entities have little, if any, incentive to incur the costs of implementing consumer safeguards, which are imposed on regulated companies. Arguably, the lack of security resulting from pushing the industry further underground may discourage some would-be gamblers from internet gambling. But, on balance, internet gambling in the U.S. will most likely continue to thrive.

¶40 The market may distinguish and reward foreign unregulated companies that voluntarily undertake consumer protection measures.[149] However, empirical evidence supports the general proposition that foreign companies will be less compliant with domestic law than domestic companies.[150] Furthermore, privately-held companies generally will be less transparent and regulated than publicly-traded companies.[151] Arguably, even if private e-casinos instituted consumer safeguards, publicly-traded domestically-based companies are preferable. The U.S. has taken this option off the table for American gamblers and, in so doing, has increased their exposure to the very dangers it purports to address.

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[147] Catherine Holahan, *Online Gambling Goes Underground*, BUSINESSWEEK, Oct. 19, 2006, available at http://www.businessweek.com/technology/content/oct2006/tc20061019_454543.htm.

[148] *Id.*

[149] *See* Martin Cave, *Market Models and Consumer Protection*, 8 J. CONSUMER POL'Y 335, 341 (2004) ("[A] competitive firm will disclose its product's characteristics on the assumption that consumers with rational expectations will ascribe to the product the worst possible quality consistent with the (non-) disclosure.").

[150] Michael O. Moore et. al., *Why Don't Foreign Firms Cooperate in U.S. Antidumping Investigations?: An Empirical Analysis*, DEPT. OF ECONOMICS GEORGE WASHINGTON UNIVERSITY, Jan. 19, 2007, http://home.gwu.edu/~mom/firmchoice.pdf. Presented as merely persuasive evidence, this empirical study looks at how a firm's organizational characteristics relate to its compliance with environmental laws. *Id.* The study compared public and private, and domestic and foreign firms. *Id.* In both cases the former was found to be more compliant than the latter. *Id.*

[151] *See* Privately Held Company, Wikipedia.org, http://en.wikipedia.org/wiki/Privately_held_company (last visited Apr. 12, 2008).

FURTHER OBSERVATIONS: WHERE TO GO FROM HERE?

In light of U.S. policy concerns, what are the viable alternatives? While a comprehensive answer to this question is beyond the scope of this *iBrief*, the author recommends that the U.S. follow the examples of the U.K., Australia and other developed nations and regulate online gambling in a manner that can address legitimate public policy concerns while remaining enforceable and manageable. Commentators have suggested alternative regulatory frameworks.

Some commentators vie for intrastate regulation:[152]

> The state could protect its citizens by requiring that online gambling businesses operate honestly according to that state's rules. State regulation would include social protections, such as enforcing standards against underage gambling, requiring mechanisms such as loss limits that gamblers could use to control their gambling, and mandating the delivery of responsible gaming information to online players.

¶41 In addition to promoting responsible online gambling, states could tax gambling and create jobs, keeping gambling dollars within the U.S."[153]

¶42 Others point out that "the Internet is uniquely a creature of interstate commerce"[154] and thus federal regulation might be a better approach. Recently, law-makers have proposed legislation in support of both intrastate and interstate regulation.[155] Yet, although lobbyists and legislators have mobilized to push for regulation, the U.S. is trending toward prohibition.[156]

¶43 Arguably, flat bans have a tendency to produce dangerous black markets.[157] Thus, it can be argued that regulation is usually a desirable alternative. But does this viewpoint justify legalizing cocaine or child pornography? No doubt, the line must be drawn somewhere. While this

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[152] Stewart, *supra* note 90, at 13.
[153] *Id.* at 13–14.
[154] Rodefer, *supra* note 27, at 37.
[155] Bob Pajich, *Texas Poker Bill Dies*, CARDPLAYER.COM, May 14, 2007, http://www.cardplayer.com/poker-law/article/2155/texas-poker-bill-dies; Bob Pajich, *Surprise Testimony at Online Gambling Bill Hearing*, CARDPLAYER.COM, June 8, 2007, http://www.cardplayer.com/poker-law/article/2246/surprise-testimony-at-online-gambling-bill-hearing.
[156] *See supra* Parts I.C, II.
[157] Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO.ORG, July 17, 1991, http://www.cato.org/pubs/pas/pa-157.html ("More crimes were committed because prohibition destroys legal jobs, creates black-market violence, diverts resources from enforcement of other laws, and greatly increases the prices people have to pay for the prohibited goods.").

issue is beyond the scope of this *iBrief*, the author would make a couple of observations. First, U.S. law regarding cocaine trafficking and child pornography is unequivocal: these activities are deemed unacceptable and are, correspondingly, illegal across the board. Second, U.S. policy on gambling has been ambivalent, at best. A moral argument against online gambling will not be persuasive as long as there remains no meaningful distinction between forms of gambling deemed lawful (e.g. horseracing, state lotteries, fantasy football, credit swap defaults) and those deemed unlawful (e.g., dog-racing, sports-betting). Second, the tangible character of drugs makes effective enforcement within U.S. borders a practical possibility. The Internet, on the other hand, eludes such enforcement due to the lack of physical national borders and, accordingly, makes attempting to ban online gambling akin to clutching a handful of fine sand.

CONCLUSION

¶44 U.S. gamblers have demonstrated that they will continue gambling online.[158] Neither the Act nor the DOJ have effectively addressed the dangers of online gambling.[159] On the contrary, the U.S. has forced transparent and regulated publicly-traded companies out of the market, only to be replaced by more opaque and potentially unscrupulous privately-held companies.[160] In so doing, the U.S. has amplified the risks of consumer abuse, underage gambling, problem gambling and money laundering. Furthermore, other governments have demonstrated that regulating online gambling is a workable alternative.[161] It should not take another Prohibition for the U.S. to realize what many countries already have: Regulation is the better option.

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[158] *See supra* Part III.
[159] *See supra* Parts I, II.
[160] *See supra* Part III.
[161] *See supra* Part III.B.