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Beating the Odds: Regulation of Online Gaming Stateside and Abroad

By Lisa Lester*

I. INTRODUCTION

The days of glitzy and glamorous gambling are no more. Gambling no longer evokes the images of Frank Sinatra and Dean Martin playing on a neon stage with well-dressed, wealthy patrons sipping on martinis. Instead, gambling is now done by any average Joe sitting on his desk chair at home. Gambling has evolved from something you could only do in smoke-filled hidden rooms to placing bets and rolling virtual dice from the comfort of your living room. You no longer have to travel to Las Vegas or to Atlantic City to enjoy poker, blackjack, slots, craps, and other various games; you simply need to turn on the computer, deposit money in an account and play until your heart's content or your wallet runs dry.

The Internet gaming industry began as a small and insignificant part of the larger Internet community and has since expanded into a multi-billion dollar a year industry.¹ The first online gambling site was launched in August 1995.² Internet gambling more than doubled from 1997 to 1998, the number of gamblers increasing from 6.9 million to 14.5 million and revenues more than doubling from \$300

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1. I. Nelson Rose, *The Law of Internet Gambling*, GAMBLING AND THE LAW (June 15, 1999), <http://www.gamblingandthelaw.com/internet.html>.

2. American Gaming Association Official Web Site Industry Information, <http://www.americangaming.org/industry/factsheets> (last visited Nov. 25, 2008).

million to \$651 million.³ In 1999, only 282 sites which accepted real money wagers were listed on Rolling Good Times.⁴ As of November 25, 2008, 309 online casino sites⁵, 217 online poker sites⁶, 120 online bingo sites⁷, 215 online sports books sites⁸, and 8 online backgammon sites accepted play from California alone.⁹ Internet gambling has turned into a \$13 billion industry annually, with online revenues representing an estimated five percent of the total global gaming gross revenue of \$258 billion in 2005.¹⁰ North American residents accounted for an estimated forty-seven percent of the global gross gaming yield in 2005.¹¹

In addition to the large increase in total gross revenue, gambling itself seems to have become a cultural icon, with online poker leading the way. Advertisements and commercials for Internet poker sites appear in national publications and on major television channels. The World Series of Poker (WSOP) has turned into a national phenomenon, with the event broadcasted on ESPN and its sister channels. Merchandise, video games, and board games have been based on the WSOP.¹² The winners of the WSOP's coveted gold

3. STAFF OF NAT'L GAMBLING IMPACT STUDY COMM'N, 106TH CONG., FINAL REPORT ON GAMBLING IN THE UNITED STATES (Comm. Print 1999).

4. I. Nelson Rose, *The Law of Internet Gambling*, GAMBLING AND THE LAW (June 15, 1999), <http://www.gamblingandthelaw.com/internet.html> (citing Bigham's Viewpoint, *Internet Clogging Up With Casinos*, WHERETOBET (April 22, 1998), available at <http://www.wheretobet.com/index.html>) (last visited Nov. 25, 2008).

5. Online Casino City, <http://online.casinocity.com/casinos> (last visited Nov. 25, 2008).

6. Online Casino City, <http://online.casinocity.com/poker> (last visited Nov. 25, 2008).

7. Online Casino City, <http://online.casinocity.com/bingo> (last visited Nov. 25, 2008).

8. Online Casino City, <http://online.casinocity.com/sportsbooks> (last visited Nov. 25, 2008).

9. Online Casino City, <http://online.casinocity.com/casinos> (last visited Nov. 25, 2008).

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

11. *Id.*

12. See, e.g., World Poker Outlet, <http://www.worldpokeroutlet.com/wsop/index.php> (last visited Jan. 28, 2008) (offering official WSOP chip sets, handheld video games, and WSOP tables among

bracelet, the highest award offered by the WSOP Main Event, have become household names alongside the likes of Michael Jordan or Roger Federer. A hopeful gambler can win a seat in the WSOP Main Event through various online tournaments and promotions.¹³ In fact, the Main Event winner in 2003, Chris Moneymaker, won his seat from an online tournament.¹⁴ Celebrities have also helped spur this phenomenon, with Sully Erna, Jennifer Tilly, Tobey Maguire, James Garner, and others playing in the WSOP Main Event. Other organizations and networks have hosted celebrity poker tournaments, often with the winnings going to charity.¹⁵

As a result of the boom of online gambling and increasing public acceptance of gambling, the gambling website operators moved overseas for tax advantages, and regulation problems began.¹⁶ This comment will examine the United States government's past and present attempts to regulate the online gaming industry, as well as question whether and to what extent the Government can regulate Internet gaming sites that are foreign owned and based off-shore.

other items); Official Merchandise—Harrah's World Series of Poker, <http://www.shopwsop.com/default.aspx> (last visited Jan. 28, 2008) (offering WSOP glassware, t-shirts, money clips, hats, calculators, posters, and watches among many other items); and Xbox, <http://www.xbox.com/en-US/search.aspx?keyword=WSOP> (last visited Jan. 28, 2008) (offering the official World Series of Poker: Tournament of Champions (Xbox 360 game)).

13. See, e.g., World Series of Poker Official Site, <http://www.worldseriesofpoker.com> (last visited Nov. 25, 2008); Party Poker.com, <http://www.partypoker.com> (last visited Nov. 25, 2008); Poker Stars, <http://www.pokerstars.com> (last visited Nov. 25, 2008); Full Tilt Poker, <http://www.fulltiltpoker.net> (last visited Nov. 25, 2008); Hollywood Poker, <http://www.hollywoodpoker.com> (last visited Nov. 25, 2008); and Bodog Poker, <http://www.bodoglife.com> (last visited Nov. 25, 2008).

14. See World Series of Poker, Official Tournament Coverage and Results, <http://www.worldseriesofpoker.com/tourney/tournament-results.asp?tid=7&grid=5> (last visited Nov. 25, 2008).

15. See World Series of Poker Official Site, 2007 Results and Schedule, <http://www.worldseriesofpoker.com/tourney/tourneydetails.asp> (last visited Nov. 25, 2008).

16. See Offshore-E-Com Official Site, <http://www.offshore-e-com.com/html/spec.html> (last visited Nov. 25, 2008).

II. HISTORICAL BACKGROUND

Gambling seems to have been around in one form or another for centuries. In fact, there is historical evidence that gambling existed as early as 2300 B.C.¹⁷ However, the “gambling explosion” was contained in three waves of gambling.¹⁸ The first wave began with the American colonists and continued through the first two decades of the nineteenth century.¹⁹ A forty-year period of dormancy followed, and then most of the states legalized some form of gambling after the Civil War.²⁰ Currently, we are in the third wave of gambling, which began with the Great Depression and is mainly characterized by the legal and social acceptance of gaming.²¹ Nevada was the first state to legalize gambling in 1931, and New Jersey followed soon thereafter.²² New Hampshire became the first to legalize the lottery system in 1963.²³ Other forms of gambling soon followed, including horse and dog racing, off-track betting, and jai alai.²⁴ In fact, gambling has reached such a pervasive level that only two states, Hawaii and Utah, do not have any form of legalized gambling.²⁵ This across-the-board legalization seems to be a result of the fact that many people are now seeing gambling as less of a vice and more as entertainment.²⁶ Gambling, itself, brings in massive income for its host states in the forms of taxes and revenues.²⁷

17. See Gambling Origins, <http://www.gamblingorigins.com> (last visited Nov. 25, 2008).

18. 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, 165 (1996) (citing I. Nelson Rose, *Gambling and the Law-Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93 (1993)).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Montpas, *supra* note 18, at 166.

24. *Id.*

25. *Id.* (citing Joseph P. Shapiro, *America's Gambling Fever*, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 57).

26. Montpas, *supra* note 18, at 166.

27. *Id.* at 166-67.

A month after the launch of the first online gambling site in August 1995 several Internet casinos opened their doors to accept offshore wagers.²⁸ The purpose was two-fold: casinos wanted to avoid United States law enforcement, yet still aimed to receive profits from American consumers.²⁹ Of the approximately twenty-three million people who gambled on the Internet in 2005, eight million of them were from the United States.³⁰

In terms of regulation, the states have traditionally regulated gambling.³¹ The Internet, however, has turned gambling into a global industry, thus making it a matter of federal concern in terms of money-laundering. Many states seek to prohibit online gambling because of its four unique dangers: the potential for fraud over the Internet; children's access to gambling sites; an increase in gambling addictions; and the need to preserve state revenues generated from legally enforced (and state-run) gambling operations.³² In opposition to the states' views, there have been suggested benefits to Internet gambling.³³ These benefits include: driving network development; providing a more wholesome environment than real-world casinos; and benefiting consumers by increasing competition in gambling services.³⁴ The second arguable benefit seems to be weak, because places like Las Vegas have been successfully marketing vacations to families, and casinos try hard to make their environments more kid-

28. Seth Gorman & Antony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L.J. 667, 667 (1996).

29. *Id.* at 668 (citing Joshua Quittner, *Betting on Virtual Vegas: To Get Around U.S. Gambling Laws, the First Online Casinos are Setting Up Their Card Tables Offshore*, TIME, June 12, 1995, at 63).

30. American Gaming Association Official Web Site Industry Issues Detail, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=17 (last visited Nov. 25, 2008).

31. Andrea M. Lessani, *How Much Do You Want To Bet That The Internet Gambling Prohibition Act of 1997 Is Not The Most Effective Way To Tackle The Problems Of Online Gambling?*, THE UCLA ONLINE INSTITUTE FOR CYBERSPACE LAW AND POLICY ARCHIVE (1998), <http://www.gseis.ucla.edu/iclp/alessani.html>.

32. *Id.*

33. *Internet Gambling: Prohibition v. Legalization Before the Nat'l Gambling Impact Study Comm'n* (May 21, 1998) (testimony of Tom W. Bell, Director, Telecommunications & Technology Studies the Cato Institute).

34. *Id.*

friendly by including attractions such as roller coasters, arcades, movie theatres, restaurants, bowling alleys, and malls.³⁵

The states have used state police powers derived from the Constitution, which gives states the ability to regulate on the behalf of its citizens' welfare and health.³⁶ According to I. Nelson Rose, these virtually unlimited powers are often related and tied to morality, which leads to the natural extension into the regulation of gambling, which is thought by some to still be immoral.³⁷

State anti-Internet gambling laws usually take one of two forms: either prohibiting all forms of Internet gambling or only appearing to prohibit online gaming, while actually authorizing their local gambling operations to take bets online.³⁸ No matter the form that the states choose, Congress and the federal government can only regulate gambling activity affecting interstate commerce.³⁹

This conflict between what the federal and state governments are able to do in their quest to regulate gambling is best demonstrated with the disagreement that exists between the United States Department of Justice and United States courts on whether Internet gambling is legal in the United States.⁴⁰

The first federal act that was alleged to have some authority over Internet gaming was the United States Wire Act of 1961.⁴¹

35. See, e.g., New York New York Hotel and Casino, <http://www.NYNYHotelCasino.com> (last visited Nov. 25, 2008) (offering The Roller Coaster and a games midway for the young and young at heart); Circus Circus Hotel & Casino, <http://www.circuscircus.com> (last visited Nov. 25, 2008) (offering the Adventuredome with various theme park rides, live circus acts offered daily and a large midway with a variety of games of luck, chance and skill); and Sahara Hotel and Casino, <http://www.saharavegas.com> (last visited Nov. 25, 2008) (offering Speed the Ride and the Pit Pass Arcade).

36. U.S. CONST. amend. X. See also *Advanced Delivery Serv., Inc. v. Gates*, 183 Cal. App. 3d 967, 976 (Ct. App. 1986) ("Not only does the Legislature have the power to completely prohibit wagering on horse races, but it may also limit such wagering to persons physically present within the enclosure").

37. I. Nelson Rose, *The Future Legal Landscape for Internet Gambling, GAMBLING AND THE LAW* (November 3, 2000), available at <http://www.gamblingandthelaw.com/antigua.html> (last visited Nov. 25, 2008).

38. *Id.*

39. See U.S. CONST. art. I, § 8, cl. 3.

40. See, e.g., Gorman & Loo, *supra* note 28 (giving a brief history as to the origins of regulating Internet gambling).

41. 18 U.S.C. § 1084 (2007).

Motivation for passing this statute did not seem to come from the desire to attain absolute prohibition of Internet gambling.⁴² In fact, the Internet was not even a possibility in the minds of many, and the telecommunications boom had just begun. The statute itself prohibits gambling over the “wires,” and the Department of Justice has taken this to mean that the statute applies to all forms of Internet gaming.⁴³ In addition, under the recent court decision, *Thompson v. MasterCard Int’l*, the Court affirmed a lower court ruling which held that under current federal statutes, sports betting conducted over the Internet is illegal, but casino games are legal.⁴⁴ The case involved the use of credit cards to “purchase credits which the bettor may then use, or not use, as he pleases.”⁴⁵ “[A] charge for gambling losses is submitted on the credit card, and the player is gambling with real money electronically withdrawn from the credit card and paid to the casino to be billed later by the issuer of the credit card.”⁴⁶ The plaintiffs argued that through an association with the Internet casinos, the various credit card companies had “directed, guided, conducted, or participated, directly or indirectly, in the conduct of an enterprise through a pattern of racketeering activity and/or collection of unlawful debt.”⁴⁷

A similar provision exists in the Travel Act, which prohibits anyone from traveling or using any facility in interstate or foreign commerce with the intent to promote or carry on unlawful activity.⁴⁸ Courts have held that the transportation of gambling across state lines violates the Travel Act because, “the use of a telephone or a voice or a message can be and is actually transported by wires across state lines to the same extent as materials are transported over state lines in moving vehicles.”⁴⁹

42. Gambling Laws – U.S., <http://www.gambling-laws-us.com> (last visited Jan. 28, 2008).

43. Gorman & Loo, *supra* note 28, at 671-74.

44. *In re Mastercard Int’l Inc.*, Internet Gambling Litig., 132 F. Supp. 2d 468 (E.D. La. 2001).

45. *Id.* at 474.

46. *Id.* at 474 (quoting Thompson Complaint ¶ 23).

47. *Id.* at 475.

48. 18 U.S.C. § 1952 (2007); *see also* Gorman & Loo, *supra* note 28, at 671.

49. *United States v. Smith*, 209 F. Supp 907, 916 (E.D. Ill. 1962); *see also* Gorman & Loo, *supra* note 28, at 675.

The last major law enacted along the same lines is the Interstate Horseracing Act, 15 U.S.C. §3001-3007 (IHA). The statute's intent was to give the states primary responsibility for determining what forms of gambling can take place within their own borders and to "further the horseracing and legal off-track betting industries in the US."⁵⁰ The IHA, however, was amended in 2000 to reflect the changes brought on by the explosion of Internet gaming and testimony by the Department of Justice, "to explicitly expand interstate off-track wagers to include wagers through the telephone or other electronic media."⁵¹

A last part of the historical background, which looks to be the focal point in shaping the controversies today in the field of Internet gaming, is a 2004 World Trade Organization (WTO) ruling.⁵² This action was brought before the WTO by Antigua and Barbados against the United States.⁵³ The tribunal found that the aggressive efforts of the United States government to curb Internet gambling were in violation of WTO commercial service accords.⁵⁴ The Tribunal explicitly found that the United States was unfairly prohibiting foreign Internet gambling operators from accessing the American market, while allowing domestic companies to legally accept online bets.⁵⁵ The WTO ruling against the United States, pursuant to the Uruguay Round treaties, gave the WTO the ability to impose trade

50. U.S. GEN. ACCOUNTING OFFICE, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES 42 (2002) [hereinafter *GAO Report*].

51. *Id.* at 16.

52. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

53. Request for Consultations by Antigua and Barbados, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, S/L/110WT/DS285/1 (March 13, 2007) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.html (last visited Nov. 25, 2008) [hereinafter *285 Request*].

54. *Id.*

55. PR Newswire, *Representative Frank Questions Need for Internet Gambling Study and Warns of WTO Internet Gambling Dispute Consequences*, Oct. 4, 2007, available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=LVRJCNO.story&STORY=/www/story/10-04-2007/0004676308&EDATE=THU+Oct+04+2007,+02:52+PM>.

sanctions against the United States.⁵⁶ At present, the European Union (EU) (which is currently composed of twenty-seven nations), India, Japan, Australia, Canada, Costa Rica, Macao, and the Caribbean Community (CARICOM) (which is currently comprised of sixteen Caribbean nations and eleven CARICOM observers of various Caribbean and South America locations)⁵⁷ have joined Antigua and Barbados in seeking compensation from the United States for economic injury resulting from this trade agreement violation.⁵⁸ The United States appealed the judgment, but the appellate court found that the United States violated the General Agreement on Tariffs and Trade (GATT) by the grant of authority to allow Internet betting on horse races under the IHA.⁵⁹ Another panel

56. See WTO Official Site, <http://www.wto.org>. (last visited Nov. 25, 2008) (explaining the origins of the WTO, and providing links and full text of all organizational and official documents).

57. Caribbean Community (CARICOM) Secretariat Official Site, <http://www.caricom.org> (last visited Nov. 25, 2008).

58. See PR Newswire, *supra* note 55. Australia, one of the countries seeking to bring an action against the United States has, ironically, outlawed Internet gambling within its own borders, as has Germany. See Australian Government: Attorney General's Department Commonwealth of Australia Law, <http://www.comlaw.gov.au> (last visited Nov. 25, 2008) (giving full text documents of the Interactive Gambling Act of 2001 which is discussed below); Reuters, *EU Set to Warn Germany Over Gaming Market*, (Jan. 24, 2008), available at http://uk.news.yahoo.com/rtrs/20080124/tot-uk-gaming-germany-eu-b86c26b_1.html (last visited Nov. 25, 2008) [hereinafter *Reuters*]. Thus, the question would remain: are these countries still allowed to bring their claims, even though they have followed in the United States' footsteps? Germany is in fact already being sued for violating European Commission laws for prohibiting foreign competition in Internet gaming. See *Reuters, supra*. The EU Internal Market Commission is looking to cut down barriers to cross-border competitors in services, which because of national identity of the member-nations, has hampered the EU for many years. *Id.* The Commission's main complaint is that Germany did not adequately warn them of the new law. *Id.* If the legal action continues, it could eventually end up in the European Court of Justice. *Id.* If the Court found against Germany, then Germany would be forced into changing their law to conform to EU rules. *Id.* Moreover, Germany's actions have caused European gaming interest groups to get involved and "[t]he European Gaming and Betting Association said the German ban directly contravened EU law on the free movement of services and urged the Commission to take swift action." *Id.*

59. See 285 Request, *supra* note 53.

later ruled that the United States had not taken sufficient steps to comply with both the appellate and the initial ruling.⁶⁰

The WTO rulings and their implications shape the landscape of Internet gambling today. Due to disagreements and conflicts between nations increasing at an alarming rate, and the United States' willingness to forego the international community and take unilateral action, the world of Internet gambling is in turmoil. Due to the inability to establish constitutional jurisdiction, the question is now whether the United States has any right to regulate these off-shore based Internet gambling companies.⁶¹ The conflict among the laws of different nations, as well as those nations' attempts to regulate or curtail gambling, has had a significant impact on the United States' quest.

This comment will examine the history and the current state of Internet gambling regulation, both in the United States and in foreign nations. It will analyze WTO rulings and the consequences these rulings can bring for the United States, and will discuss current legislation before the House and Senate. In addition, the comment will examine this legislation's possible effectiveness at harnessing the horse we call Internet gambling.

III. A BRIEF OVERVIEW OF ATTEMPTS TO REGULATE THE ONLINE GAMING INDUSTRY

The United States government is not the first governmental entity to attempt to regulate the gaming industry - on its shores, in its waters, or on its servers. Nevada is a state that is often looked at for guidance by the gaming industry in terms of: how to regulate; how to enforce regulations; and how to provide assurance that the industry is reputable.⁶²

60. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *Appellate Body Report I*]. See also Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R/Corr.1 (Aug. 20, 2007) (correcting minor typographical errors in the *Appellate Body Report I*).

61. See U.S. CONST. art. III, § 2 (provides both the original and appellate jurisdiction of the Supreme Court of the United States).

62. See e.g., John K. Maloney, *The State of the Licensing Process Today*, Maloney & Tabor, Inc. Official Web Site, available at

A. Nevada: A State Example of Attempts to Regulate Internet Gaming

Nevada heavily regulates its gaming industry, subjecting its casinos and virtually anyone who works in the industry to a slew of obligations and requirements that employees and casinos must meet in order for the casinos and hotels to maintain their gaming licenses and to keep their doors open to the millions who enter every day. Almost every casino that has opened outside the state has looked to Nevada for a model system from which to mold both their home jurisdiction regulations and their day-to-day regulation and management of their properties.⁶³ Thus, it is no surprise that the federal government has also looked to examples from the state's representatives in Congress, the leading hotel entrepreneurs and owners, and the Nevada State Gaming Control Board in molding federal regulations.⁶⁴

Nevada first took actions to regulate the online gaming industry as a preventative measure in case the federal government should ever choose to legalize it.⁶⁵ Most importantly, the state is well aware of

<http://www.maloneytabor.com/CM/Articles/StateofLicensingProcess.asp> (last visited Nov. 25, 2008).

63. *Id.*

64. *Id.*

65. *See, e.g.*, Letter from Frankie Sue Del Papa, Nevada State Attorney General, and Jeffrey R. Rodefer, Senior Deputy, Nevada State Attorney General Division, to Steve DuFine, Chairman, Nevada State Gaming Control Board (Dec. 29, 2000) (on file with Nevada State Attorney General Office), *available at* <http://ag.state.nv.us> (This letter describes Advisory Opinion No. 2000-38 of the Attorney General's Office, which stated "an Internet game involving [point wagers or tickets in which no money was required, but patrons could still win prizes] . . . must receive approval from the Nevada Gaming Commission pursuant to its Regulations 14.230 through 14.250, before being exposed for play to the public, albeit on the Internet"). *See also* NEV. REV. GAMING COMM'N STAT. § 14.230 (2007) ("Approval for new games: applications and procedures"); NEV. REV. GAMING COMM'N STAT. § 14.240 (2007) ("Field trials of new games"); NEV. REV. GAMING COMM'N STAT. § 14.250 (2007) ("Final approval of new games"). *See also* I. Nelson Rose, *The Future Legal Landscape for Internet Gambling*, GAMBLING AND THE LAW (November 3, 2000), *available at* <http://www.gamblingandthelaw.com/antigua.html> (last visited Jan. 28, 2008) ("Nevada, as usual, led the way in showing how an established industry can turn an

its ability to only regulate within its borders, and take significant measures to ensure that any bet that a Nevada casino takes is placed within the state itself, and not from an alternate location.⁶⁶ The

attempt at prohibition into legalization of its business and the raising of barriers against potential competition.”); NEV. REV. STAT. § 465.090(1) (2007).

(It is unlawful for a person to furnish or disseminate any information in regard to racing or races, from any point within this state to any point outside the State of Nevada, by telephone, telegraph, teletype, radio or any signaling device, with the intention that the information is to be used to induce betting or wagering on the result of the race or races, or with the intention that the information is to be used to decide the result of any bet or wager made upon the race or races)

NEV. REV. STAT. § 465.090(2) (2007) (Exceptions to § 465.090(1)) (“[a] newspaper of general circulation . . . printing and disseminating news concerning races that are to be run or the [race] results . . . that have been run; or [t]he furnishing or dissemination of information concerning wagers made in an off-track pari-mutuel system of wagering approved by the Nevada Gaming Commission”); NEV. REV. STAT. § 465.092 (2007) (States that any one person or any group of persons from within or outside of the State of Nevada cannot:

[a]ccept or receive, directly or indirectly, through any medium of communication a wager from another person who is physically present within this state; or . . . [a]llow a lessee, agent or employee to accept or receive, directly or indirectly, through any medium of communication a wager from another person who is physically present within this state);

NEV. REV. STAT. § 465.093 (2007) (States that no one knowingly can:

[f]rom within this state, place, send, transmit or relay through a medium of communication a wager to another person or an establishment that is located within or outside of this state; or [f]rom outside of this state, place, send, transmit or relay through a medium of communication a wager to another person or an establishment that is located within this state).

66. *See, e.g.* NEV. REV. STAT. § 463.160 (2007) (“Licenses required; unlawful to permit certain gaming activities to be conducted without license”); NEV. REV. STAT. § 463.160 (2007) (“Limitation on approval of nonrestricted license in county whose population is 100,000 or more; additional local regulation of resort hotels permissible”); NEV. REV. STAT. § 463.162 (2007) (“State gaming license required where equipment, services or property delivered or furnished for gaming interest or revenue; exemptions”); NEV. REV. STAT. § 463.163 (2007) (“Operation of gaming device in restricted area of public transportation facility: Prior approval of Board required”); NEV. REV. STAT. § 463.165 (2007) (“Licensing of certain persons having significant influence over gaming operation of licensee; remuneration, contracts and employment prohibited for certain unsuitable or unlicensed persons; termination of contracts or agreements for services or employment”); and NEV.

Nevada State Gaming Control Board (Gaming Control Board) provides an Internet Wagering Notice, which explicitly states this intention:

The State of Nevada, the State Gaming Control Board and the Nevada Gaming Commission do not regulate, license, control, or in any way sanction, endorse or approve any Internet or online casino, betting activity, or any aspect thereof. Any statement or reference to the contrary is strictly prohibited and has not been authorized or in anyway approved or sanctioned by Nevada's Gaming Regulatory authorities.⁶⁷

This notice denies the Gaming Control Board's involvement in the regulation or endorsement of any gambling activity done over the Internet.⁶⁸ The exceptions to this rule seem to only be found in Nevada's own casinos offering its state-resident patrons an opportunity to place their sports bets from their home⁶⁹. An example of such a program is operated by Station Casinos (Stations), a major gaming company based in Las Vegas, who currently operates fifteen properties, with at least one other major property in its final stages of development in the greater Las Vegas area.⁷⁰ Stations runs a program called Sports Connection which is legal under the Gaming Control Board regulations.⁷¹ In order to do this, however, Stations utilizes a number of strict rules and regulations.⁷² First, any person

REV. STAT. § 463.160 (2007) ("Registration or licensing of person conducting certain tournaments or contests in association with gaming licensee; termination of association").

67. NEV. GAMING COMM'N & STATE GAMING CONTROL BOARD, *Internet Wagering Notice: Notice of Unregulated and Unapproved Internet Activities*, available at http://gaming.nv.gov/internet_wagering.htm (last visited Nov. 25, 2008).

68. *Id.*

69. See e.g., Station Casinos Sports Connection Official Site, <http://www.stationssportsconnection.com> (last visited Nov. 25, 2008).

70. See Station Casinos Official Site: Investor Relations, <http://www.stationcasinos.com/corp> (last visited Nov. 25, 2008).

71. See Station Casinos Sports Connection Official Site, <http://www.stationssportsconnection.com> (last visited Nov. 25, 2008).

72. *Id.*

wishing to establish a betting account with Sports Connection must provide an acceptable proof of identity, a Social Security Number, and proof of residence within the city of Las Vegas, as defined by the Gaming Control Board.⁷³ The main regulation requires the person making the wager to be physically located in the state of Nevada, even if the wager is by telephone or Internet, rather than the wager being placed on the casino floor.⁷⁴ Certain measures have been instituted by Stations in order to ensure the location of its bettors.⁷⁵ The main safeguard is that the bettor must use Cox Cable (Cox) as a service provider to access the Internet, and the Sports Connection software is only compatible with Cox.⁷⁶ The Internet Service Provider (ISP) address associated with each computer is able to identify the location of the computer, and thus prevent bets from being placed from outside of the state.⁷⁷ The phone section of Sports Connection is not utilized often because of the problems associated with placing the bets, particularly, the high amount of regulations and restrictions on the types of phones that can be used to place bets.⁷⁸

73. Station Casinos Sports Connection Official Rules Site, <http://www.stationsportsconnection.com/Rules.aspx> (last visited Nov. 25, 2008) [hereinafter *Sports Connection Rules Site*]. See also NEV. REV. STAT. § 463.305 (2007) (“Approval of gaming device, mobile gaming system or inter-casino linked system required; list of approved gaming devices, mobile gaming systems and inter-casino linked systems; removal of gaming device or mobile gaming system following suspension or revocation of approval; regulations”).

74. NEV. REV. STAT. § 463.305. Stations’ official rule is that “Station Sports Connection wagers are accepted only from within the Las Vegas area. Station Casinos Race and Sports Books are prohibited by law from accepting wagers originating from outside the State of Nevada. [The patron] understand[s] that it is illegal to place a wager originating outside the State of Nevada.” See *Sports Connection Rules Site*, *supra* note 73.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* New rules have been implemented to allow wagers to be made over the phone, as long as the call is made from the Las Vegas Valley and an additional \$50 deposit will be required for use of the pager. See Station Casinos Sports Connection FAQs Site, <http://www.stationsportsconnection.com/FAQ.aspx> (last visited Nov. 25, 2008). Thus, the pager can transmit information regarding the person’s location as well as the location of the nearest mobile phone tower, thus allowing the location of the wager to be pinpointed. *Id.*

79. See Station Casinos Official Rules Site, *supra* note 73.

Moreover, Stations is also mindful of possible money laundering and fraud, which are ever-present in the gaming industry.⁷⁹ Due to this concern, Stations has enacted several rules which ensure that patrons are using their account funds for gambling and not for other unlawful purposes.⁸⁰ Lastly, Stations explicitly states that their Sports Connection Rules are only an addition to, not a replacement for, the Nevada Revised Statutes on the subject.⁸¹

B. The Wire Act, 18 U.S.C. § 1084

The main regulation the government uses as a justification for its ability to regulate Internet gaming is the Wire Act, 18 U.S.C. § 1084. "Aware of the importance to the rapid 'transmission of gambling information,' Congress devised a means to combat organized gambling by denying gamblers the availability of interstate wire communications facilities."⁸² Under 18 U.S.C. §1084(a),

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,

80. *Id.* "Station Sports Connection wagers cannot be accepted from any individual who has not properly filed a Station Sports Connection account application which has been approved by Race and Sports Book Management." *Id.* Moreover, "Station Sports Connection accounts are limited to the sole and exclusive use of individual named on this application. No agents or representatives are allowed." *Id.* In addition, "account customers will be required to provide their account number and proper identification when conducting account transactions [and] Station Sports Connection account deposits and withdrawals must be signed and authorized by the customer at the Race and Sports Books during normal business hours. No agents or representatives are allowed." *Id.*

81. *Id.*

82. Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U. J. SCI. & TECH. L. 7, 13 (1996) (quoting H.R. REP. NO. 967, 87th Cong., 1st Sess. at 2361 (1961)).

shall be fined under this title or imprisoned not more than two years.⁸³

Essentially, the statute makes it illegal for a bookie or someone else involved in the business of betting to use the telephone to gamble, but it does not prohibit an ordinary bettor from using the telephone in a state, such as California, to place a bet abroad, such as in Antigua.⁸⁴ States, however, may still prohibit these average bettors from placing a bet over the phone.⁸⁵ It begs the question as to how states can attempt to regulate the actions of a betting provider that occur within the borders of another country. While the state conclusively has jurisdiction within its own borders, it hardly follows that its jurisdiction flows to its neighboring state, much less that of another country.⁸⁶

In addition to looking at Nevada and other states for methods of regulation, the United States government looks at interest groups, as it would with any other relevant field subject to federal legislation. One of the largest is the American Gaming Association (AGA), which “represents the commercial casino entertainment industry by addressing federal legislative and regulatory issues affecting its members and their employees and customers, such as federal taxation, regulatory issues, and travel and tourism matters.”⁸⁷ In order to receive the AGA’s support, any legislation on Internet

83. 18 U.S.C. § 1084(a).

84. *See* Robbins, *supra* note 82, at 14-15.

85. *Id.*

86. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (2007).

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

See also Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (2007) (Generally, foreign governments are immune under the act of state doctrine in terms of Internet gambling).

87. American Gaming Ass’n Official Site: Overview, <http://www.americangaming.org/about/overview.cfm> (last visited Nov. 25, 2008).

gaming must meet three elements.⁸⁸ These three elements are: “The right of states to regulate gaming must be protected; [the legislation] must not create competitive disadvantages between and among commercial casinos, Native American casinos, state lotteries, and pari-mutuel [sic] wagering operations; and [n]o form of gaming that currently is legal should be made illegal.”⁸⁹ It is important for the government to give due recognition, as the support of the major gaming outlets are vital to any piece of legislation’s success or failure. If a major gaming company refuses to give due deference and obedience to a specific piece of legislation, and chooses to pay the fine or face other prescribed punishments, other companies would be sure to follow and the law would be a virtual failure in implementation. These three elements become vital to the government’s recognition when attempting to place any sort of regulation on Internet gaming.⁹⁰

C. Foreign Governments’ Attempts at Internet Gaming Regulations

Foreign governments are the last example of entities which have tried to regulate Internet gambling in some way, shape, or form. Internet gaming has been legalized in over fifty countries and jurisdictions, mainly in Europe, the Caribbean, and the Australia-Pacific region.⁹¹

Australia is one of the countries that has chosen to prohibit Internet gaming, following a similar path to that which the United States hopes to successfully emulate. Australia recently passed the Interactive Gambling Act of 2001 (IGA).⁹² This law “makes it an offense to provide an interactive gambling service to a customer physically present in Australia.”⁹³ The law applies “to all interactive gambling service providers, whether based in Australia or off-shore,

88. American Gaming Ass’n Official Site: Industry Issues Detail, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=17 (last visited Nov. 25, 2008).

89. *Id.*

90. *Id.*

91. See *GAO Report*, *supra* note 50.

92. *Id.*

93. *Id.* at 45.

whether Australian or foreign owned.”⁹⁴ While the Act applies to interactive casinos and games on the Internet, it does not apply to sports wagering or lotteries, which continue to be regulated by existing state and territorial legislation.⁹⁵ The Act, however, does not prohibit online wagering per se, except when wagers are accepted online after a sporting event has started.⁹⁶ Interactive gambling service providers (providers) have developed potential defenses to the Australian law, which resemble those taken against the various American regulations.⁹⁷ First, “the offence will not apply if a . . . provider did not know and could not, with reasonable diligence, have ascertained that its service had Australian customers.”⁹⁸ Yet the main defense is if the provider can show that they have exercised reasonable diligence in ensuring that Australian customers are prevented from using their service, then they should not be held in violation of the IGA.⁹⁹ The IGA provides examples of elements in a successful defense.¹⁰⁰ Examples of include:

[W]hether prospective customers were informed that Australian law prohibits the provision of the service to customers who are physically present in Australia; whether customers were required to enter into contracts that were subject to an express condition that the customer was not to use the service if the customer was physically present in Australia; whether the person required customers to provide personal details, and, if so, whether those details suggested that the customer was not physically present in Australia; [and] whether the person has network data that

94. *Id.*

95. *Id.*

96. GAO Report, *supra* note 50.

97. *Id.*

98. Australia Department of Broadband, Communications and the Digital Economy. Official Website, The Interactive Gambling Act of 2001, http://www.dbcde.gov.au/communications_for_consumers/internet/online_gambling/interactive_gambling_act_2001 (last visited Nov. 25, 2008).

99. *Id.*

100. *Id.*

indicates that customers were physically present outside Australia when the relevant customer account was opened and throughout the period when the service was provided to the customer.¹⁰¹

These examples are precisely what providers have been attempting to use as a defense in the United States, and it is where many of the current problems lie. The United States and Australia may want to begin looking at a more active means of regulation, rather than passively allowing providers to circumvent laws by alleging that they reasonably monitored the locations of their customers and, in addition, took measures to ensure their customers were not located in the countries that prohibit Internet gaming.¹⁰² This sort of circumstantial evidence is no longer seen as an acceptable means of obeying regulations by foreign governments. The IGA goes one step further, by making “it an offence to publish or broadcast in Australia an advertisement for an interactive gambling service.”¹⁰³ This “extends to all forms of media, both electronic and non-electronic, including advertising via the Internet, broadcast services, print media, billboards and hoardings.”¹⁰⁴ Australia also protected itself from objections from other countries to this advertising ban, since it “does not extend to advertisements published in overseas media, such as magazines that are published overseas, or websites that are aimed at non-Australian audiences.”¹⁰⁵ Thus, if a foreign company publishes an Internet gambling advertisement directed at its own citizens who are abroad in Australia on holiday or because of work, school, or another reason, that advertisement would likely not be prohibited. This is one example of how the Australian government is taking careful steps to not interfere within the borders of other sovereign nations, demonstrating they have learned from the

101. *Id.*

102. *Id.*

103. Australia Department of Broadband, Communications and the Digital Economy Official Website – The Interactive Gambling Act of 2001, http://www.dbcde.gov.au/communications_for_consumers/internet/online_gambling/interactive_gambling_act_2001 (last visited Nov. 25, 2008).

104. *Id.*

105. *Id.*

earlier mistakes of the United States.¹⁰⁶ This is yet another illustration of how Internet gaming has become a worldwide industry, and any country hoping to regulate or prohibit it in some way must take caution when trying to implement its laws in other countries.

Another country that has taken means to regulate and prohibit Internet gaming is Canada. Its Criminal Code “makes it illegal to gamble or conduct any gaming activities within Canada unless they fall within recognized exceptions set out in the . . . Code.”¹⁰⁷ Since commercial land-based betting on single sporting events is not permitted in Canada, it follows that it would be illegal to run a similar operation on the Internet.¹⁰⁸ Their Criminal Code restricts online gambling offers of any form within the country by requiring a provincial government to run and manage the site, itself, and no third party may partake in the operation of such a site.¹⁰⁹ Thus, Canada has taken protective measures for the regulation of Internet gaming for those provincial governments that choose to operate an online gaming site.

The United States has looked at previous attempts to regulate Internet gaming and has implemented its own rules and regulations through various federal legislation. The rules and regulations that will be discussed hereafter are the most recent attempts, and thus most relevant for purposes of this article.

IV. INTERNET GAMING PROHIBITION AND ENFORCEMENT ACT

The Internet Gambling Prohibition and Enforcement Act (IGPEA) was proposed by Representative Jim Leach (R-IA), passed the House of Representatives on July 11, 2006, and was introduced on the Senate floor on July 12, 2006.¹¹⁰ The IGPEA, along with H.R. 4777, introduced by Representative Bob Goodlatte (R-VA), make up the Unlawful Internet Gambling Enforcement Act of 2006

106. See, e.g., 285 Request, *supra* note 53.

107. GAO Report, *supra* note 50, at 45.

108. See *id.*

109. *Id.*

110. H.R. 4411, 109th Cong. (2d Sess. 2006); See also American Gaming Association, Federal Issues: Status Reports, http://www.americangaming.org/hillupdate/reports_detail.cfv?id=9 (last visited Nov. 25 2008).

(UIGEA).¹¹¹ The IGPEA's stated purpose is "[t]o prevent the use of certain payment instruments, credit cards, and fund transfers for unlawful Internet gambling, and for other purposes."¹¹² The Act amends the Wire Act, by expanding section (a), which covers those "engaged in the business of betting or wagering."¹¹³ The original provision reads as follows:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.¹¹⁴

The IGPEA changes the section in several ways. First, punishment for violating the provision of the statute is increased from two years to five years.¹¹⁵ Second, the characteristics of an offending person were expanded to include anyone who:

[E]ngaged in a gambling business, knowingly accepts, in connection with the transmission of a communication in interstate or foreign commerce, within the special maritime and territorial jurisdiction of the United States, or to or from any place outside the jurisdiction of any nation with respect to any transmission to or from the United States of bets or wagers or information assisting in the placing of bets or wagers . . . credit, or the proceeds of credit,

111. *Id.*

112. H.R. 4411, *supra* note 110.

113. 18 U.S.C. § 1084(a) (2007).

114. *Id.*

115. H.R. 4411 at § 102.

extended to or on behalf of another (including credit extended though the use of a credit card . . . an electronic fund transfer or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of the other person . . . any check, draft, or similar instrument which is drawn by or on behalf of the other person and is drawn on or payable through any financial instrument; or . . . the proceeds of any other form of financial transaction as the Secretary of the Treasury and the Board of Governors of the Federal Reserve System may prescribe by regulation which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of the other person.¹¹⁶

Thus, IGPEA would expand the coverage to find anyone engaged in the gaming industry who either uses or accepts information over the wires dealing with gambling wagers or information related to gambling or the placing of bets thereof, to be guilty under the amended act. The government is thus looking to expand the limitation of interstate or foreign transmissions to any part or type of gambling transactions or information. Moreover, this addition ensures that credit card companies and other financial institutions cannot participate in providing funds to make wagers over wire transmissions. If a bettor cannot use a credit card or bank account number to place a bet online or over a phone, options for providing money to the betting service are limited at best. Money cannot be instantaneously transmitted over the phone, Internet, pager, or other means, and gambling providers are not likely to allow their bettors a free bet or wager. If a bettor loses, and has not already given the gambling provider the monetary amount of the wager, then why would he then pay the provider? By inserting this provision into the statute, the United States government would be virtually, albeit indirectly, prohibiting Internet gambling within the borders of the

116. *Id.*; 18 U.S.C. § 1084(a)(2)(A)-(D) (2007).

United States by anyone through either American-owned or foreign-owned companies.

As previously stated, the United States government also undertook specific tactics in IGPEA so as not to offend other entities that have already legalized some sort of gaming over the wires.¹¹⁷

The IGPEA explicitly excludes from prohibition:

[T]he use of a communication facility for the transmission of bets or wagers or information assisting in the placing of bets or wagers, if—at the time the transmission occurs, the individual or entity placing the bets or wagers or information assisting in the placing of bets or wagers, the gambling business, and, . . . any individual or entity acting in concert with a gambling business to process the bets or wagers are physically located in the same State . . . the State . . . has explicitly authorized such bets and wagers, the State . . . requires a secure and effective location and age verification system to assure compliance with age and location requirements, and the gambling business and any individual or entity acting in concert with a gambling business to process the bets or wagers complies with such law . . . the State has explicitly authorized and licensed the operation of the gambling business and any individual or entity acting in concert with a gambling business to process the bets and wagers within its borders.¹¹⁸

117. See H.R. 4411, *supra* note 110.

118. H.R. 4411 at § 102; 18 U.S.C. §1084(c)(1)-(5). Thus, the previous example of Station Casinos' Sports Connection system, as permitted by Nevada law would continue to be legal, even with the passage of IGPEA. This is because the sports book which is taking the bet is physically located within the state of Nevada and Stations has taken sufficient measures to ensure that the gambler is physically present within its borders. See NEV. REV. STAT. § 465.094 (2007) ("A race book or sports pool that is licensed pursuant to chapter 463 of NRS, if the wager is accepted or received within this state and otherwise complies with all other applicable laws and regulations concerning wagering" is exempted from having to abide by § 465.092 and §465.093). The Gaming Control Board has also recognized this service as being legal under Nevada state law; thus, the federal government will not force the state into obeying its law with this provision. If the

While the federal government is cognizant of stepping on its own states' toes, it is noticeably silent as to foreign-run gambling operations. The only section under which foreign companies might be affected is the amended 18 U.S.C. § 1084(f) which states:

When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State . . . or local law enforcement agency, acting within its jurisdiction, that any communication facility furnished by it is being used or will be used by its subscriber for the purpose of transmitting or receiving gambling information in interstate or foreign commerce, within the special maritime and territorial jurisdiction of the United States, or to or from any place outside the jurisdiction of any nation with respect to any transmission to or from the United States in violation of Federal, State . . . or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency.¹¹⁹

Even though there is the possibility that a foreign company could be one of these "common carriers," the United States still appears to assert authority over sovereign entities which are far outside of any American court's jurisdiction. The IGPEA also amends 31 U.S.C. § 5362.¹²⁰ The amended section provides:

government had chosen not to include this section in IGPEA, then under the Supremacy Clause of the United States Constitution, the federal law would trump Nevada's, and Stations would be forced into shutting down its Sports Connection operation and the Gaming Control Board would subsequently be forced into changing Nevada gaming regulations to comply with IGPEA. *See* U.S. CONST. art. VI.

119. H.R. 4411, *supra* note 110, at § 102.

120. *See* H.R. 4411, *supra* note 110.

No person engaged in a gambling business may knowingly accept, in connection with the participation of another person in unlawful gambling. . . credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card) . . . an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, form or on behalf of such other person . . . any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or . . . the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.¹²¹

Once again, this amended provision raises the possibility of foreign companies being brought under American jurisdiction. Credit card companies are not all American owned; therefore, under this provision, the U.S. government is, in effect, telling possible foreign companies what they can and cannot do. The U.S. Constitution confers various power and authority to the U.S. government to regulate within the nation's own borders.¹²² The Constitution, however, is silent as to the authority of the U.S. government to impose regulation on foreign governments. Due to this silence and the United States' involvement with numerous international treaties, the nation has, in essence, implied that it will not stretch its regulations outside of its own borders.¹²³ Moreover,

121. H.R. 4411, *supra* note 110, at § 201.

122. See U.S. CONST. art. VI.

123. In recent years, the United States has demonstrated its willingness to take unilateral action without the required consent of other nations, as provided for under various treaties. With the invasion of Iraq, allegedly for the purpose of locating known weapons of mass destruction, the United States explicitly

treaties usually occur under a reciprocal rights system, in which nations mutually agree to uphold certain standards and regulations.¹²⁴

Amended subsection (e) of 31 U.S.C. § 5363 lists the agencies responsible for the enforcement of IGPEA.¹²⁵ These agencies are “the Federal functional regulators,” which include the regulating

disobeyed and ignored the United Nations’ ruling that further diplomatic channels were to be exhausted before military action should occur. *See e.g.* BBC News Official Site, *Iraq War Illegal, Says Annan*, Sept. 16, 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3661134.stm (last visited Nov. 25, 2008). Not all United States government officials seemed to agree with the actions taken, and these actions are believed to be the main cause behind Colin Powell’s resignation as Secretary of State. *See e.g.* Karen DeYoung, *Falling On His Sword*, WASH. POST, Oct. 1, 2006, at W12. If this behavior by the United States were to continue, then these treaties would become less prevalent as sources of law, and despite the Supremacy Clause’s declaration that these treaties, along with the United States Constitution are to be the “supreme Law of the Land,” if the government chooses to ignore them and not give them their fair deference, then other nations will likely follow suit in not recognizing reciprocal rights to the United States. *See* U.S. CONST. art. VI.

124. For example, the North American Free Trade Agreement (NAFTA), an economic free trade agreement among the United States, Canada and Mexico provides for the same amount of tariffs or same tariff exemptions to all three signatories, and one nation does not give another signatory different rights than it does to the other signatory or itself, for that matter. *See* SICE - FOREIGN TRADE INFORMATION SYSTEM: NORTH AMERICAN FREE TRADE AGREEMENT, <http://www.sice.oas.org/Trade/NAFTA/NAFTATCE.ASP> (last visited on Nov. 25, 2008). Because the United States is a signatory on several significant multi-nation treaties, the American government is subject to many various restraints, regulations, and rights of reciprocity. Therefore, the WTO action was brought against the United States, as it violated the agreement to which the U.S. was a party. The United States has repeatedly refused to comply with the WTO ruling and this has subsequently led to other nations bringing similar actions against the United States. *See, e.g. Appellate Body Report 1*. Because of the willingness demonstrated by the United States to forego their obligations, other nations have also followed in refusing to enforce or even recognize the American laws within their own borders. *See Appellate Body Report 1*. In fact, in the BetonSports indictment, the United States had to wait until the BetonSports CEO returned to American soil in order to bring charges under UIEGA because their jurisdiction did not extend to either the listed home base of the company in London, England or to the actual base of a majority of their operations in the Caribbean. *See* MATT RICHTER, *BetOnSports, After Indictment, Folds Its Hand and Shifts Focus to Asia* (Aug. 11, 2006), available at <http://www.nytimes.com/2006/08/11/technology/11gamble.html> (last visited Nov. 25, 2008).

125. H.R. 4411, *supra* note 110, at § 201 (2006).

agencies of payment systems and other providers of financial transactions, and the Federal Trade Commission (FTC).¹²⁶

Foreign nations are finally mentioned at the end of IGPEA. This section does not amend any previously existing legislation; rather, it is a new addition to legislation. It provides:

In deliberations between the United States Government and any other country on money laundering, corruption, and crime issues, the United States Government should . . . encourage cooperation by foreign governments and relevant international fora in identifying whether Internet gambling operations are being used for money laundering, corruption, or other crimes . . . advance policies that promote the cooperation of foreign governments, through information sharing or other measures, in the enforcement of this Act; and . . . encourage the Financial Action Task Force on Money Laundering, in its annual report on money laundering typologies, to study the extent to which Internet gambling operations are being used for money laundering purposes.¹²⁷

While the government is placing the requirement of cooperation with foreign governments into law, it is doing little else than just that—requiring cooperation.¹²⁸ There is nothing limiting the United States' jurisdiction, nor is there anything which excludes foreign-owned companies from the jurisdiction of the IGPEA.¹²⁹ Not all of the regulations included in IGPEA were enacted into law.¹³⁰ In fact, the IGPEA combined with H.R. 4777 to form the Unlawful Internet Gambling Enforcement Act of 2006.

126. H.R. 4411, *supra* note 110, at § 201; 31 U.S.C. § 5363(e) (2006).

127. H.R. 4411, *supra* note 110, at § 301.

128. *Id.*

129. *Id.*

130. SAFE Port Act of 2006, Pub.L. No. 109-347, H.R. 4954, 109th Cong. (as passed by the Congress, Oct. 13, 2006).

V. UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

The Unlawful Internet Gaming Enforcement Act of 2006 (UIGEA) is actually Title VII of the Safe Port Act, H.R. 4954.¹³¹ The Safe Port Act's main purpose was to attempt to improve security at United States ports and, in reality, had absolutely nothing to do with Internet gambling.¹³² President George W. Bush signed the Safe Port Act, which included UIGEA, into law on October 14, 2006.¹³³ The final language of UIGEA "does not outlaw online gambling; rather, it forbids financial institutions to process payments from sites that are deemed illegal" and, unlike its predecessor, it does not amend the Wire Act.¹³⁴ UIGEA essentially makes it illegal for banks, credit card companies, or similar institutions to collect on a debt incurred on an online gambling site.¹³⁵ Representative Goodlatte also played a significant role in the drafting and passage of UIGEA's. He said, "The passage of this legislation is a step in the right direction in the fight against online gambling and will help to cut off the money supply to these illegal outfits."¹³⁶ Goodlatte believes the passage of this Act will lead to the decrease of money funneled to illegal activities and those who fund them.¹³⁷

UIGEA's effects have already been seen both nationally and internationally. After the legislation was passed, \$6.5 billion was shaved off of the value of online gambling shares.¹³⁸ Moreover, Americans have essentially been prevented from placing bets or wagers over the Internet since the passage of the UIGEA. Many individual gaming companies took large economic hits also, bringing

131. See American Gaming Association Official Site, *supra* note 88.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. SONIA ARRISON, *Thank You For Gambling*, E-COMMERCE TIMES, Oct. 23, 2006, <http://www.ecommercetimes.com/story/business/53628.html?welcome=1201516250> (last visited Nov. 25, 2008).

137. *Id.*

138. THE YEAR IN NUMBERS: 2006, CNN Official Site, <http://www.cnn.com/2006/WORLD/europe/12/28/numbers.year/index.html?iref=newssearch>.

to mind comparisons of the dot-com bust a few years prior. PartyGaming, which is the world's largest online gaming provider, fell out of the Financial Times Stock Exchange Index following the UIGEA's passage.¹³⁹ Their shares dropped thirteen percent, after it was estimated that the elimination of Americans from their customer base wiped out approximately ninety percent of their revenues.¹⁴⁰ Online gaming companies were said to be "frantically trying to sell their American operations" before UIGEA was enacted.¹⁴¹ The Internet gaming firms Leisure & Gaming and Sportingbet sold their American operations for only \$1, even though its buyer was assuming \$13.2 million worth of debts in Sportingbet's case.¹⁴²

The biggest challenge to UIGEA is the Automated Clearing House network (ACH), which is an electronic processing system used by the Federal Reserve that currently cannot tell a gambling transaction from a normal transaction, such as a mortgage payment.¹⁴³ ACH payments include direct deposit of social security benefits, payroll checks, business-to-business payments, e-commerce payments, and direct payments of various consumer bills, among others.¹⁴⁴ The ACH is, in fact, a "nationwide batch-oriented electronic funds transfer system governed by [rules] which provide for the interbank clearing of electronic payments for participating

139. SONIA ARRISON, *Thank You For Gambling*, E-COMMERCE TIMES, Oct. 23, 2006, <http://www.ecommercetimes.com/story/business/53628.html?welcome=1201516250> (last visited Nov. 25, 2008).

140. SIMON BOWERS, *Players walk away as US law wipes out 90% of PartyGaming's poker revenue*, THE GUARDIAN, Oct. 17, 2006, available at <http://www.guardian.co.uk/business/2006/oct/17/usnews.gambling> (last visited Nov. 25, 2005).

141. FIONA WALSH, *Last chance saloon for online gaming firms*, THE GUARDIAN, Oct. 13, 2006, available at <http://www.guardian.co.uk/business/2006/oct/13/gambling.newmedia> (last visited Nov. 25, 2008).

142. *Id.*

143. MIKE BRUNKER, *Will ban end Internet gambling? Don't bet on it*, MSNBC, Oct. 17, 2006, <http://www.msnbc.msn.com/id/15240569/> (last visited Nov. 25, 2008).

144. NACHA The Electronic Payments Ass'n, *What is ACH?*, http://www.nacha.org/About/what_is_ach.htm (last visited Nov. 25, 2008).

depository financial institutions.”¹⁴⁵ The Federal Reserve and the Electronic Payments Network serve as ACH operators, which are “central clearing facilities through which financial institutions transmit or receive ACH entries.”¹⁴⁶ Since a direct arm of the United States government operates this system (the Federal Reserve), if this system cannot recognize a gambling payment from other normal, legal payments, then the government is, in a sense, circumventing its own law with the system.¹⁴⁷ Unlike the credit card bans on gambling in 2002, these ACH payments are “essentially bank-to-bank, account-to-account transaction[s], the bank on the sending end does not keep any record of the person behind the bank account on the receiving end.”¹⁴⁸ In addition, ACH payments “were relatively easy practices to enforce, because the credit card systems and issuers coded these transactions, and they were essentially just able to flick a switch and block them.”¹⁴⁹ The online gaming industry soon became aware of the possibility for American gamblers to use ACH payments to fund their online gaming and began to offer it as a payment option; thus, effectively circumventing UIGEA.¹⁵⁰

There are several reasons for the passage of UIGEA. The first is found in 31 U.S.C. § 5361(a)(3) which states “Internet gambling is a growing cause of debt collection problems for insured depository

145. *Id.*

146. *Id.*

147. MIKE BRUNKER, *Will ban end Internet gambling? Don't bet on it*, MSNBC, Oct. 17, 2006, <http://www.msnbc.msn.com/id/15240569/> (last visited Nov. 25 2008).

148. *Id.* Ken Dreifach, Esq., with the New York firm Sonnenschein, Nath & Rosenthal, said that the government would find it next to impossible to regulate the ACH payments because, “At this point you can’t do that any more than you can ask Western Union to block all transactions to pet food companies.” *Id.*

149. *Id.*

150. See Online Gambling Insider, ACH Casinos, <http://www.online-gambling-insider.com/ach-casinos.asp> (last visited Nov. 25, 2008). This site gives links to all known online casinos, as well as their available payment methods. It also lists those which have the ability to circumvent current U.S. law, giving rise to the distinct possibility that a new licensing program, similar to the one provided for by the Internet Gambling Regulation and Enforcement Act of 2007 below, so at least the government will be able to exercise at least a minimal amount of control over Internet gambling.

institutions and the consumer credit industry.”¹⁵¹ A second reason is stated as, “New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”¹⁵² A third reason, though not a reason per se, is that UIGEA explicitly excluded from the regulations any compacts made with Native American tribes for Indian reservation gaming.¹⁵³ The Act allows Internet gaming to occur as long as it is within the scope and confines of Indian land.¹⁵⁴ Thus, the government is taking special concern not to impose any regulations on Indian lands which may contravene or even add to agreements already entered into to legalize gambling on an Indian reservation.

The UIGEA defines “Unlawful Internet Gambling” as follows:

[T]o place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.¹⁵⁵

This definition is vague at best, and the reasoning probably lies in the fact that Congress wanted to leave open the possibility of completely outlawing Internet gambling in the future. It appears that foreign countries are also included, however, foreign countries are not subject to United States regulations or jurisdiction. The UIGEA also defines “Intrastate Transactions” as follows:

[U]nlawful Internet gambling’ does not include placing, receiving, or otherwise transmitting a bet or wager where . . . the bet or wager is initiated and received or otherwise made exclusively within a single State . . . the bet or wager and the method by which the bet or wager is initiated and received or

151. SAFE Port Act § 802, 31 U.S.C. §§ 5361-5367 (2007).

152. 31 U.S.C. § 5361(a)(4) (2007).

153. See 31 U.S.C. § 5361(b) (2007).

154. 31 U.S.C. § 5362(10)(c) (2007).

155. 31 U.S.C. § 5362(10)(A) (2007).

otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include . . . age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and . . . appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law or regulations; and . . . the bet or wager does not violate any provision of . . . the Interstate Horseracing Act of 1978[citation omitted] . . . the Professional and Amateur Sports Protection Act[citation omitted] . . . the Gambling Devices Transportation Act[citation omitted]; or . . . the Indian Gaming Regulatory Act.¹⁵⁶

The main provision of UIGEA is 31 U.S.C. § 5363, a prohibition on acceptance of any financial instrument for unlawful Internet gaming.¹⁵⁷ It states:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling . . . credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card) . . . an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person . . . any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or . . . the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve

156. 31 U.S.C. § 5362(10)(B) (2007).

157. SAFE Port Act, § 802; 31 U.S.C. §§ 5361-5367 (2007).

System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.¹⁵⁸

This is essentially an exact replication of the provision in IGPEA, and explicitly excludes any credit card companies, banks, or other financial institutions from allowing its patrons to use their funds or accounts to gamble on the Internet. The problem that could arise in the future is credit card companies, banks, and other financial institutions may try to claim that they are not engaged in the business of betting or wagering. Instead, they are in the business to give credit or to disburse patrons' funds based on instructions given to them. The institutions could say they cannot prevent their patrons from using their money for their own purposes, and as long as the uses are not illegal, then why should banks prevent the use of their patrons' funds? Since UIGEA does not expressly outlaw Internet gaming, Internet gaming is still legal; thus, the institutions should not be expected to prevent the use of individual accounts to partake in such activities.

The UIGEA also establishes a system of measures to prevent prohibited transactions in 31 U.S.C. § 5364.¹⁵⁹ The Act provides that a system should be instituted to identify and prevent restricted transactions within a period of 270 days by the Secretary and the Board of Governors of the Federal Reserve System.¹⁶⁰ The UIGEA also provides requirements for these policies and procedures to be implemented by the Secretary and Board of Governors of the Federal Reserve System, including the need for them to be reasonably designed to block and prevent restricted transactions, permit any participant in such a restricting system to choose from alternative means of enforcement, to exempt certain transactions from falling under the Act, and to make sure that any activity specifically exempted under unlawful Internet gambling is not blocked.¹⁶¹ Sufficient safeguards for financial institutions that block restricted

158. 31 U.S.C. § 5363(1)-(4).

159. See SAFE Port Act, § 802.

160. 31 U.S.C. § 5364(a).

161. 31 U.S.C. § 5364(b).

transactions are in place to encourage financial institutions to comply with the Act.¹⁶²

The governmental organizations that will ensure compliance with the Act are identical to those proposed in IGPEA, and include “the Federal functional regulators” of the payment systems and the Federal Trade Commission.¹⁶³

A limitation relating to interactive services reflected a departure from IGPEA.¹⁶⁴ Relief granted against an interactive computer service is limited:

[T]o the removal of, or disabling of access to, an online site violating section 5363, or a hypertext link to an online site violating such section, that resides on a computer server that such service controls or operates, except that the limitation in this subparagraph shall not apply if the service is subject to liability under this section under section 5367 . . . be available only after notice to the interactive computer service to monitor its service or to affirmatively seek facts indicating activity violating this subchapter . . . specify the interactive computer service to which it applies; and . . . specifically identify the location of the online site or hypertext link to be removed or access to which is to be disabled.¹⁶⁵

Moreover, a service that does not violate this Act will also not be liable under 18 U.S.C. § 1084(d), except that the UIGEA’s limitation:

[S]hall not apply if an interactive computer service has actual knowledge and control of bets and wagers and . . . operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received, or otherwise made or at which unlawful bets or wagers are offered to be placed,

162. *Id.*

163. 31 U.S.C. § 5364(e).

164. 31 U.S.C. § 5365(c) (2007).

165. 31 U.S.C. § 5365(c)(1)(a)-(e).

received, or otherwise made; or . . . owns or controls, or is owned or controlled by, any person who operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received, or otherwise made, or at which unlawful bets or wagers are offered to be placed, received, or otherwise made.¹⁶⁶

Even if an interactive computer service abides by the Act's provisions and implements procedures to verify the location and age of its bettors, the service can still be liable for violating UIGEA if it knows that bettors are located in the U.S. Through these measures, the United States is stressing its dedication at enforcing this law. Considering the political climate in recent years, it should come as no surprise that the federal government is focusing on gambling.

Once again, the only explicit mention of foreign nations is found in § 803, which mirrors the provision in IGPEA.¹⁶⁷ The UIGEA emphasizes cooperation among nations, as well as having the Financial Action Task Force on Money Laundering to continue to study the extent Internet gambling operations are being used for money laundering purposes.¹⁶⁸ There still is no provision explaining or justifying governmental attempts at expanding its jurisdiction to reach outside of American borders; thus, regulating foreign nations. The UIGEA, however, states "The Secretary of the Treasury shall submit an annual report to Congress on any deliberations between the United States and other countries on issues relating to Internet gambling."¹⁶⁹ Professor Nelson Rose is careful to point out that this is merely a request and not a per se requirement.¹⁷⁰ Furthermore, this develops the problems of comity and international sovereignty.¹⁷¹ This may have been the reason why the litigation from Antigua and

166. 31 U.S.C. § 5365(c)(2)(a)-(b).

167. Safe Port Act § 803 (2007).

168. *Id.*

169. *Id.*

170. I. Nelson Rose, *Gambling and the Law: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, GAMBLING AND THE LAW (2006), http://www.gamblingandthelaw.com/columns/2006_act.htm (last modified Nov. 25, 2008).

171. *Id.*

the Barbados was started in the WTO and may explain why it has reached its current level.¹⁷²

VI. CURRENT PROPOSED INTERNET GAMBLING REGULATIONS

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

The Internet Gambling Regulation and Enforcement Act of 2007 (IGREA) was introduced to the floor of the House of Representatives on April 26, 2007 by Representative Barney Frank (D-MA).¹⁷³ It was drafted in response to Antigua challenging UIEGA in the WTO and winning on the matter twice, both in 2004 and 2005, with the WTO finding the law in violation of WTO provisions.¹⁷⁴ Antigua argued that by permitting online wagering while making it illegal for financial institutions to handle payments for Internet casinos abroad, the United States impermissibly discriminates against cyber casinos.¹⁷⁵ Representative Frank argues that, "Congress should accept that reality and replace the ban with regulation designed to ensure the financial integrity of gaming cyberspace, to screen out minors and to make sure that the US gets its cut in taxes."¹⁷⁶ He explains that Washington may be left with only two choices: Either to "[a]llow Americans to wager online with off-shore casinos [or to] [b]an all Internet gambling – including fantasy sports leagues and off-track betting on horses, and maybe even the sale of lottery tickets online."¹⁷⁷ Thus, IGREA amends U.S.C. Title 31, Chapter 53, which deals with money laundering and financial crimes in order "[t]o provide for the licensing of Internet gambling facilities by the

172. *Id.*; see also 285 Request, *supra* note 53.

173. H.R. 2046, 110th Cong. (1st Sess. 2007).

174. *Id.*

175. Letter from Rep. Barney Frank, Chairman, U.S. H.R. Comm. on Fin. Services, to Members of the H.R. (Sept. 5, 2007) (on file with the U.S. H.R. Comm. on Fin. Services).

176. *Id.* The IGREA kept the criminal penalties from UIGEA and did not implement any changes, whether they were insignificant or substantial. See 31 U.S.C. § 5363.

177. See Frank, *supra* note 176.

Director of the Financial Crimes Enforcement Network [“Director”], and for other purposes.”¹⁷⁸

The IGBEA lists two main reasons for wanting the bill to be passed.¹⁷⁹ The first purpose is to provide additional tax revenues and to deter tax avoidance.¹⁸⁰ The second purpose is that IGBEA should be passed in order to provide protection against underage gambling, compulsive gambling, money laundering, and fraud for those who gamble online.¹⁸¹ However, it is hard to see how the reasoning behind issuing licenses for Internet gambling leads to the diminishing of other associated evils of gambling, such as gambling addictions or gambling by underage individuals.

The establishment and administration of licensing programs is provided for in § 5383.¹⁸² Subsection (b) explicitly provides, “No person shall engage in the business of Internet betting or wagering in the United States without a license issued by the Director in accordance with this [Act].”¹⁸³ If enacted, this would be the first *per se* ban on Internet gambling. If the betting service provider, however, had obtained a proper license from the Director, then they would have a legalized exception to the Internet gambling ban.

In addition, subsection (c) describes requirements for an application for a license. In order to obtain a license, one must submit his “complete financial statements . . . [d]ocumentation showing the corporate structure of the applicant and all related businesses and affiliates; and . . . a certification that the applicant agrees to be subject to United States jurisdiction and all applicable United States laws relating to Internet gambling activities.”¹⁸⁴

Subsection (d) of IGBEA lists other factors which may be considered by the Director when making the decision of whether or not to grant a license to the particular service provider.¹⁸⁵ The factors include:

178. *Id.*

179. H.R. 2046 ; 31 U.S.C. § 5381(a)(1)-(6) (2007).

180. 31 U.S.C. § 5381(a)(6) (2007).

181. 31 U.S.C. § 5381(a)(5) (2007).

182. 31 U.S.C. § 5383 (2007).

183. 31 U.S.C. § 5383(b) (2007).

184. 31 U.S.C. § 5383(c) (2007).

185. 31 U.S.C. § 5383(d) (2007).

[t]he financial condition of the applicant; . . . [t]he business expertise and record of the applicant, including the applicant's compliance with similar laws and requirements in foreign jurisdictions . . . [i]f the applicant is an individual, a background check to determine if the individual has any criminal record . . . and if the applicant is a . . . business entity, such background check shall occur with respect to the president or other chief executive of the corporation, partnership, or other business entity and other partners or senior executives and directors of the business entity as determined appropriate by the Director in the Director's sole discretion.¹⁸⁶

The government ensures that all costs will be borne by the applicant, and IGREA provides that the applicant will be responsible for any and all costs the Director finds to be appropriate in her assessment and analysis of the application.¹⁸⁷

IGREA is not free from all safeguards. The use of licenses for Internet Service Providers raises several concerns regarding age verification and, as with any online service, identity fraud, and theft. The IGREA answers some of these concerns in subsection (g).¹⁸⁸ These safeguards are only placed on the licensee¹⁸⁹, and it is unclear from the IGREA how the government or other agencies would moderate or ensure that these safeguards were effectively put in place and monitored. First of all, the licensee must have appropriate safeguards in place to ensure that the person making the bet or wager is eighteen years of age or older.¹⁹⁰ This subsection immediately raises the question as to how service providers would check and verify a person's age. Most age verifications on the Internet take place in the form of checking a box ensuring the user is over a certain age or by the user entering their date of birth. This form of checking identification, however, does not seem to be reliable or accurate. If one goes to Las Vegas to make a bet or to play blackjack or poker, they must show a government-issued ID which demonstrates her age. Under no circumstances do casinos simply take one's word that she

186. *Id.*

187. 31 U.S.C. § 5383(e)(1)(A) (2007).

188. 31 U.S.C. § 5383(g)(1)-(9) (2007).

189. *Id.*

190. 31 U.S.C. § 5383(g)(1) (2007).

is over the gambling age. This subsequently raises the legality of IGREA, as it places the legal Internet gambling age at eighteen, whereas in every other state where gambling is legal, the legal age is twenty-one. Would the licensee be required to comply with state laws or that of the federal act if passed? According to the Supremacy Clause in the United States Constitution, federal law would trump state gambling provisions;¹⁹¹ thus, IGREA would trump all state laws to the contrary. If this were to be the case, Nevada would not be the only state to amend its laws. Other states would have to follow suit, and the likely result would be that Nevada and other states would have two different legal ages for gambling; eighteen on the Internet and twenty-one in person.

For many consumers, this would be confusing, and the recent dangers of gambling, both moral and economic, would begin at an earlier age than before. This seems to almost completely counteract several of the justifications in the regulation of the gaming industry under a relatively expansive view of the Constitution. IGREA will not decrease underage gaming; in fact, the only effect IGREA likely would have is to increase Internet gaming.

Even if some complicated, lengthy procedures are taken at the outset to ensure that one is of legal gambling age, who is to say that these age restrictions will continue to be enforced? If the system requires a person to enter a user ID and password, it would still be possible for anyone under the age of eighteen to log in under that account and gamble. There seems to be little support that this system will serve IGREA's necessity of becoming law by combating underage gambling. In fact, the system would only intensify the numbers of underage gamblers, as well as the available opportunities to conduct themselves in gambling.

Amended section 31 U.S.C. § 5383(g)(2) of IGREA provides the second safeguard that licensees must put in place in order to obtain an Internet gambling license.¹⁹² This safeguard deals with the online gambler's location.¹⁹³ The licensee must place appropriate safeguards in their system to verify that the gambler is physically located in a jurisdiction that allows Internet gambling at the time the

191. See U.S. CONST. art. VI.

192. H.R. 2046 at PAGE; 31 U.S.C. § 5383(g)(2) (2007).

193. 31 U.S.C. § 5383(g)(2) (2007).

wager is placed.¹⁹⁴ Problems with this safeguard relate back to those found in IGREA's subsection (g)(1). While this safeguard seems more likely for successful implementation, problems with the specific laws of the jurisdiction in which the online gambler is located arise once again. If the systems were such that they were able to successfully confirm one's age as being over eighteen, what would the system be able to do if the gambler was located in a jurisdiction that only allowed for Internet gambling by those twenty-one years of age or older? Again, according to the Supremacy Clause of the United States Constitution, it seems the states would have to make their laws conform to IGREA.¹⁹⁵ Due to the uphill congressional battle (including the fact that Senate Majority Leader Harry Reid is from Nevada), it seems unlikely for this legislation to pass.

The IGREA's third necessary safeguard for potential licensees is the placement of "appropriate mechanisms to ensure that all taxes relating to Internet gambling due to Federal and State governments and to Indian tribes from persons engaged in Internet gambling are collected at the time of any payment of any proceeds of Internet gambling."¹⁹⁶ This provision further provides that these taxes should be paid to the Director.¹⁹⁷ This does not seem to be as difficult or complicated to implement as do the previous two required safeguards. A licensee could even borrow from Nevada's gaming laws, which provide that in the case of any winnings over a certain amount, the casino or place of wagering automatically deducts the taxes and then the casino is responsible for paying the United States government the taxes on the wager and not the patron themselves¹⁹⁸. The ISP could simply play the role of the casino, withhold the taxes, and mail out a form for the gambler to physically sign or have them electronically sign through some sort of verification process.

The fourth necessary safeguard is that the licensee implements "appropriate safeguards to combat fraud and money laundering as may be prescribed by regulations issued by the Director or a designee

194. *Id.*

195. *See* U.S. CONST. art. VI.

196. H.R. 2046; 31 U.S.C. § 5383(g)(3) (2007).

197. *Id.*

198. *See* Bank Secrecy Act, 31 C.F.R. §103.22 (2007).

of the Director.”¹⁹⁹ The potential problem with this requirement is that it is not specific and leaves the licensee in the dark as to their requirements. ISP providers likely will invest a vast amount of money and time in the development of gaming systems, and if they were always susceptible to new laws regarding money laundering and fraud, they would have to constantly adapt their systems to comply. Because of this uncertainty and the ever-present chance that the ISP’s costs will variably increase, the ISP would be unable to provide a static price for subscribers for its services; thus, possibly affecting their success. If ISPs could not gain or hold subscribers, they may lose desire to run such a business; therefore, making IGREA’s purpose futile.

IGREA requires licensees to implement appropriate safeguards to combat compulsive Internet gambling.²⁰⁰ Again, the licensee would find problems in implementation. In Las Vegas casinos, their method of dealing with this is to provide a brochure throughout its casino floor which identifies sources that offer help and other services for compulsive gamblers and their family and friends. The IGREA really does not specify how extensive these safeguards are to be, or what qualifies as appropriate.²⁰¹ Thus, would ISPs be able to display a similar banner or link to go to an outside company for help with compulsive gambling, or would they be able to do more? Or less? Also, would the government designate those companies suitable for dealing with compulsive gamblers, or would the ISPs be able to choose? All of these questions were left unanswered by the proposed version of IGREA.

A final specified safeguard is that the licensee provides appropriate mechanisms for protecting the privacy and security of any person engaged in Internet gambling.²⁰² This could be accomplished by any of the methods that any Internet site engaging in monetary transactions uses. One potential problem is that the government could impose too strict of requirements. For example, the government may require an ISP to use a certain security provider,

199. H.R. 2046; 31 U.S.C. § 5383(g)(5) (2007).

200. H.R. 2046; 31 U.S.C. § 5383(g)(6) (2007).

201. *Id.*

202. H.R. 2046; 31 U.S.C. § 5383(g)(7) (2007).

which could lead to questions of monopolization or other anti-trust violations.²⁰³

The provision at the end of IGREA's safeguards section allows the Director to establish further required safeguards by either regulation or order.²⁰⁴ This further contributes to the uncertainty of the ISPs' costs of compliance. The inability to ascertain exact costs with compliance could lead to uncertainty from subscribers on whether or not to participate in the services; thus, leading to lack of a need for IGREA.

The only real specificity of the license is provided for in IGREA's amended subsection (i)(1) of 31 U.S.C. § 5383, which sets the term of a license as being one year.²⁰⁵ The renewal provision, however, does not specify the length of time nor the amount of renewals a licensee may have.²⁰⁶

The IGREA also makes it clear that licenses will not be granted for every applicant.²⁰⁷ It defines a broad category of actions that can lead to the denial of a license application.²⁰⁸ Subsection (h) provides that "No license shall be granted to any individual who has been convicted under the laws of any foreign country, the United States, or any State for any criminal violation involving gambling laws, financial markets, or financial laws, including any money laundering, fraud, privacy, or information security law."²⁰⁹ This may raise several Constitutional questions; mainly, whether American courts have the jurisdiction to enforce this provision. In addition to the jurisdictional question is the challenge of the necessity of cooperation with other nations for the sharing of information. If the United States and the home nation of the licensee applicant have not entered into a treaty or other mutual agreement in which information is to be shared between the two nations, then how would the United States government be able to ascertain whether the applicant had been convicted of one of the aforementioned crimes?

203. See Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (2007).

204. H.R. 2046; 31 U.S.C. § 5383(g)(9) (2007).

205. H.R. 2046; 31 U.S.C. § 5383(i)(1) (2007).

206. H.R. 2046; 31 U.S.C. § 5383(i) (2007).

207. *Id.*

208. *Id.*

209. H.R. 2046; 31 U.S.C. § 5383(h)(1) (2007).

Not only can a license be denied outright, it can also be revoked after being issued.²¹⁰ The IGREA provides for two instances in which a licensee's application can be revoked: (1) if "the licensee fails to comply with any provision of [the IGREA]" and (2) if "[t]he licensee . . . is convicted of a crime involving the payments systems, financial markets, or Internet gambling laws of the United States or the jurisdiction in which the licensee is located."²¹¹ Again, the problem of what country the crime was committed in becomes an issue with enforcement.

The previous Internet gaming laws had only lightly touched on defining the jurisdiction of the United States courts in enforcing the provisions of the respective act. IGREA defines the jurisdiction to situations in which "any court of the US of which (i) the investigation which gave rise to the summons or the examination is being or has been carried on; (ii) the person summoned is an inhabitant; or (iii) the person summoned carries on business or may be found."²¹² These provisions raise questions in the situation where the licensee is a business entity based in a foreign country. For example, if the head of the entity and the entity, itself, is based in Monte Carlo, and they sell their customers' information to a third party, then how would the United States courts bring either the company head or the company itself under American jurisdiction? If a majority of the gamblers were located in New York, and a majority of the investigation was occurring there, then how could either the New York state courts or the United States federal courts bring either the company head or the company under its jurisdiction? Similar to the WTO dispute, foreign nations would argue the United States has no authority to cross international borders in an attempt to regulate foreign citizens.²¹³ It is likely the United States would take a similar stance if the situation was reversed. If the United States chose to not enforce its laws abroad, then would the United States have to resort to a position similar to the BetonSports indictment in which it simply waited for the offender to re-enter the United States and then arrested them?²¹⁴

210. H.R. 2046; 31 U.S.C. § 5383(j) (2007).

211. *Id.*

212. H.R. 2046; 31 U.S.C. § 5383(3)(B)(i)-(iii) (2007).

213. *See 285 Request*, *supra* note 53.

214. *See Richtel*, *supra* note 124.

While this seems to be the option that would take the longest and would also be the least likely to occur, it may be the only one that is within the constitutional parameters of the American courts.²¹⁵

The acting court with jurisdiction may also:

[I]ssue an order requiring the person summoned to appear before the Director or a delegate of the Director to produce books, papers, records, and other data, to give testimony as may be necessary to explain how such material was compiled and maintained, [and] to allow the Director to examine the business of a licensee and to pay the costs of the proceedings.²¹⁶

This does not appear to differ much from a regular subpoena, but once again, the court with jurisdiction would have problems serving such a notice on an officer of the company if their operations were solely based off-shore, as in the aforementioned example.

The IGREa also imposes additional regulations on the licensees apart from those mentioned above. For example, IGREa prohibits any licensee from carrying on business “in any State which prohibits such business within such State if the Governor or other chief executive officer of such State informs the Director of such prohibition before the end of the 90-day period beginning on the date of the enactment of the [IGREa].”²¹⁷ In addition, IGREa prohibits any licensee from engaging in taking Internet bets or wagers “in connection with any sport event or contest of any sporting league which prohibits such business if the chief executive officer of such sporting league informs the Director before the end of the 90-day period.”²¹⁸

IGREa failed to address protection for third-party financial institutions.²¹⁹ First, “No person shall be held liable for engaging in investment banking activities for or on behalf of a licensee or involving a licensee, if such activities are performed in compliance

215. See U.S. CONST. art. III.

216. H.R. 2046; 31 U.S.C. § 5383(l)(C) (2007).

217. H.R. 2046; 31 U.S.C. § 5385(a)(1) (2007).

218. *Id.*

219. H.R. 2046; 31 U.S.C. § 5384 (2007).

with [the IGREA and other various laws].”²²⁰ Second, “No person shall be held liable for engaging in payments processing activities for or on behalf of a licensee or involving a licensee, if such activities are performed in compliance with [the IGREA].”²²¹ Third, “No financial institution shall be held liable for engaging in financial activities and transactions for or on behalf of a licensee or involving licensee, if such activities are performed in compliance with [the IGREA] and with applicable . . . banking laws.”²²²

B. Internet Gambling Regulation and Tax Enforcement Act of 2007

The Internet Gambling Regulation and Tax Enforcement Act of 2007 (IGRTEA) was introduced on June 7, 2007.²²³ It was proposed after IGREA, in order to specify what taxes were to be imposed on the prospective licensees for the privilege of receiving a license.²²⁴ In order to do this, IGRTEA amends Section 36 of the Internal Revenue Code of 1986.²²⁵ The statute states, “Each licensee shall be required to pay to the Director during each 30-day period of operation a license fee of 2 percent of all funds deposited with or on behalf of the licensee by any person for the purpose of placing a bet during the preceding 30-day period.”²²⁶ The IGRTEA ensures that the licensee, herself, pays the tax and does not pass it off on her customers.²²⁷ Finally, IGRTEA emphasizes the importance that the licensee ensures that all necessary fees and taxes are paid to the government:

No person shall receive a license if: [t]hey don’t implement proper mechanisms to ensure that all taxes

220. H.R. 2046 at 31 U.S.C. § 5384(a).

221. H.R. 2046 at 31 U.S.C. § 5384(b).

222. *Id.*

223. H.R. 2607, 110th Cong. (1st Sess. 2007).

224. *Id.*

225. H.R. 2607 at § 2(a).

226. H.R. 2607; 36 I.R.C. § 4491(5)(A)(i).

227. H.R. 2607; 36 I.R.C. § 4491(5)(B). In particular, the statute states, “The license fee shall be direct and exclusive obligation of the licensee and may not be deducted from the amounts available as deposits to the person placing a bet.” *Id.*

due to the government are paid in full in terms of on the winnings . . . [t]hey don't pay their own taxes as to the implementation of their Internet business . . . [and] [t]hey don't pay the license fees.²²⁸

This bill is a response to the concern that IGREA faces an uphill battle in its passage. Through the refusal to obey WTO rulings, the U.S. has expressed its desire for Internet gaming to be legal; if, however, Internet gambling is legalized, the government would want sole control over regulations affecting the industry.²²⁹ The IGRTEA provides for extra revenue for the government through the licensees, themselves, in addition to the taxes they would already be obligated to pay as a business under the Internal Revenue Code.²³⁰ Thus, in turn for passing some kind of licensing scheme, additional revenue would come to the government for whatever use it desires. The statute further emphasizes the licensee must pay all taxes on any winnings procured by the gamblers, as well as their own taxes as an entity doing business in the United States, even if the provider entity is wholly foreign based.²³¹

Not all states, however, sat back and passively allowed the bills to be debated. Other state representatives introduced bills which seemed to stall the debate or discussion of the legalization of an Internet gambling licensing scheme.

C. Internet Gambling Study Act

The Internet Gambling Study Act (IGSA) was introduced by Representative Shelley

Berkeley (D-NV) on May 3, 2007. The IGSA was similar to a Bill, H.R. 5474, which was previously introduced on May 24, 2006 by Representative Jon Porter (R-NV).²³² The IGSA “[authorizes a federally funded study] by the National Academy of Sciences to identify the proper response of the United States to the growth of

228. H.R. 2607 at PAGE; 36 I.R.C. § 4491(7).

229. H.R. 2607, 110th Cong., 1st Sess. (2007).

230. *Id.*

231. *Id.*

232. H.R. 2140, 110th Cong. (1st Sess. 2007).

Internet gambling.”²³³ The IGSA expressed the desire to analyze the impact that the UIGEA has on American Internet gambling.²³⁴

The IGSA used two previous findings as justification to conduct more studies on the impact UIGEA had over its initial one-year period.²³⁵ These studies found:

Many observers and industry analysts believe that it is impossible to stop the sale of most products or services over the Internet . . . [and] [a]lthough interpretations of a recent ruling of the World Trade Organization’s appellate body differ, legal experts agree that it calls into question whether certain of Federal and State gambling laws violate the commitments of the United States under the General Agreement on Trade and Services.²³⁶

Again, IGSA emphasizes the necessity of the United States to at least examine the WTO ruling.²³⁷ It calls on the government to analyze the impact the elimination of all American subscribers from its servers had on the Internet gambling. The IGSA does not bring to attention the fact that many Americans are still able to gamble online by using various servers that circumvent UIGEA’s procedures and provide a system in which the gambler can deposit funds in an account using a credit card or bank account, despite UIGEA’s explicit prohibition against such actions.²³⁸

The IGSA lists issues it believes the study should consider before any Internet gambling license scheme is considered in Congress. These issues include: assessing the ability of Americans to utilize Internet gaming sites; determining what effects Internet gambling has on minors and compulsive gamblers, as well as what safeguards are already in place for dealing with these effects; determining how much of Internet gaming revenue is being utilized by terrorists and

233. *Id.*

234. *Id.* at § 2.

235. *Id.* at § 2(a)(3)-(4).

236. *Id.*

237. *Id.* at § 2(a)(6).

238. *See* discussion *supra*, at 55.

other like organizations for purposes of money laundering or fraud; analyzing the licensing systems already in use by other countries; looking at the possibility of having the states develop their own frameworks and concurrently, any federalism issues that may arise; looking at the forecasted potential tax revenue that could be realized from legalizing such a scheme; and looking at the impact the refusal of the United States to honor the WTO ruling as well as looking at possible solutions to obtain international cooperation in dealing with American procedures.²³⁹

Representative Berkeley suggested that a licensing scheme will fail in passage unless some of these issues are discussed and handled. If this bill was enacted, IGREa should be put on the “back-burner” until the study has been completed and its findings presented to Congress. This is because if the study is thorough, then its findings will very well lead to strong justifications for the passage of an American licensing scheme and the subsequent overruling of UIGEA. Representative Berkeley is simply looking for the possibility that her state will be able to be the leader in the development in this new industry, as it has been in “land” gaming since its legalization some 150 years ago.

VII.CONCLUSION

With the Internet gaming industry’s future uncertain, at least within American borders, the gaming industry as a whole also seems to be teetering on a slight scale to stay afloat and to be as profitable as it has been in the past. Thus, because of the availability of gambling through other mediums, people no longer have to go to an actual casino to wager. They can stay at home and gamble at their computer, or now, on their mobile phones.²⁴⁰ As with technological advancements in other major industries, the gaming industry recognizes that it must adapt to the changing circumstances, or suffer at the hands of more convenient, user-friendly methods of gambling.

239. H.R. 2140, § 3(a)(2)(A)-(J).

240. See Spin3 Official Site, <http://www.spin3.com> (last visited Nov. 25, 2008) (describing new forms of interactive gaming which can be done over one’s mobile phone).

While casinos know that for many people nothing can beat the feeling of actually pulling the slot machine handle down, physically rolling the dice, seeing a royal flush in your hands, and then physically collecting and rejoicing in the winnings. For other sectors of the gaming industry, however, convenience is everything. Casinos want to play some part in the regulation of these Internet sites, rather than simply see their revenues decrease and the proceeds go overseas.

It seems as though the passage of IGREA would be a step in the right direction, mainly because even with the passage of UIGEA, Americans have still found a way to gamble online. This simple fact should make the United States government want to adopt some sort of licensing scheme so they can enjoy the revenue generated from a multi-billion dollar industry, as well as have some control over its usage. Other less technologically innovative countries have successfully implemented and are operating their own Internet gambling licensing schemes. Therefore, the revenues the United States could be receiving are instead going overseas to the countries operating with licensing schemes. With the recent suffering of the economy, the United States should be looking to expand sources of revenue. The gaming industry could only help in this regard.

Moreover, with recent international events, the United States has demonstrated its willingness to unilaterally act in situations which affect not only its own citizens, but the citizens of the world as a whole. The WTO has played a role in the Internet gambling industry in its relation to GATT. The United States has ignored its rulings, and has continued to act according to the measures prescribed under UIGEA. If IGREA is passed, however, the United States will need to cooperate with other nations to ensure that many of its provisions are recognized. With the current resentment of many countries against the United States because of its denial to American gambling markets, many countries would ignore any desires to recognize the American policies, much less abide by them. The Foreign Sovereign Immunities Act recognizes the reality that:

If every state and nation attempts to apply its laws with respect to Internet activities it deems illegal, the end result will be an Internet that satisfies the lowest common denominator in terms of acceptable activity. Values and mores are so different and the desire to

regulate so different—especially from country-to-country—that agreeing to a common framework would be difficult.²⁴¹

While it is important to recognize that it will never be likely or possible that a uniform system of regulation could be developed, international comity becomes a focal point in any law passed within a nation's borders that has prospective effect on other nations.²⁴² In order to enforce a licensing scheme, the United States would need the cooperation of other nations, as well as international organizations including the WTO. The United States would be unable to gain this support until it fulfills its commitments under GATT and addresses both the WTO ruling, and the requisite measures to abide by that ruling. A licensing scheme of its own surely seems to be a step in the right direction.

Moreover, despite the thoughts that UIGEA would eliminate all Internet gambling within its own borders, it is becoming clear that Americans are still partaking in gambling online even though it should be illegal. The government does not realize the vast availability of off-shore sites which offer gambling services to American customers. There are currently seventy-six jurisdictions which offer some form of license for participation in online gaming.²⁴³ Thus, Internet gambling has not been eliminated from the entire world, even with the passage of UIGEA, as the government seems to think would have been a plausible result. Following this line of reasoning, UIGEA has failed to be effective, which calls for a change.

Despite the United States government's position on whether or not Internet gambling should be legalized, it should at least recognize the large economic role the gaming industry as a whole plays in several of its states, most recognizably Nevada. However, with the passage of Indian gaming laws and the availability of gambling to forty-eight out of the fifty states' citizens, the federal government must consider the welfare of these people, who are also American

241. 28 U.S.C. § 1605 (2007).

242. GAMBLINGLICENSES.COM, www.gamblinglicenses.com (last visited Nov. 25, 2008).

citizens. The American economy has taken a hit over recent years, and in times of economic crises, consumer demand for luxury goods decreases. Gambling is considered a luxury, and more and more people are unable to afford their monthly or yearly trip to Las Vegas, Biloxi, or Atlantic City, to name a few. However, people may be more likely to gamble if they can do it from the convenience of their own homes. Consumer industries have realized this in the past, with the introduction of sites such as Amazon, which provides the consumer with an “all-in-one” store in which users can simply click on an item, add it to their shopping cart, pay for the items and arrange for delivery, all without ever taking off their bathrobe and slippers. With the American way of life, known for its rapid pace, convenience becomes important as there are simply not enough hours in the day.

Internet gambling has been accessible in the United States for six years now, and the government has yet to find an effective solution in dealing with it. They allowed it all and subsequently outlawed it all several years later. It seems that the most effective demonstration of Internet gambling regulation has been the licensing systems utilized by other countries. It is only logical the United States would find it necessary to develop a similar system in order to receive the additional revenues, as well as play some role in the regulation of its own citizens. Technology continues to develop at a rapid pace, and the United States must continue to be at the forefront of such developments and not fall behind, especially in a multi-billion dollar industry such as gambling. The United States is currently falling behind the pack, and the horses are nearing the last bend. The United States needs to mount a come-back and end in the winner’s circle, rather than be the last horse in a race to billion-dollar revenues.

