

2007

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Recommended Citation

PeterPaul Shaker J.D., *America's Bad Bet: How The Unlawful Internet Gambling Enforcement Act Of 2006 Will Hurt The House*, 12 Fordham J. Corp. & Fin. L. 1183 (2007).

Available at: <https://ir.lawnet.fordham.edu/jcfl/vol12/iss6/4>

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America's Bad Bet: How The Unlawful Internet Gambling Enforcement Act Of 2006 Will Hurt The House

Cover Page Footnote

The author would like to thank Professor Harold F. Moore for his comments and direction in writing this paper.

AMERICA'S BAD BET: HOW THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 WILL HURT THE HOUSE

*PeterPaul Shaker**

INTRODUCTION

America's Second Prohibition, centered on online gambling, has met criticism at home for its impractical and hypocritical nature, and earned disdain abroad for its disrespect of World Trade Organization (the "WTO") obligations to equal market access. By preventing American financial institutions from facilitating online wagers, the Unlawful Internet Gambling Enforcement Act of 2006 (the "UIGEA") ushers in an era of greater risk to American online gamblers, many of whom ignore the law and continue to place Internet wagers through less reliable means. Further, the UIGEA continues America's recent attack against online gambling providers—an attack the WTO deems a violation of the General Agreement on Trades and Services ("GATS"), to which the United States is a party. Continued resistance to these WTO obligations could come back to haunt America as the WTO may suspend trademark and copyright protection agreements, opening up a floodgate for worldwide knockoffs of American intellectual property. Congress should repeal the UIGEA, thereby preventing a Second Prohibition and protecting American intellectual property interests.

In 2006, the Internet gambling market was expected to reach \$15 billion worldwide, eclipsing the 2005 total of \$12 billion,¹ half of which came from the pocketbooks and piggy banks of as many as 23 million.² Internet gambling activity is specifically high in the U.S. market not because of America's greater thirst for action but rather because of

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1. Jeremy Herron, *Internet Gambling Still Expected to Grow*, (Oct. 16, 2006) http://fairplayers.com/en/magazine/hot_news_fairplayers_09.html.

2. Frank Ahrens, *New Law Cripples Internet Gambling: Banks Are Barred From Handling Transactions*, WASHINGTON POST, Oct. 14, 2006, at A1.

America's technological advances which make Internet gaming possible.³ Gambling is a generally accepted pastime in much of the world and enjoys a \$260 billion global market.⁴ Both the Asian and European Internet gambling markets are expected to grow as broadband Internet connects more of their cities and villages to the World Wide Web.⁵

In October 2006, Congress passed the UIGEA, which seeks to prevent online gambling by criminalizing fund transfers from American financial institutions to gambling websites.⁶ The global nature of the Internet renders the UIGEA's aim impractical as bettors sidestep illegal fund transfers by using online third-party vendors, whose activity is beyond the reach of American lawmakers.⁷ Further, UIGEA conflicts with the United States' WTO commitments, specifically GATS.⁸

This paper argues that the UIGEA hurts American interests and should be repealed and replaced with laws that monitor and regulate Internet gambling. Part I of this paper focuses on American legislative history of gambling and the United States World Trade Organization obligations. Although individual states are the ultimate arbiters of the types of gambling that may take place within their borders, the federal government has the power to regulate interstate gambling activities. In doing so, however, the federal government must remain cognizant of America's foreign obligations, namely to the World Trade Organization. Part II presents and analyzes relevant UIGEA provisions. The bill's legislative history depicts its shadowy eleventh-hour addition to the overwhelmingly supported Safe Port Act, leaving UIGEA provisions bare and lacking real teeth. Part III looks at the domestic and foreign effects of UIGEA. At home, people are still gambling online but with fewer safeguards and higher risk. Abroad, America is publicly running afoul of its World Trade Organization obligations, an act that could cost

3. Herron, *supra* note 1; see also C. Jeremy Pope, *Losing the Battle But Winning the War: The Federal Government's Attempts to Regulate Internet Gaming Through Utilization of the Wire Act and Other Means*, 75 MISS. L.J. 903, 904 (2005).

4. Herron, *supra* note 1.

5. *Id.*; see also United States General Accounting Office: Report to Congressional Requesters, *Internet Gambling: An Overview of the Issues*, GAO-03-09, 17 (2002) (explaining that "over 50 countries and foreign jurisdictions, mostly in Europe, the Caribbean, and the Australia/Pacific region, have legalized Internet gambling") [hereinafter GAO Report].

6. Ahrens, *supra* note 2.

7. See *infra* notes 116-20 and accompanying text.

8. See *infra* notes 136-39 and accompanying text.

the United States a pretty penny.

I. BACKGROUND OF AMERICA'S ATTACK ON INTERNET GAMBLING

A. America Builds its House

States have the right to regulate gambling activities within their borders, while the federal government is allowed to regulate interstate gambling activities.⁹ Generally, the perception is that gambling is best regulated on the local level, and that the federal government supports the states in enforcing their own laws.¹⁰ Currently, forty-eight states and the District of Columbia allow some type of gambling activity, while only Utah and Hawaii restrict all forms.¹¹

The commerce clause allows Congress to regulate all interstate commerce, including interstate gambling.¹² Federal gambling laws do not replace state laws, rather they protect them from circumvention in interstate and foreign commerce.¹³ Congress passed a series of laws meant to restrict gambling activities, including the Wire Act, the Travel Act, and the Illegal Gambling Business Act.¹⁴ Collectively, these acts are referred to as the federal anti-racketeering laws,¹⁵ and they were intended to curb organized crime.¹⁶ These laws were not meant to usurp the states' police power over gambling activities;¹⁷ rather they were intended to bring organized crime bosses under federal jurisdiction for violating multiple state gambling laws.¹⁸

The Department of Justice (the "DOJ") takes the view that these anti-racketeering laws extend to Internet gambling businesses.¹⁹ The

9. Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, ¶5 (2004).

10. *Id.*

11. *Id.* at n.15.

12. GAO Report, *supra* note 5, at 11-12.

13. *Id.*

14. Pope, *supra* note 3, at 905-06.

15. Jeffrey Rodefer, *Federal Wager Wire Act*, available at <http://www.gambling-law-us.com/Federal-Laws/wire-act.htm> (last visited May 22, 2007).

16. Pope, *supra* note 3, at 906.

17. Rodefer, *supra* note 15.

18. Rodefer, *supra* note 15; see also Pope, *supra* note 3, at 906.

19. Rodefer, *supra* note 15.

DOJ relies mainly on the Wire Act,²⁰ which makes it a crime to use a wire communication to engage in the “business of betting or wagering.”²¹ The Wire Act does not criminalize the act of gambling, only the business of gambling.²² The DOJ contends that although the Wire Act and related anti-racketeering laws predate the advent of the Internet, the Internet falls reasonably within the statute’s wording.²³

The DOJ uses the Wire Act to prosecute operators of gambling websites.²⁴ In 2001, the DOJ used the Wire Act as the basis to prosecute Jay Cohen for operating World Sports Exchange, which allowed American bettors to place sports wagers.²⁵ In July 2006, the DOJ used the Wire Act to prosecute BetonSports.com CEO David Carruthers for allowing Americans to wager on sports and casino games.²⁶ The DOJ does not differentiate between the type of Internet gambling activity offered by the website, interpreting the Wire Act as reaching sports wagers, casino games, and games of chance.²⁷

The circuits do not agree that the Wire Act universally applies to online gambling.²⁸ In *United States v. Cohen*, the second circuit court found that the Wire Act applied to online sports wagers.²⁹ *Cohen* did not consider whether the Wire Act applied to games of chance such as casino games.³⁰ With *In re Mastercard International*, the Fifth Circuit found that the Wire Act did not apply to games of chance in that “a plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sporting event or contest.”³¹ Neither the

20. GAO Report, *supra* note 5, at 11.

21. 18 U.S.C. § 1084(a) (2007); *see also* GAO Report, *supra* note 5, at 12-13 (explaining that ambiguity surrounding the phrase “wire communication” may develop as Internet technology becomes wireless).

22. Rodefer, *supra* note 15; *see also* Pope, *supra* note 3, at 907-08.

23. GAO Report, *supra* note 5, at 12 (“Internet gambling falls into this category, as bets are generally placed at a personal computer in one state or country and received at a server in another state or country.”).

24. Ahrens, *supra* note 2.

25. *See generally* *U.S. v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

26. *See generally* Chuck Humphrey, *BetonSports Charges: History of Online Gambling Criminal Charges*, <http://www.gambling-law-us.com/Articles-Notes/online-gambling-arrests.htm> (last visited May 22, 2007).

27. *Cohen*, 260 F.3d 68.

28. Pope, *supra* note 3, at 908-10.

29. *Id.*

30. *Id.*

31. 132 F. Supp. 2d 468, 480 (2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002); *see also* Pope, *supra* note 3.

second nor the fifth circuit agree with the DOJ's view that the Wire Act applies universally to online gambling.

Congress has considered the issue of Internet gambling on several occasions since the phenomena's birth in the early 1990's.³² In 1996, Congress created the National Gambling Impact Study Commission to examine the social and economic impacts of gambling in general and also Internet gambling specifically.³³ In 2002, Congress requested that the United States General Accounting Office (the "GAO") examine U.S. payments systems with respect to Internet gambling.³⁴ While Congress could have addressed its concerns about Internet gambling following either of its inquiries, Congress chose not to take restrictive actions against online gamblers, gambling websites or financial institutions before UIGEA.³⁵

B. World Trade Organization Obligations

Formed in 1995, the WTO is a trade association designed to facilitate trade and foster economic relationships³⁶ among its 150 member nations.³⁷ The WTO has three aims: to help trade flow freely, to serve as a forum for trade negotiations and to serve as a forum for dispute settlement.³⁸ The WTO functions as a forum for continuous

32. GAO Report, *supra* note 5, at 1.

33. *Id.* (explaining that the comprehensive legal and factual study "recommended (1) that the federal government prohibit any Internet gambling not already authorized and encourage foreign governments not to harbor Internet gambling organizations, and (2) that Congress pass legislation prohibiting the collection of credit card debt for Internet gambling").

34. *Id.*

35. Pope, *supra* note 3, at 905 (explaining that the federal government uses decades old statutes to prosecute Internet gambling operations because specific "federal legislation aimed at combating Internet gambling has failed to gain passage by Congress").

36. Philip M. Nichols, *Trade Without Values*, 90 NW. U.L. REV. 658, 658-59 (1996) (describing the World Trade Organization formation as a result of the Uruguay Round of Multilateral Trade Negotiations).

37. See *Understanding the WTO: Members and Observers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (listing 150 member nations) (last visited Apr. 16, 2007); see also *US Paves Way For Russia WTO Entry*, BBC NEWS, Nov. 19, 2006, <http://news.bbc.co.uk/2/hi/business/6163008.stm> (reporting Russia's impending entry into the WTO, bringing total WTO membership to 150 nations).

38. Craig A.A. Dixon, Note, *Environmental Survey of WTO Dispute Panel*

negotiations and allows member nations to fine-tune trade policy.³⁹ WTO members submit their disputes concerning their economic relationships to a Dispute Settlement Board (“DSB”)⁴⁰ whose holdings are binding unless overturned by a vote of every member nation.⁴¹ The DSB administers WTO rules and procedures and has the authority to establish panels, adopt panel reports, monitor implementations of panel rulings, and authorize suspensions of WTO concessions and obligations.⁴² The United States has agreed to take trade disputes arising under its WTO commitments before the DSB.⁴³

GATS is the official trade agreement governing trade in services among WTO members.⁴⁴ The WTO provides member nations a list that classifies service sectors and sub-sectors negotiable under GATS.⁴⁵ GATS regulates a number of different services and operates as a multilateral framework of principles meant to liberalize trade regulation among WTO members.⁴⁶ One goal of GATS is to reduce restrictions

Resolution Decisions Since 1995: “Trade at All Costs?”, 24 WM. & MARY ENVTL. L. & POL’Y REV. 89, 91-92 (2000).

39. Nichols, *supra* note 36, at 659.

40. Jay L. Eizenstat, Comment, *The Impact of the World Trade Organization on Unilateral United States Trade Sanctions Under Section 301 of the Trade Act of 1974: A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute*, 11 EMORY INT’L L. REV. 137, 149 (1997).

41. Nichols, *supra* note 36.

42. Eizenstat, *supra* note 40.

43. *Id.* at 151.

44. Stewart M. Young, *Article: Whistleblowing in a Foreign Key: The Consistency of Ethics Regulation under Sarbanes-Oxley with the WTO GATS Provisions*, 32 DENV. J. INT’L L. & POL’Y 55, 59 (2003).

45. *World Trade Organization: Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991), <http://www.takuzinis.lv/xhtml1.1/20040417.html> (last visited May 22, 2007). These services include business, communications, construction, distribution, educational, environmental, financial, health, tourism, recreational and transport. *Id.*

46. Young, *supra* note 44, at 60:

With trade in services, one does recognize the legitimate need for regulations. There is a legitimate purpose to restricting trade in services to maintain proper quality for those services domestically, while there is also a legitimate need to liberalize the trade of these services as well. GATS is a mesh of these two legitimate needs; allowing countries on the one hand to keep their legitimate restrictions and regulations on certain industries, while also creating an atmosphere of liberalization of trade in those industries through an international agreement.

Id.

that might unfairly discriminate against foreign service providers.⁴⁷ Therefore, GATS allows WTO members to implement regulations adverse to WTO liberalization objectives only if such regulations are supported by national policy objectives.⁴⁸

According to the Schedule of Commitments (“SOC”), WTO member nations may choose which services are subject to GATS.⁴⁹ The SOC is a list of obligations by which member nations of the WTO agree to be bound.⁵⁰ A service industry is subject to GATS once a WTO member lists that service industry in its SOC.⁵¹ If a member lists a service industry on its SOC, all future laws and regulations implemented by that member must comply with GATS.⁵² The WTO interprets the United States’ GATS commitments to include specific commitments for gambling and betting services.⁵³

In August 2003, Antigua and Barbados brought a GATS violation claim against the United States, arguing that certain United States measures prevent the cross-border supply of gambling and betting services.⁵⁴ Antigua and Barbados alleged that the aforementioned three U.S. federal laws (the Wire Act, the Travel Act, and Illegal Gambling Business Act) were inconsistent both with U.S. GATS obligations and with the U.S. Schedule of Specific Commitments annexed to GATS.⁵⁵ The United States invoked a GATS exception, asserting that the federal laws were “necessary” for the protection of public morals.⁵⁶

47. *Id.* at 61.

48. *Id.* (explaining that “the WTO seeks to ensure that member nations do not attempt to hinder international trade unless the WTO member has legitimate and genuine objectives (known as a national policy objective within the wording of GATS)”).

49. *Id.* at 62.

50. *Id.* at 63.

51. *Id.*

52. *Id.* at 64.

53. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, World Trade Organization Dispute Settlement: Dispute DS285, (Jan. 5, 2007) http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm. The WTO views Internet gambling as a service covered by GATS sub-sector entitled “Other Recreational Services (except sporting)” to which the United States claimed no exception in its Schedule of Commitments. *Id.*

54. *Id.*

55. *Id.* (stating that Antigua claimed violations of GATS Articles II, VI, VIII, XI, XVI and XVII).

56. *Id.* (stating that the U.S. claimed exceptions under GATS Articles XIV(a) and

In November 2004, the dispute resolution panel ruled in favor of Antigua and Barbados, finding that the United States had violated its GATS obligations.⁵⁷ The panel concluded that the three federal laws prohibit cross-border supply contrary to U.S. market access commitments.⁵⁸ The panel rejected the United States GATS exceptions as the United States failed to prove that the three federal laws were necessary for the protection of public morals, citing legislative gambling carve-outs throughout the United States, particularly the Interstate Horse Racing Act.⁵⁹ The United States appealed the panel's findings.⁶⁰

In April 2005, the appellate panel also found that the United States had violated its GATS obligations.⁶¹ The appellate panel upheld both the panel's finding "that the United States' Schedule includes a commitment to grant full market access in gambling and betting services" and the panel's finding "that the United States acts inconsistently with Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 by maintaining certain limitations to market access that are not specified in its Schedule."⁶² The appellate panel found that the three federal laws were justified under Article XIV(a) but that the United States had failed to show that these laws satisfied the overarching goal of Article XIV,⁶³ as will be discussed in detail in Part III below.

XIV(c), which exempt legislation "necessary to protect public morals or to maintain public order").

57. *Id.*

58. *Id.*

[The] three U.S. laws (the Wire Act, the Travel Act and the Illegal Gambling Business Act) . . . , on their face, prohibit one, several or all means of delivery included in mode 1 (i.e. cross-border supply), contrary to the United States' specific market access commitments for gambling and betting services for mode 1. Therefore, the United States failed to accord services and service suppliers of Antigua treatment no less favourable [sic] than that provided for under the terms, limitations and conditions agreed and specified in the US Schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS (i.e. concerning market access).

Id.

59. *Id.*; see also 15 U.S.C. §§ 3001-3007 (The Interstate Horse Racing Act).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* The appellate panel

reversed the Panel's finding that the United States had not shown that the three federal statutes are "necessary to protect public morals or to maintain public order" within the meaning of Article XIV(a); found that the United States' measures are justified under Article XVI(a) of the GATS as measures "necessary to protect public morals or to maintain public order;" and upheld, albeit on a narrower ground, the Panel's finding

In April 2005, the DSB adopted the panel report as modified by the appellate panel and recommended that the United States bring the inconsistent measures into conformity with its GATS obligations.⁶⁴ The U.S. intended to comply with the DSB recommendations through legislation.⁶⁵ Rather than pass any legislation ameliorating the DSB concerns, in April 2006, the U.S. informed the DSB that it had been in compliance with its recommendations all along, using as evidence a DOJ statement made before a U.S. House of Representatives subcommittee:

The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horse Racing Act, 15 U.S.C. §§3001-3007, amended the existing criminal statutes. In view of these circumstances, the United States is in compliance with the recommendations and rulings of the DSB in this dispute.⁶⁶

Antigua and Barbados assert that the U.S. has failed to comply as the DOJ statement was in fact one of the arguments proposed to and rejected by both the panel and appellate panel.⁶⁷ Antigua and Barbados have requested that the DSB establish a panel assessing U.S. compliance with DS285.⁶⁸

that the United States had failed to show that these measures satisfy the conditions of the chapeau of Article XIV.

Id.

64. WTO Dispute Settlement Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 2006 WTO DS Lexis 69, at *1 [hereinafter DSR].

65. *Id.* at *2-3.

66. *Id.* at *3-4.

67. *Id.* at *4-5.

68. *Id.* at *14.

II. UIGEA LEGISLATIVE HISTORY & RELEVANT PROVISION ANALYSIS

A. The Bad Bet

Sponsored by Rep. Robert W. Goodlatte (R-Va.),⁶⁹ UIGEA was added to the Safe Port Act (HR 4954)⁷⁰ at the urging of Senate Majority Leader Bill Frist (R-Tenn.) and Senator Jon Kyl (R-Az.).⁷¹ Goodlatte sponsored the bill because of his belief that Internet gambling hurts American society:

All the problems that manifest themselves with gambling, even in heavily regulated states, are even worse on the Internet. There are family problems, bankruptcy problems, gambling addiction, gambling by minors, using gambling to launder money for criminal and terrorist organizations and organized crimes. It does not help our society.⁷²

President Bush signed the bill into law in October, 2006.⁷³

UIGEA is based on two bills that previously failed to gain Congressional approval, H.R. 4411 and H.R. 4777.⁷⁴ The “Unlawful Internet Gambling Enforcement Act of 2005” (H.R. 4411) sought to

69. Ahrens, *supra* note 2.

70. I. Nelson Rose, *Gambling and the Law: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed* (2006), http://www.gamblingandthelaw.com/columns/2006_act.htm (last visited May 22, 2007).

Professor I. Nelson Rose is an internationally known scholar, public speaker and writer and is recognized as one of the world’s leading authorities on gambling law. A 1979 graduate of Harvard Law School, he is a tenured full Professor at Whittier Law School in Costa Mesa, California, where he teaches one of the first law school classes on gaming law.

I. Nelson Rose, <http://www.casinocitytimes.com/news/article.cfm?contentID=161472> (last visited May 22, 2007).

71. AFX News Limited, *Roundup: Online Gaming Stocks Plummet After Anti-Gaming Legislation Passed*, <http://www.forbes.com/business/feeds/afx/2006/10/02/afx3059915.html> (last visited May 22, 2007); *see also* Rose, *supra* note 70. UIGEA “was rammed through Congress by the Republican leadership in the final minutes before the election period recess. According to Frank R. Lautenberg (D-NJ), no one on the Senate-House Conference Committee had even seen the final language of the bill.” *Id.*

72. Ahrens, *supra* note 2.

73. *Id.*

74. Rose, *supra* note 70.

criminalize facilitating unlawful Internet gambling transactions.⁷⁵ The “Internet Gambling Prohibition Act,” (H.R. 4777) “was designed to expand the coverage of the Wire Act to most types of gambling services offered over the Internet.”⁷⁶ UIGEA does not expand the scope of the Wire Act by criminalizing Internet gambling, rather UIGEA aims to prevent Internet gambling by making it difficult for Internet gamblers to access funds.⁷⁷

B. Key Provisions

UIGEA begins with Congress’ findings and purpose.⁷⁸ Congress found (1) that Internet gambling is funded primarily through electronic means,⁷⁹ (2) that a 1999 congressional commission recommended legislation prohibiting electronic fund transfers to Internet gambling sites,⁸⁰ (3) that Internet gambling is a growing problem for some financial institutions,⁸¹ and (4) that new mechanisms are needed if law is to keep pace with technology.⁸² Congress notes that UIGEA does not alter any federal, state or tribal law regulating gambling.⁸³

With congressional purpose established, UIGEA proceeds to define key terms relating to the Act. UIGEA defines a bet or wager as risking something of value on a contest, sporting event or game subject to chance.⁸⁴ A wager also includes purchasing an opportunity to win a prize when that opportunity is subject predominantly to chance.⁸⁵ Further, a wager includes any instrument or information that facilitates the movement of gambling funds.⁸⁶ UIGEA does however exempt certain activities from being considered a bet or wager.⁸⁷ A bet or wager does not include any activity governed by the Securities and Exchange

75. See DSR, *supra* note 64, at 10-11.

76. *Id.*

77. AFX News Limited, *supra* note 71.

78. 31 U.S.C. § 5361 (2007).

79. 31 U.S.C. § 5361(a)(1) (2007).

80. 31 U.S.C. § 5361(a)(2) (2007).

81. 31 U.S.C. § 5361(a)(3) (2007).

82. 31 U.S.C. § 5361(a)(4) (2007).

83. 31 U.S.C. § 5361(b) (2007).

84. 31 U.S.C. § 5362(1)(A) (2007).

85. 31 U.S.C. § 5362(1)(B) (2007).

86. 31 U.S.C. § 5362(1)(D) (2007).

87. 31 U.S.C. § 5362(1)(E) (2007).

Commission⁸⁸ or any activity exempt from regulation under the Commodity Exchange Act.⁸⁹ UIGEA also exempts from consideration several types of fantasy sports.⁹⁰ UIGEA defines unlawful Internet gambling as knowingly transmitting a wager via the Internet where such wager violates any applicable federal, state or tribal law.⁹¹ UIGEA exempts from consideration intrastate bets,⁹² intra-tribal transactions⁹³ and activities allowed under the Interstate Horseracing Act of 1978.⁹⁴

After defining its relevant terms, UIGEA then creates prohibitions. UIGEA prohibits any person engaged in the business of betting or wagering from accepting an unlawful Internet gambling wager via credit,⁹⁵ electronic fund transfer,⁹⁶ check⁹⁷ or other financial transaction.⁹⁸ UIGEA extends the prohibition to all financial institutions, requiring them to identify and block the restricted transactions.⁹⁹ UIGEA exempts restricted transactions that are not practical to identify and block.¹⁰⁰

Finally, UIGEA creates the framework under which its prohibitions will be enforced. Federal financial institution regulators and the Federal Trade Commission are charged with enforcing UIGEA.¹⁰¹ Under UIGEA, both the United States attorney general¹⁰² and state attorney generals¹⁰³ may bring suit in federal court to prevent or restrain restricted transactions.¹⁰⁴ Successful prosecution carries a criminal penalty of a fine and no more than five years in prison.¹⁰⁵

88. 31 U.S.C. § 5362(1)(E)(i) (2007).

89. 31 U.S.C. § 5362(1)(E)(iv)(I) (2007).

90. 31 U.S.C. § 5362(1)(E)(ix) (2007).

91. 31 U.S.C. § 5362(10)(A) (2007).

92. 31 U.S.C. § 5362(10)(B) (2007).

93. 31 U.S.C. § 5362(10)(C) (2007).

94. 31 U.S.C. § 5362(10)(D) (2007).

95. 31 U.S.C. § 5363(1) (2007) (“... including credit extended through the use of a credit card.”).

96. 31 U.S.C. § 5363(2) (2007).

97. 31 U.S.C. § 5363(3) (2007).

98. 31 U.S.C. § 5363(4) (2007).

99. 31 U.S.C. § 5364(a) (2007).

100. 31 U.S.C. § 5364(b)(3) (2007).

101. 31 U.S.C. § 5364(e)(1-2) (2007).

102. 31 U.S.C. § 5365(b)(1)(A) (2007).

103. 31 U.S.C. § 5365(b)(2)(A) (2007).

104. 31 U.S.C. § 5365(a) (2007).

105. 31 U.S.C. § 5366(a) (2007).

C. Analysis

UIGEA's definition of unlawful Internet gambling is ambiguous as it is inconsistent with federal case law.¹⁰⁶ UIGEA allows the DOJ to prosecute American financial institutions that facilitate a wager on a contest, sporting event, or game of chance,¹⁰⁷ but in interpreting the Wire Act, the courts have only deemed Internet wagers on sports and races illegal.¹⁰⁸ Internet casino games (which are games of chance) fall outside the scope of the Wire Act and are legal.¹⁰⁹ Further, the courts have never spoken to the legality of Internet poker.¹¹⁰ The Poker Players Alliance asserts that poker falls beyond both the Wire Act and UIGEA because poker is a game of skill, not chance.¹¹¹

UIGEA exemptions allowing financial institutions to facilitate wagers conflict directly with the rationale for enacting UIGEA. As mentioned above, Goodlatte proposes that Internet gambling creates a moral hazard issue.¹¹² The aim of UIGEA is to curb online gambling by preventing American financial institutions from facilitating fund transfers.¹¹³ Yet, UIGEA creates exceptions in which American financial institutions may facilitate several types of Internet gambling including securities trading, fantasy sports, intrastate wagers, intratribal wagers and activities relating to the Interstate Horseracing Act.¹¹⁴ In order to realize fully its policy goals, UIGEA would have to eliminate these carve-outs.

UIGEA will not achieve its aim of preventing financial transactions between American bettors and Internet gambling sites for two reasons—bettors skirt the law by using e-wallets¹¹⁵ and American financial

106. See Rose, *supra* note 70.

107. See *supra* notes 84, 91, 99, 102 and accompanying text.

108. See Rose, *supra* note 70; see also, *supra* note 31.

109. See *supra* note 31 and accompanying text.

110. See Rose, *supra* note 70.

111. Poker Players Alliance, Memo to Members, available at http://www.pokerplayersalliance.org/alerts/Poker_Players_Alliance_Action_Plan_Oct_1.pdf.

112. See *supra* note 72 and accompanying text.

113. See *supra* note 77 and accompanying text.

114. See *supra* notes 88-90, 92-94 and accompanying text.

115. Associated Press, *Experts: Online Gambling Ban Won't Work*, <http://www.foxnews.com/story/0,2933,224839,00.html> (last visited May 22, 2007) (explaining that online payment processors are known as e-wallets).

institutions are exempted from monitoring checks:

The act makes it illegal for banks to transfer money from customer accounts to online gambling firms. But for the most part, bettors don't pay their online bookies directly. Payments usually are routed to offshore firms through an online intermediary such as Canadian-based Neteller,¹¹⁶ the biggest money-transfer firm in this sphere. In addition, American banking lobbyists insisted that the most basic form of payment be exempted if the industry was to support the law. That's the good old-fashioned check—both paper and electronic versions—whose volume made them impossible to monitor. So checks are exempted.¹¹⁷

Many e-wallets fall outside the reach of UIGEA as they are incorporated in foreign nations and are not subject to U.S. regulations.¹¹⁸ Further, gambling transactions from foreign e-wallets are difficult to monitor because e-wallets mix illegal Internet gambling transactions with other, legal transactions.¹¹⁹

In order to dissuade players from placing wagers, UIGEA would need to criminalize the act of online gambling itself.¹²⁰ As worded, UIGEA provides no disincentives for the average Internet bettor, who

116. In January 2007, Neteller voluntarily removed itself from the U.S. online gaming market following the arrest of 2 of its executives, who were charged with money laundering. See Aaron Todd, *NETeller exit impacts U.S. Internet gambling market* (Jan. 18, 2007), <http://aarontodd.casinocitytimes.com/articles/32260.html>. Epassport.com, MyWebAtm, and YouTeller have emerged to replace Neteller as the e-wallets of choice for U.S. online gamblers. See Haley Hintz, *U.S. Friendly Online Poker Rooms: Where to Play, How to Pay*, <http://www.pokernews.com/news/2007/2/us-friendly-online-poker-rooms.htm> (last visited May 22, 2007).

117. John Heylar, *New Anti-Gambling Law Won't Stop Online Bettors*, <http://sports.espn.go.com/espn/news/story?id=2611872> (last visited May 22, 2007).

118. See Rose, *supra* note 70.

119. See GAO Report, *supra* note 5, at 27. The report states that e-wallets:

[E]nable consumers to use their credit cards to set up accounts with many kinds of Internet-based merchants, including online casinos. The issuers indicated that while on-line payment providers did not circumvent the coding system, most aggregators' transactions were not coded to reflect the purpose or type of transaction such as Internet gambling. Because credit card transaction codes can be obscured as the transactions pass through such intermediaries, issuing banks cannot determine whether credit card funds are being used for Internet gambling.

Id.

120. David H. Lantzer, *Internet Gaming Tax Regulation: Can Old Laws Learn New Tricks?*, 5 CHAP. L. REV. 281, 285 (2002) (explaining that gambling legislation is ineffective as long as bettors are exempt from prosecution).

faces no criminal liability.¹²¹ Further, Internet gamblers need only spend a few extra minutes setting up an e-wallet in order to navigate UIGEA's current restrictions.¹²² Bettors are not inconvenienced by UIGEA¹²³ and anything short of criminal liability is unlikely to dissuade them.¹²⁴

Even if UIGEA were to impose criminal penalties on individual bettors, two huge obstacles would have to be surmounted for enforcement: the privacy of the home and the anonymity of the Internet. Clearly, the bulk of online gambling is done in the home.¹²⁵ Furthermore, obtaining warrants for the over 20 million Internet gamblers¹²⁶ would prove near impossible given the anonymity enjoyed by bettors.¹²⁷ The DOJ has pushed Internet service providers to increase data retention efforts, but Congress has yet to approve such action.¹²⁸ As worded, UIGEA fails to prevent Americans from gambling online; further, UIGEA directly has negatively affected the world economy.

121. See Rose, *supra* note 70 ("Being in the 'business of betting or wagering' still does not include mere players."); see also 31 U.S.C. § 5363 (2007).

122. Catherine Holahan, *Online Gambling Goes Underground: A U.S. Law Aimed at Cracking Down Internet Gambling May Drive the Practice More Into the Shadows and Do Little to Deter Bettors*, http://www.businessweek.com/print/technology/content/oct2006/tc20061019_454543.htm (last visited May 22, 2007).

123. *Id.*

124. See Rose, *supra* note 70.

125. Lara Farrar, *Caught in the Gambling Web*, <http://www.cnn.com/2006/TECH/internet/07/20/online.gambling/index.html> (last visited May 22, 2007).

126. See Ahrens, *supra* note 2.

127. See Farrar, *supra* note 125.

128. Hintze, Haley. U.S. Justice Dept. Officials Continue Push for Increased Net-Monitoring, <http://www.pokernews.com/news/2006/10/justice-officials-push-net-monitoring.htm> (last visited May 22, 2007). On October 18, 2006:

FBI Director Robert Mueller called on Internet service providers to record and store records of their customers' online activities to a greater degree than that currently mandated by law. The move, part of the greater battle between governmental control and the freedom and flow of information that the Internet represents, is likely to trigger fierce debate as privacy and law-enforcement concerns butt heads in a legal battle that's now expected to occur early in 2007.

Id.

III. EFFECTS OF UIGEA

A. UIGEA Caused Decline in Share Value for Several
International Public Companies

When Congress passed UIGEA as part of the Safe Port Act, numerous international companies experienced an immediate decline in share value.¹²⁹ Several public sports-books listed on the London Stock Exchange lost over half their value on the first day of trading following UIGEA's passage—Partygaming PLC lost 2.4 billion sterling (58% of its value) and Sportingbet PLC lost 497 million sterling (64% of its value) by the end of the first trading day following UIGEA's passage.¹³⁰ Nasdaq-listed companies such as Canada's Cryptologic Inc. and Taiwan's GigaMedia, both Internet gambling software manufacturers, also experienced significant immediate drops in share value.¹³¹ UIGEA's passage directly cost public companies money.

B. UIGEA Undermined WTO obligations

In its WTO dispute against Antigua and Barbados, the United States asserted that federal measures preventing Internet gambling satisfied WTO requirements as measures necessary to protect public morals.¹³² The panel found that the U.S. laws were, in fact, measures enacted to protect public morals, but that these measures failed the "necessary test" required by the WTO.¹³³ The appellate panel, however, found that these measures did pass the necessary test, but failed the WTO equal application test as "the U.S. did not demonstrate that the prohibition embodied in the measures at issue applied to both foreign and domestic suppliers of remote gambling services."¹³⁴ Specifically, the appellate panel found that the Interstate Horse-Racing Act seemingly allowed domestic interstate Internet gambling for horse racing.¹³⁵

As a member nation of the WTO, the United States has a GATS

129. See AFX News Limited, *supra* note 71.

130. See AFX News Limited, *supra* note 71.

131. See Herron, *supra* note 1.

132. See note 56 and accompanying text.

133. Bridges: Weekly Trade News Digest, *Antigua, U.S. Gambling Dispute: Appellate Body Issues Mixed Report*, <http://www.ictsd.org/weekly/05-04-13/story2.htm> (last visited May 22, 2007).

134. *Id.*

135. *Id.*

obligation to open its Internet gambling markets to foreign competition.¹³⁶ Prior to the passage of UIGEA, the WTO ruled that the United States violated its GATS obligations by denying market access to foreign Internet gambling sites.¹³⁷ UIGEA was based on two failed legislative proposals, H.R. 4411 and H.R. 4777.¹³⁸ In its dispute settlement report, the WTO explicitly states that “[e]ach Bill is not only non-responsive to the recommendations and rulings of the DSB, [but also] each is in fact directly contrary to the recommendations and rulings in several key respects.”¹³⁹

As a WTO member, the United States has an obligation to adhere to Dispute Settlement Board decisions.¹⁴⁰ In April 2005, the dispute resolution panel ruled that the United States must bring its domestic policy in line with its WTO obligations.¹⁴¹ As the April 2006 deadline approached, the United States still had not enacted any measures satisfying the DSB decision.¹⁴² One week later, the United States informed the DSB of its compliance with the DSB ruling based on a DOJ statement.¹⁴³ Antigua and Barbados dispute that the DOJ statement constitutes compliance with the DSB ruling and have requested that the DSB review the matter.¹⁴⁴

The United States’ failure to respect two major WTO obligations, adherence to GATS provisions and adherence Dispute Resolution Panel ruling, diminishes WTO credibility and opens the door for other member nations to neglect WTO obligations:

The failure of countries to adhere fully to their World Trade Organization obligations would significantly erode, and perhaps completely vitiate, the ability of the World Trade Organization to

136. See *supra* notes 57-63 and accompanying text.

137. *Id.*

138. See *supra* notes 74-76 and accompanying text.

139. See DSR, *supra* note 64, at 11.

140. See *supra* notes 40-43 and accompanying text.

141. See *supra* note 64 and accompanying text.

142. See DSR, *supra* note 64, at 3.

143. See *supra* note 66 and accompanying text.

144. See *supra* notes 67, 69 and accompanying text; see also DSR, *supra* note 64, at 15 (implying that the matter is still unresolved but that the “United States has agreed to accept the establishment of a panel at the first meeting at which this request for the establishment of a panel appears on the agenda”). As of this point, this Author is unaware of the establishment of such a panel.

perform its functions. The World Trade Organization has no resources of its own to enforce compliance. Instead, its authority “will depend entirely on its credibility.” Defiance of any treaty creates a risk that the cooperative structure built around that treaty will collapse. Indeed, one senior trade official has predicted that if the World Trade Organization’s “authority is once eroded by a big trading power, that will be the end of the [World Trade Organization].”¹⁴⁵

Further, if the United States continues to ignore its WTO responsibilities, it may lose invaluable WTO protections:

If the United States remains recalcitrant, under the WTO rules, Antigua would potentially have the right to suspend its own compliance with the treaty that obligates it to respect the United States’ intellectual-property laws. . . . In such a scenario, Antigua couldn’t simply be ostracized as a rogue state. It would have every right under WTO rules to pursue such a course. In fact, Antigua could go down this road only in response to the United States’ continuing refusal to honor *its* [sic] international obligations.¹⁴⁶

C. UIGEA Increased the Risk to American Bettors

Since the passage of UIGEA, Americans have not stopped gambling online but have instead shifted their Internet gaming activities from regulated public websites to unregulated private sites.¹⁴⁷ Public Internet gaming websites are those sites with publicly traded parent companies.¹⁴⁸ Because of both DOJ prosecutions and UIGEA, these sites are voluntarily removing themselves from the American Internet gaming market for fear of criminal prosecution and further economic harm.¹⁴⁹ Private Internet gaming sites, such as Bodog.com and FullTiltPoker.com, have privately owned parent companies.¹⁵⁰ These

145. See Nichols, *supra* note 36, at 708-09.

146. Henry Lanman, *Rolling the Dice: The United States Big Legal Gamble With Internet Gaming*, <http://www.slate.com/id/2153352/fr/rss> (last visited May 22, 2007).

147. See Holahan, *supra* note 122 (explaining that, during the weekend following UIGEA’s signing, several private Internet gambling sites “saw record numbers of players . . . , according to Louisiana’s Casino City, which monitors traffic on online poker sites in its trade journals.”).

148. *Id.*

149. *Id.*

150. *Id.*

sites contend that they are beyond the reach of UIGEA and the DOJ and are continuing to do business as usual with American bettors.¹⁵¹

Public Internet gaming sites are regulated by the exchanges on which their parent companies trade while private Internet gaming sites are completely unregulated.¹⁵² Regulation of Internet gaming sites benefit bettors because regulated sites offer financial transparency and gaming integrity.¹⁵³ Unregulated private websites answer to no one, which increases the risk of theft of player funds or skewed odds.¹⁵⁴

D. UIGEA Increased the Risk of Money Laundering

The DOJ asserts that Internet gambling increases the risk for money laundering due “to the volume, speed, and international reach of Internet transaction and offshore locations of most Internet gambling sites, as well as the fact that the industry itself is already cash-intensive.”¹⁵⁵ One legislative intention behind UIGEA was to reduce the risk of money laundering by making Internet gaming transactions more difficult to complete.¹⁵⁶ By preventing direct links to American financial institutions, UIGEA has not prevented American gamblers from gambling, but has merely forced them to use e-wallet intermediaries to

151. *Id.* (explaining that private companies do not interpret UIGEA as banning casino style games, leaving the industry “in a legal gray area that has existed since November, 2002, when the U.S. 5th Circuit Court of Appeals ruled the 1961 Wire Act only applied to ‘sporting events or contests’ and not to wagers in general”).

152. *Id.*

153. *Id.*

154. *Id.*

[T]he new law will do little to stop online gambling, say gamblers, betting companies, and industry analysts alike. Instead, the law will drive out regulated, publicly traded companies like PartyGaming, the Gibraltar-based parent of PartyPoker, and make way for private gambling companies and banks based in nations where such industries are loosely policed at best. As a result, the new law could ultimately make billions of dollars in U.S. online gambling transactions more difficult to trace, and increase the likelihood that funds end up in criminal hands. “It leaves an opening for some of the more unscrupulous companies coming in from unregulated places,” says Frank Catania, former director of New Jersey’s Division of Gaming Enforcement.

Id.

155. John G. Malcolm, 2003 Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs, <http://www.usdoj.gov/criminal/cybercrime/MalcolmTestimony318.htm> (last visited May 22, 2007).

156. *See supra* note 72 and accompanying text.

transfer funds.¹⁵⁷

Preventing American financial institutions from facilitating Internet gaming transactions will increase the chance of money laundering.¹⁵⁸ Direct linking to American financial institutions allows for better monitoring and reduces the risk of money laundering.¹⁵⁹ E-wallets increase the risk of money laundering because many are incorporated in countries with lax regulatory oversight.¹⁶⁰ Further, when e-wallets transfer funds to American financial institutions, both gambling and non-gambling funds are mixed making it difficult for American banks to block payments.¹⁶¹

E. UIGEA Reflects a Suspect Public Policy Goal

UIGEA's legislative history reflects the public policy notion that gambling hurts society and ought to be strictly regulated.¹⁶² While Congress may espouse such a notion, millions of Americans do not and continue to gamble online, a disregard for legislative authority paralleling the alcohol prohibition of 1919.¹⁶³ Although gambling may in general place a strain on individuals, families, and communities,¹⁶⁴ targeting online gambling will not remedy America's overall gambling problem because the United States continues to allow numerous gambling alternatives. Gambling is ingrained in American life: lottery tickets, bingo, sports betting, office pools, fantasy leagues, horse races, and Las Vegas are but some of the gambling outlets available in the United States.¹⁶⁵ The addictive nature of gambling itself coupled with the numerous avenues to gambling have resulted in millions of Americans developing gambling problems, some so severe that the

157. See Holahan, *supra* note 122.

158. *Id.* The author quotes Molly Millerwise, director of public affairs at the Treasury Department, as saying "that the relative secrecy within which many private e-wallets operate has made them targets for money laundering and the transfer of funds to illegal organizations." *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. See *supra* notes 69-77 and accompanying text.

163. See Ahrens, *supra* note 2.

164. Bernard P. Horn, *Is There a Cure for America's Gambling Addiction?*, <http://www.pbs.org/wgbh/pages/frontline/shows/gamble/procon/horn.html> (last visited May 22, 2007).

165. *Id.*

consequences are bankruptcy, divorce and even suicide.¹⁶⁶ Further, gambling has turned many addicts into first-time criminals who commit felonies to pay off gambling debts, particularly financial crimes like embezzlement, check kiting, tax evasion, as well as credit card, loan, and insurance fraud.¹⁶⁷

As such, state and federal governments have a legitimate interest in passing laws aimed at protecting public morals.¹⁶⁸ A problem arises, however, when the federal government fails to restrict all forms of gambling in a uniform manner.¹⁶⁹ In deciding that the U.S. failed to honor its WTO obligations, the appellate panel found that U.S. public moral concerns are legitimate on their face but fail to pass WTO scrutiny because U.S. federal measures are not applied equally to foreign and domestic remote gambling services.¹⁷⁰ The fact that the IHA seemingly allows domestic interstate Internet gambling,¹⁷¹ coupled with the numerous non-Internet interstate gambling activities that exist across the United States,¹⁷² reflects an inconsistent and therefore suspect public policy agenda.

CONCLUSION

The Unlawful Internet Gaming Enforcement Act of 2006 will have an effect contrary to its legislative intentions as Americans are not deterred from wagering online, and as the risk of money laundering will increase as unregulated private Internet gambling sites replace regulated public Internet gambling sites. Further, UIGEA undermines United States' World Trade Organization obligations as it echoes inconsistent application of federal laws, with repercussions on a potentially global scale. Congress should repeal UIGEA and create a regulatory mechanism satisfactory of the U.S.'s WTO obligations. Doing so will allow America to avoid a second prohibition and contribute to a more seamless global economy.

166. *Id.*

167. *Id.* (explaining that “[p]athological gamblers are responsible for an estimated \$1,300,000,000 worth of insurance-related fraud per year”).

168. *Id.*

169. *See supra* note 134 and accompanying text.

170. *See supra* note 132 and accompanying paragraph.

171. *See supra* note 135 and accompanying text.

172. *See supra* note 165 and accompanying text.