

BREAKING DOWN THE UIGEA: DID CONGRESS KILL INTERNET GAMBLING?

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I. Introduction

More than a few jaws dropped as word of the surprise Congressional action leaked out. The United States government had finally passed a law prohibiting Internet gambling – or so it appeared. Interestingly, the industry seemed willing to accept this reality before it even read the Statute. Mere days after the weekend announcement that Congress had passed the “Unlawful Internet Gambling Enforcement Act of 2006,” (“UIGEA”), several publicly-listed gaming companies announced that they would no longer be accepting wagers from United States citizens.¹ Over seven billion dollars was erased from the London Stock Exchange in a matter of days, as Internet gambling stocks tumbled upon the news of the law’s passage.²

But what is the real relevance and impact of the new legislation? Can it really be labeled as “prohibition?” This article will explore the text of the UIGEA, the events leading up to its passage, and implications for the future.

II. Historical Background

Since 1998, the United States Congress has unsuccessfully attempted to pass some form of Internet gambling legislation. Although such legislation had passed in both the House and the Senate, in previous years, never did that occur in the same congressional session. Commonly, the bills would become bogged down in objections by special interest groups and their lobbyists,

¹ C. Krafcik, “The Infancy of Prohibition - Who's In, Who's Out,” *Interactive Gaming News* (October 16, 2006).

² A. Sullivan, “New Law Won’t Stop Internet Gambling,” *PCWorld.com* (November 21, 2006).

each seeking to include their own “carve out” from the proposed prohibition. Concerns came from the horse racing industry, parimutuel gaming, Indian reservations, land-based casinos, and, of course, the online gaming industry itself. Usually, Congress would run out of time before the pending legislation could clear committee hearings and be calendared for a vote by both Houses of Congress.

2006 proved to be a very different year, however. Republicans, having effectively controlled Congress since 1994, were now in trouble. Allegations of government corruption pervaded the news cycles on a regular basis, including specific concerns relating to the notorious lobbyist, Jack Abramoff’s, previous involvement in advocating for certain gambling interests.³ In response, conservative lawmakers created a ten-point “American Values Agenda” which included a proposed constitutional amendment prohibiting gay marriage, restrictions on stem cell research, and prohibitions on Internet gambling.⁴

Representatives Bob Goodlatte (R-VA) and Jim Leach (R-IA) led the charge to prohibit Internet gambling in the United States. They attempted to link online gaming with all manner of crime and disorder, in the attempt to garner support for their controversial legislation. Goodlatte claimed that online gambling was “sucking billions [of dollars] out of the United States.”⁵ Leach claimed: “The potential threat of identity theft and fraud is high for the individual better just as the risk posed to our national security from terror and criminal organizations that control such sites.”⁶ He further alleged that online gambling has become a “haven for money laundering activities.”⁷ Senator John Kyl (R-AZ), another anti-gambling zealot, attempted to link online

³ Associated Press, “House votes to reign in online gambling” (July 11, 2006).

⁴ Declan McCullagh, “House Votes ‘Yes’ on Net-Gambling Crackdown” *CNetNews.com* (July 11, 2006), which can be viewed at: http://news.com.com/House+votes+yes+on+Net-gambling+crackdown/2100-1030_3-6092852.html.

⁵ Rep. Robert Goodlatte, *Richmond Times Dispatch* (April 6, 2006).

⁶ Rep. Jim Leach, *Wall Street Journal* (April 4, 2006).

⁷ *Id.*

gambling with the occasionally-popular War on Drugs by calling online gambling the “crack cocaine of gambling.”⁸

Despite this thoroughly-considered and focus-group-tested rhetoric, the American public was not buying it. Two well-respected polls conducted in 2006 confirmed that the vast majority of Americans believed that the government should not prohibit Internet gambling.⁹ However, Republicans stuck with their strategy, and continued to pander to the religious right/family values voters, by pushing their morality agenda in the hopes that voter turnout would save them from a feared drubbing at the polls in November, 2006. However, as history showed, the American public had become intolerant of the corruption and mismanagement in their government, and took out their frustration on the Republican leadership at the polls in the mid-term elections – turning over control of both Houses of Congress to the Democrats. However, Republican lawmakers were able to score a last minute victory against the online gambling industry, by pushing through the UIGEA as an add-on to a comprehensive Homeland Security bill that was politically impossible to oppose.

III. Passage of the UIGEA

In early 2006, the United States Congress began debating various bills pertaining to online gambling. As noted above, all previous attempts to prohibit Internet gambling at the federal level failed, for a variety of reasons. In 2006, however, the political environment proved favorable for passage of the desired anti-gambling legislation.

For one, Congress was intent on distancing itself from any continued, perceived influence by those associated with disgraced lobbyist, Jack Abramoff, who had been involved in opposing various gambling bills in the past. Passage of this year’s online gambling legislation provided an

⁸ Sen. John Kyle, *MSNBC.com* (April 10, 2001).

⁹ Zogby International Poll: 87% believe online gambling is a personal choice which should not be banned; *Wall Street Journal* Poll: 85% oppose government prohibition of online gambling.

opportunity to demonstrate that Congress was no longer beholden to his influence. In addition, the effort to vilify Internet gambling provided a convenient distraction to the increasingly unpopular War in Iraq.

In April, 2006, this author predicted that the online gambling industry was at its most vulnerable point in history, in regards to passage of Internet prohibition legislation.¹⁰ Unfortunately, that prediction became reality; but the legislation adopted by Congress was not as comprehensive or problematic as initially feared.

Notably, two (2) separate bills were under consideration by the House of Representatives during the Summer of 2006; the Leach Bill¹¹ and the Goodlatte Bill.¹² The intent of the Leach Bill was to prohibit various electronic financial transactions (“EFTs”) related to online gambling, and to encourage voluntary compliance by foreign governments with efforts to control those transactions. The Goodlatte Bill went a bit further. While it similarly made reference to regulating EFTs, the Bill also sought to expand the scope of the Wire Act¹³ to prohibit the offering of traditional online casino games of chance, in addition to its existing prohibitions on the business of betting on sporting events. The Goodlatte Bill thus sought to alter the definition of what constitutes “the business of betting or wagering” to include online casinos and poker rooms. Since it included a substantive prohibition on a new category of online gambling activity, the Goodlatte Bill was viewed as more controversial than the Leach Bill, and therefore it encountered more opposition as it moved through the halls of Congress. Ultimately, however, the House compromised on a joint Bill that incorporated provisions from both Bills.

¹⁰ See, *Life After Prohibition*, which can be viewed at: <http://www.gamblinglawupdate.com/archives/Life%20After%20Prohibition.pdf>.

¹¹ HR 4411, “The Unlawful Internet Gambling Enforcement Act.”

¹² HR 4777, “The Internet Gambling Prohibition Act.”

¹³ 18 U.S.C. § 1953(a).

On July 11, 2006, the House passed a consolidated Leach/Goodlatte Bill by a vote of 317-93.¹⁴ The proposed legislation then made its way to the Senate for consideration. While most industry observers believed that the Senate would run out of time before it could calendar the Internet gambling issue for discussion and voting, Senate Majority Leader, Bill Frist (R-TN), found a way to get this Bill passed. While his initial efforts to tack this Bill onto an Armed Services spending bill failed,¹⁵ the prohibition campaign finally reached fruition as a compromise Bill was tacked onto the SAFE Port Act, at the last minute, on September 29, 2006.¹⁶ However, in order to ensure passage of the Bill without debate, distraction, or delay, the proponents were required to remove more controversial the portions of the Bill that sought to expand the Wire Act to include prohibitions on online casinos and poker rooms. By removing these provisions, and attaching the remainder of the Bill to Homeland Security legislation, the Act became politically impossible to oppose.

While this shrewd move resulted in the Bill's passage, it also caused a significant "gutting" of the law's prohibitions, along with some confusion and inconsistencies in the remaining language. As discussed below, the UIGEA does not impose any substantive prohibition on gambling activity that was not already present, under state or federal law, before the Bill's passage.

¹⁴ Declan McCullagh, "House Votes 'Yes' on Net-Gambling Crackdown" *CNetNews.com* (July 11, 2006), which can be viewed at: http://news.com.com/House+votes+yes+on+Net-gambling+crackdown/2100-1030_3-6092852.html.

¹⁵ "Online Gambling Bill Hits Snags In Congress," *Reuters.com* (September 26, 2006), which can be viewed at: http://today.reuters.com/news/articlenews.aspx?type=internetNews&storyID=2006-09-26T230803Z_01_N26221105_RTRUKOC_0_US-LEISURE-CONGRESS-GAMBLING.xml

¹⁶ John Caldwell, "Online Poker And Gaming Bill Passes in Late Night, Ditch Effort," *PokerNews.com* (September 30, 2006), which can be viewed at: <http://www.pokernews.com/news/2006/9/online-poker-bill-passes.htm>.

IV. Analysis of the UIGEA

The primary prohibition in the Bill is found in § 5363, entitled “Prohibition on Acceptance of Any Financial Instrument for Unlawful Internet Gambling.” That section provides, in pertinent part:

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, EFTs, checks, drafts, or the proceeds of any other form of financial transaction as set forth in federal regulation].

In other words, the Bill contemplates civil or criminal remedies against individuals and entities involved in assisting or facilitating online gaming transactions, who previously only faced liability under the criminal law concepts of “aiding and abetting” or “conspiracy.” One who substantially assists another individual in committing a criminal offense is punished the same as the principal actor who committed that offense.¹⁷ This is known as “aiding and abetting.” “Conspiracy,” on the other hand, requires the government to prove knowledge of, and voluntary participation in, an agreement to violate the law.¹⁸ Conspiracy does not require a completed crime, while “aiding and abetting” does not expressly require proof of an agreement to violate the law.¹⁹ After passage of the UIGEA, the government was no longer limited to relying upon these amorphous concepts of vicarious liability to punish those dealing in online gambling funds. Now, the Department of Justice has a new tool in its arsenal which is directed at those who facilitate the transmission of, or receive, funds relating to certain prohibited online gambling activities. The trick is to determine which online gambling activities trigger application of the financial transaction prohibitions.

¹⁷ Title 18, USC § 2.

¹⁸ *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980).

¹⁹ *Perenira v. United States*, 347 U.S. 1, 11, 74 S.Ct. 358, 364, 98 L.Ed.2d 435 (1954).

In support of the new prohibitions, the UIGEA uses a variety of terms – some of which are ambiguous or undefined. Initially, the Act broadly defines a “bet or wager” as:

the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.²⁰

Further, a “bet or wager” specifically includes a chance on a lottery or prize awarded predominantly by chance; a “scheme” as defined in Title 28, U.S.C. § 3702 [relating to government-sponsored amateur or professional sports betting]; and, “any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from, an account with the business of betting or wagering.”²¹ While this final prohibition incorporates the term “business of betting or wagering,” that term is not specifically defined anywhere in the Statute. The only reference to that term comes in § 5362(2), which states:

The term “business of betting or wagering” does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service.²²

Notably, the Act tells us what the business of betting or wagering is not, but does not convey what activity constitutes the “business of betting or wagering.” Instead, that term was likely defined in the provisions designed to expand the Wire Act, as discussed above, which were omitted from the final draft in order to ensure passage of the Bill. In defining what is not included in the term “business of betting or wagering” the law creates significant ambiguity as to

²⁰ § 5362(1)(A). The Statute also includes various exemptions to the activities covered by the Act, including securities/commodities activities, derivative instruments, state law bucket shop/gambling exemptions, insurance/indemnity contracts, bank deposits, “free play” games/contests, and certain fantasy sports games. §5362(1)(E)(j)-(ix).

²¹ § 5362(1)(A-D).

²² § 5362(2).

whether its prohibitions could ever be directly applied to a “financial service provider” which happens to be the primary category of business intended to be governed by the Act.²³

Nonetheless, the law does contain specific prohibitions. In order to establish a violation of the UIGEA, it must be shown that:

- (1) A “person”²⁴ was engaged in the business of betting or wagering;
- (2) That person knowingly accepted a financial instrument or proceeds thereof; **and**,
- (3) That instrument was accepted (by the person) in connection with the participation of another person in “unlawful Internet gambling.”²⁵

Assuming that, to determine whether one is engaged in the ‘business of betting or wagering,’ it is appropriate to look back at the term “bet or wager” defined in § 5362(1), that only answers part of the question: The financial instrument must be accepted by a person engaged in the business of betting or wagering; and (perhaps most significantly), that instrument must be accepted in connection with the participation of another person in “unlawful Internet gambling.”

In the context of this statute “unlawful Internet gambling” is defined as follows:

To 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.²⁶

Therefore, the UIGEA only applies to online gambling transactions that are already prohibited by other state, federal, or tribal laws. This prohibition is similar to the language found in the

²³ When read in conjunction with §§ 5365(d), 5366, and 5367, it appears that “financial services providers” can only be subjected to civil or criminal liability if they had actual knowledge and control of bets and wagers, and are actively involved with (or own) a website where unlawful bets or wagers are placed. Due to some odd choice of language contained in § 5365(d), financial services providers may not even be subjected to civil remedies if their role is purely that of a “financial services provider.” Time will tell what will happen when the courts attempt to unscramble these eggs.

²⁴ This includes an individual or a company.

²⁵ § 5363. (Emphasis added).

²⁶ 18 U.S.C § 5362(10) (emphasis added).

Organized Crime Control Act,²⁷ which prohibits a person from conducting an “illegal gambling business” which is defined as a gambling business that “is in violation of the law of a state or political subdivision in which it is conducted,” amongst other requirements.²⁸ These laws both look to preexisting, substantive gambling prohibitions to determine whether a violation occurred. Therefore, in order for the financial transaction to be prohibited by § 5363 of the UIGEA, the bet or wager must be “initiated, received, or otherwise made” in a place where such activity (the bet or wager) violates preexisting state, federal, or tribal law. Put another way, in order to determine whether a violation of the UIGEA exists, one must consult other substantive state and federal gambling prohibitions.²⁹

V. Impact of Existing State & Federal Laws

A. Federal Law

In order to evaluate the potential applicability of the UIGEA to any particular form of Internet gambling activity, one must consider all existing state and federal statutes that may address the gambling activity at issue. While this article will not attempt to analyze such issues, since that is a topic best suited for formal legal advice, a few observations are in order:

The Wire Wager Act, or simply the “Wire Act,”³⁰ is most often cited as the basis for criminalizing online gambling operations. The Department of Justice has, in fact, successfully used this Statute to convict an individual of operating an online sports betting business established in Antigua.³¹ However, the Wire Act has never been successfully applied to any form of gambling aside from sports betting. In fact, the United States Fifth Circuit Court of

²⁷ 18 U.S.C. § 1955 (also known as the Illegal Gambling Act).

²⁸ *Id.*

²⁹ The UIGEA also imposes duties in connection with the receipt of ‘restricted transactions’ by ‘financial service providers’ under § 5364. Since the Federal Reserve is required to promulgate regulations designed to implement that Section within 270 days of the law’s passage, this article will not address those obligations, given the lack of existing regulatory structure.

³⁰ Title 18, U.S.C. § 1084.

³¹ *U.S. v. Cohen*, 260 F.3d 68 (2d Cir. 2001), *cert den.* 536 U.S. 922, 122 S.Ct. 2587, 153 L.Ed.2d 777 (2002).

Appeal has concluded that the Wire Act does not apply to Internet casino gambling that does not involve sports betting.³²

A variety of other federal laws also address gambling activity. Those include the Travel Act,³³ the Wagering Paraphernalia Act,³⁴ the Organized Crime Control Act,³⁵ and (less specifically) the Racketeer Influenced Corrupt Organizations Act.³⁶ While one early state court decision recognized that some of these federal statutes apply to Internet gambling operations,³⁷ the federal courts have only confirmed the applicability of the Wire Act when it comes to online gambling.³⁸ To the extent that federal law can be consulted in order to determine the applicability of the UIGEA, federal statutes focus on activity such as sports betting, wagering pools, bolita, numbers, and “similar” games.³⁹

B. State Laws

In addition to incorporating the prohibitions of federal law, the UIGEA requires consideration of the restrictions of the laws of the specific state in which the bet or wager was “initiated, received, or otherwise made.” Astoundingly, this means that some financial transactions related to certain types of gambling are illegal if they were initiated in a state that restricts such activity, while identical gaming transactions emanating from a different state, which has failed to specifically address the activity at issue, remain perfectly legal.

³² *In Re MasterCard International, Inc., Internet Gambling Litigation*, 132 F.Supp.2d 468 (E.D. La. 2001), *aff’d* 313 F.3d 257 (5th Cir. 2002).

³³ Title 18, U.S.C. § 1952.

³⁴ Title 18, U.S.C. § 1953(a).

³⁵ Title 18, U.S.C. § 1955.

³⁶ Title 18, U.S.C. § 1961.

³⁷ *New York v. World Interactive Gaming Corp*, 714 N.Y.S.2d 844 (N.Y. Sp. Ct. 1999).

³⁸ *Cohen, supra*; *In Re MasterCard International, supra*.

³⁹ In addition to the Wire Act, which prohibits the business of betting on sporting events, the Wagering Paraphernalia Act prohibits the carrying or sending in interstate or foreign commerce any records of (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game. Title 18, U.S.C. § 1953(a).

To adequately address the potential scope and applicability of the UIGEA, the laws of each of the fifty (50) states would need to be evaluated. Judicial interpretations of those laws would also need to be consulted. Moreover, just like federal law, state laws are constantly being passed, amended, and repealed. A Herculean effort would be required for one to properly analyze each state's law as it applies to the variety of potential online gambling transactions that could be regulated by the UIGEA. Some states have passed specific prohibitions on the act of Internet betting, itself,⁴⁰ while others prohibit the operation of various types of an Internet gambling business.⁴¹ Still other states have passed laws which are broad enough to potentially include Internet gambling, but which do not make specific mention of such prohibitions.⁴²

Read in its narrowest sense, the UIGEA may only apply to gambling transactions that are prohibited by a specific state's law. The act of placing a bet online is not specifically prohibited by federal law.⁴³

The last-minute Congressional hack job performed on the UIGEA before it was attached to the SAFE Port Act gave birth to a deformed legislative creature that will likely be the source of judicial headaches, for years to come. The legislative intent to prohibit all electronic financial transactions related to Internet gambling was clear, but the resulting Statute is anything but.

While state law supposedly provides the substantive basis for determining whether gambling financial transactions are prohibited under the Act, the application of state law to Internet commerce may result in insurmountable constitutional problems for the government.

All state laws that seek to regulate global commerce such as Internet gambling may be

⁴⁰ E.g., Illinois and Washington.

⁴¹ E.g., Louisiana, Nevada, Oregon, South Dakota, Wisconsin, and Indiana.

⁴² For example, Florida law punishes individuals who "play" or "engage in" any "game of chance" by "any device whatever." § 849.07, *Fla.Stat.* (2006). The term "device" under the Florida Statute is not defined, and may well include computers, modems and/or gaming software. Many state laws are written in a similarly expansive manner, allowing the state to utilize its law to prohibit a vast array of gambling activities, potentially including those taking place online.

⁴³ See, *United States v. Baborian*, 528 F. Supp. 324 (D.R.I. 1981).

unconstitutional under the “dormant” Commerce Clause of the United States Constitution.⁴⁴ Under this argument, state laws which regulate national (or international) commerce are unconstitutional, since such commercial activity should only be regulated at the federal level. The reasoning behind this legal principle relates to the need for efficient and uniform execution of commercial transactions over state lines. It would be unreasonable to require a merchant to anticipate and comply with a hodgepodge of inconsistent state laws when attempting to engage in commerce at the national level. For this reason, industries such as the railroads and airlines are generally only subject to national, as opposed to state, regulation. Thus far, the courts have not hesitated in applying dormant Commerce Clause principles to attempted state-level regulation of Internet commerce.⁴⁵ Virtually all state-level restrictions on Internet commerce have been struck down on this basis.⁴⁶ While this argument has not been considered by the courts in relation to online gambling, the courts should be expected to use a similar analysis to that which has invalidated state laws attempting to restrict commercial adult websites.⁴⁷

Therefore, assuming that state law prohibitions on Internet commerce are unconstitutional under the Commerce Clause, the UIGEA would only apply to gambling activity prohibited under federal law. In the event that the courts recognize state law as providing a substantive basis for the prohibitions contained in the UIGEA, such would result in a confused state of the law, whereby some online wagering activities, originating in certain states with Internet gambling restrictions, would be prohibited – whereas others emanating from states

⁴⁴ See, *American Book Sellers Foundation for Free Expression v. Dean*, 202 F.Supp.2d 300 (D. Vt. 2002); *PSI Net, Inc. v. Chapman*, 167 F.Supp. 878 (W.D. Pa. 2001), question certified, 317 F.3d 413 (4th Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 142 F.Supp.2d 827 (E.D. Mich. 2001); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Libraries Association v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997); *Center for Democracy & Technology v. Pappert*, 337 F.Supp.2d 2006 (E.D. PA 2004); *Southeast Booksellers Ass’n v. McMaster*, 371 F.Supp.2d 773 (D.S.C. 2005).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

without such prohibitions would be unregulated. It is uncertain how financial services providers would be expected to discern the underlying legality of these transactions so as to meet the UIGEA's requirements of identifying and blocking such transactions. The inconsistency and burden resulting from the use of wildly varying state gambling laws as the substantive bases for UIGEA liability militates against use of state law for this purpose, from a constitutional perspective.

VI. Website Blocking Provisions

The provisions relating to Internet Computer Services, ("ICS's") are extremely interesting – and dangerous – from an academic and constitutional point of view. The Attorney General of the United States has now been empowered to unilaterally demand the immediate removal of any website he believes to be in violation of the UIGEA, in his unlimited discretion.⁴⁸ The law provides the ICS with the right of advance notice and opportunity to “appear” before any judicial relief can be granted.⁴⁹ It remains unclear exactly where the ICS is entitled to appear. However, nowhere in the Act does Congress provide any procedural safeguards for the website operator, whose business is about to be unilaterally terminated. This Due Process violation may not be so egregious but for the fact that Free Speech rights are at stake. The UIGEA allows the United States government to impose mandatory censorship by forcing ICS's to ban selected websites, presumably before the affected website owner even knows what happened, and without any right to object.

The potential abuses authorized by this provision are glaringly apparent. Suppose the Attorney General does not enjoy the political commentary appearing on certain Internet gaming websites or portals, and thus decides to force the closure of those select sites while leaving a

⁴⁸ § 5365(c).

⁴⁹ § 5365(c)(1)(B).

multitude of others online? Assuming that all this blocking activity occurs outside the formal legal process, little public attention or oversight will be devoted to these administrative enforcement efforts.

The First Amendment concerns of this newly-enacted censorship authority are staggering. The Internet has been called “the most participatory form of mass speech yet developed.”⁵⁰ According to the United States Supreme Court, the web is a “unique and wholly new medium of worldwide human communication.”⁵¹ Given the importance of protecting the free flow of mass communication online, the courts have provided Internet communications with a high level of First Amendment protection, and have not hesitated to strike down laws restricting the content of online communications.⁵² Congress has apparently overlooked the level of constitutional protection ordinarily afforded to online communications in allowing the Attorney General to unilaterally disable access to select websites without any notice or opportunity to be heard.

VII. Foreign Jurisdictions

Indisputably, the Internet gambling industry operates outside the jurisdiction of the United States. Online gambling websites commonly obtain licenses from jurisdictions such as Antigua and Barbuda, the Isle of Man, Gibraltar, Malta, and Curacao. Therefore, as a practical matter, the Department of Justice faces significant hurdles in seeking to apply the UIGEA directly against any offshore Internet gambling entity. The UIGEA does however contain some

⁵⁰ *Reno v. ACLU*, 521 U.S. 844, 863, 112 S.Ct. 2329, 2340, 138 L.Ed.2d 874 (1997) (quoting *ACLU v. Reno*, 929 F.Supp. 824, 883 (E.D. Pa. 1996)).

⁵¹ *Reno v. ACLU*, 521 U.S. at 850.

⁵² *Reno v. ACLU*, *supra*; *American Book Sellers Foundation for Free Expression v. Dean*, *supra*; *PSI Net, Inc. v. Chapman*, *supra*; *Cyberspace Communications, Inc. v. Engler*, *supra*; *ACLU v. Johnson*, *supra*; *American Libraries Association v. Pataki*, *supra*; *Center for Democracy & Technology v. Pappert*, *supra*; *Southeast Booksellers Ass’n v. McMaster*, *supra*.

lip service devoted to foreign cooperation with the United States' decision to crack down on Internet gambling.

The law includes a section entitled "Internet Gambling in or Through Foreign Jurisdictions"⁵³ This Section does not create any new prohibitions or regulated activities but is merely designed as an effort to encourage the United States government to work with various foreign governments to determine whether Internet gambling operations are being used for money laundering, corruption, or other crimes.⁵⁴ Specific references are made to recognized white collar crime, such as money laundering and corruption, in an effort to avoid highlighting the international differences in regulation of Internet gambling. The United States knows that it cannot encourage foreign governments that license online gambling to cooperate with its enforcement actions under the theory that online gambling is illegal. Instead, the United States is trying to pigeonhole online gambling activity into other crimes that are already recognized by various international treaties and mutual legal assistance agreements between the United States and other governments.

The foreign jurisdiction section of the UIGEA also encourages the United States to advance policies that foster cooperation with the foreign governments, and to exchange information designed to enforce the UIGEA.⁵⁵ Finally, the Secretary of the Treasury is required to submit an annual report to Congress detailing any deliberations between the United States and other countries relating to Internet gambling.⁵⁶

While these provisions express the desires of Congress to work with foreign governments to enforce United States policy on Internet gambling, such cooperation and information sharing

⁵³ SEC. 803.

⁵⁴ *Id.*

⁵⁵ SEC. 803(a)(2).

⁵⁶ SEC. 803(b).

is unlikely in all but the most egregious cases – particularly in those jurisdictions where Internet gambling is specifically licensed and authorized. While some precedent exist for information sharing and even assistance in connection with United States’ asset freeze request by other governments,⁵⁷ such cooperative efforts only likely to occur when they involve some sort of distinct legal violation, such as tax evasion, extortion, or money laundering.

VIII. Conclusion

The United States government is still a long way off from banning Internet gambling. This first attempt at prohibitionist legislation should more appropriately be viewed as a “shot across the bow” of the online gambling industry, as opposed to an outright frontal assault. Within 270 days from the enactment of the UIGEA, the Federal Reserve System, in consultation with the Attorney General, is required to enact regulations instructing financial service providers how to identify and block the restricted financial transactions.⁵⁸ The enactment of these regulations will be no simple task, given the inherent difficulty encountered when attempting to monitor vast amounts of financial data flowing through the computer systems of the financial services industry. The real-world impact of the UIGEA will ultimately be dependent upon the reaction by service providers such as NetTeller[®] and foreign banks to the regulations ultimately promulgated by the Federal Reserve. To the extent these financial institutions find a way to voluntarily comply with the obligation of identifying and blocking transactions intended for online gambling services, the industry will suffer from the withdrawal of frustrated American bettors who are no longer able to easily transfer funds to their favorite betting sites.

However, from a purely substantive legal perspective, the UIGEA is a flop. It does little more than codify prohibitions that could have been imposed through a creative use of the

⁵⁷ *United States of America v. William Scott, Jessica Davis, Soulbury, Ltd., and Worldwide Telesports a/k/a WWTS*, No. 1:05-CR-00122 (D.D.C. filed April 7, 2005).

⁵⁸ § 5364(a).

conspiracy or aiding and abetting laws already in existence.⁵⁹ The prohibitions directed at foreign online gaming website operators are unenforceable, as a practical matter, given the issues of personal jurisdiction and extra-territorial statutory application. The URL blocking procedure is patently unconstitutional. The substantive prohibitions on EFT's border on incomprehensible – particularly if each state's laws must be consulted to determine a violation. But for better or for worse, the mere passage of the UIGEA has changed the Internet gambling industry dramatically. No longer can “silk stocking,” publicly listed gaming entities operate in (presumed) open defiance of United States law by accepting online wagers from United States citizens.⁶⁰ Their exit has generated new opportunities for smaller, privately-held companies to fill the void. While the passage of the UIGEA has certainly made the intentions of United States lawmakers known, and has increased the risks for those continuing to operate in the industry, it is a far cry from the outright prohibition that many had feared - and some assumed had already passed.

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⁵⁹ See, Title 18 U.S.C. § 371, and Title 18 U.S.C. § 2.

⁶⁰ A. Sullivan, “New Law Won’t Stop Internet Gambling,” *PCWorld.com* (November 21, 2006).