

LIFE AFTER PROHIBITION?

EVALUATING THE IMPACT OF PENDING U.S. LEGISLATION

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After eight years of seemingly-endless legislative proposals, committee debates, and defeats, news that United States lawmakers intended to propose yet another round of prohibitionist legislation peaked little interest among industry leaders in early 2006. The common refrain of the “Kyl Bill,” the “Leach Bill,” and the “Goodlatte Bill,” became little more than background noise in an environment of seemingly constant regulatory changes. However, in this author’s view, the online gambling industry has never been more vulnerable to adverse United States legislation than right now. Dueling bills in both the House and Senate seek to expand the scope of the Wire Act, to now specifically apply to online gambling businesses, and to games of chance other than sports betting.¹ The bills also contain dangerous provisions requiring ISPs/hosts to block URLs identified as belonging to illegal online gambling websites, after receipt of notice from government officials.² Still other provisions focus on prohibiting Electronic Funds Transfers (EFTs) relating to online wagers.³ In short, the United States Congress is attempting to give the Department of Justice a variety of tools necessary to clamp down on all manner of Internet gambling operations – even those located overseas. While United States criminal jurisdiction will not likely extend to foreign companies owned by foreign

¹ See, the “Kyl Bill,” Senators Kyl (R-Ariz) and Pryor (D-Ark); *Internet Gambling Prohibition Act*, (“IGPA”), Representatives Goodlatte (R-Va) and Boucher (D-Va).

² IGPA at § 3

³ *Id.*

citizens, United States lawmakers have found another way to skin the cat; by cutting off the money sources, and by blocking electronic access to the sites at the source.

The current political climate bodes well for passage of one or more of these Bills. Legislators are anxious to wash their hands of any perceived influence peddling by Jack Abramoff, et. al., which allegedly occurred in previous years in connection with Internet gambling interests.⁴ With the mid-term elections approaching, and the War in Iraq continuing to devolve into further confusion and unpopularity, the GOP is seeking to start a new political conversation, and the evils of Internet gambling may provide a convenient scapegoat, creating just the diversion necessary to accomplish its goals. Although some form of gambling is legal in almost every state, the government continues to vilify certain forms of gambling as criminal vice activity that must be prohibited altogether. One lawmaker has called Internet gambling the “crack cocaine of gambling.”⁵ Now is seen as the perfect time to crack down on this “evil” activity, and the wheels have been set in motion.

So what will the real impact of these Bills be if they pass? Will the online gambling industry come to a screeching halt? Will United States advertising opportunities dry up? Will multimillion dollar, publicly-traded companies be forced underground, and their CEOs declared fugitives or “wanted men” in the United States? Not likely.

Internet gambling has become part of the culture, both in the United States and globally, such that it will not be stopped, no matter what legislation is passed at the state or federal level. A recent poll conducted by the *Wall Street Journal* shows that 85% of Americans oppose a

⁴ Vallerius, Bradley, “Kyl/Goodlatte Speculation Reaches Frenzy,” iGamingNews.com (March 8, 2006), which can be viewed at: <http://igamingnews.com/index.cfm?page=artlisting&tid=6503&k=abramoff>.

⁵ Matlick, Justin, “Gambling Prohibitionists Target the Internet,” www.pacificresearch.org (October, 1999), which can be viewed at: <http://www.pacificresearch.org/pub/ecp/1999/eclips99-10.html>.

congressional ban on online gambling.⁶ Lawmakers are merely putting their fingers in the dike of a powerful new economic force that cannot be wiped off the map with new legislation or threats of prosecution. Notably, none of the currently-pending bills seek to punish player activity, on its own, and therefore United States gamblers will continue to place bets. Given the increasing popularity of online poker, fantasy sports leagues, and casino gambling, coupled with the numbers of new Internet users coming online each day, the popularity of online gambling in the United States will likely increase despite prohibitionist efforts on Capitol Hill.

However, certain things will change. For example, the online gambling market for hosts/ISPs in the United States will dry up, to the extent that it exists today. Since hosts may be required to block online gambling websites in response to official notification, no Internet gambling site will risk being blocked by hosting with a Internet Service Provider that is willing to comply with United States law. That category of hosts will not be limited to those based in the United States, either. Large ISPs, such as Yahoo! and AOL, all have foreign divisions, but will still comply with blocking requests, even if the websites are hosted by a foreign subsidiary or affiliated entity, given the risks of non-compliance to their operations as a whole. Other purely foreign hosts will likewise comply with blocking requests, just as they do currently with websites alleged to be involved with child pornography, out of a simple desire to maintain a cordial, diplomatic relationship with United States authorities. Therefore, new opportunities will be created for small hosting companies located beyond the reach of United States authorities, in the online gambling space. Of course, connectivity and infrastructure issues must be sorted out. However, some realignment of the hosting relationships will be a natural fallout from the passage of any United States legislation containing a URL blocking requirement.

⁶ “A Wall Street Journal Poll Shows that 85% of Americans are Against the Congress Ban on Internet Gambling says TheOnlineWire.com,” referenced on *PRWeb.com* (March 21, 2006), which can be viewed at: <http://www.prweb.com/releases/2006/03/prweb361020.htm>.

Similarly, financial and billing relationships will change. Any new legislation that prohibits the processing of electronic financial transactions relating to Internet gambling will stimulate a revolution in alternative payment processing and e-wallet solutions to accommodate the industry. The real question is, of course, what will companies like NetTeller[®] do in response to United States EFT legislation? Will they rely on their offshore location to insulate them from criminal prosecution under United States law? Or will they buckle under the pressure of United States regulators and reject any financial transactions related directly (or indirectly) to Internet gambling? Those companies that refuse to continue their involvement with the online gambling industry will open opportunities for new entities, unconcerned about United States regulation, to take their place. This seemingly endless “cat and mouse game” will have little real world impact on a United States citizen’s ability to place an online bet, other than, perhaps, some temporary inconvenience while the shakeout occurs.

Another more significant, albeit indirect, effect of the proposed legislation should be of some concern to the industry. That is the psychological impact on the United States bettor, who hears that his or her government has just made Internet gambling “illegal.” The average player is unlikely to sort through the legal nuances of the legislation that gets passed, and any implementing regulations. Therefore, even though these bills (in their current form) do not attempt to regulate player activity, players may become concerned about potential prosecution if they continue to place wagers online after passage of the legislation. This spin-off effect on United States player activity could be the most significant impact on Internet gambling businesses – yet it is one that is potentially avoidable or subject to significant mitigation by the industry. An educational effort must be immediately undertaken and funded by the industry’s leaders, trade groups, and media outlets. The moment a new federal online gambling law is

passed, the industry must be ready with press releases, articles, speeches, blog postings, and any other form of communication necessary to communicate the precise impact of any pending legislation on United States player activity. If online betting is not prohibited by the new legislation, players must be immediately informed of that fact. Failure to do so will allow the rumor mill to generate significant misinformation, which plays directly into the hands of the prohibitionists on Capitol Hill.

Direct restrictions on Internet wagering by United States citizens are unlikely at the federal level, for a variety of reasons. First, the Feds typically seek to avoid these penny ante crimes of little economic or real world impact. Federal courts, prosecutors, and penitentiaries are reserved for criminals of a different stature. Moreover, as a matter of federal jurisdiction, a federal crime must involve some aspect of interstate activity or commerce. While all online transactions arguably involve interstate commerce, to one degree or another, it is unlikely that the United States Congress will seek to regulate the placement of bets by individuals using their personal computers at home, with little effect on interstate commercial activity. Such restrictions could be seen as intrusions into basic civil liberties, contributing to allegations that Big Brother is watching, and over-regulating our private lives. Accordingly, the likelihood of federal restrictions on player activity is remote.

Industry leaders remain hopeful that all forms of proposed prohibitionist legislation will be defeated, and that lawmakers will recognize that Internet gambling has become a mainstay form of entertainment for United States citizens. Unfortunately, cooler heads do not always prevail, and the Internet gambling industry may soon be forced to accept some new form of United States federal legislation specifically criminalizing, for the first time, Internet gambling activity. As noted above, the primary effect of such legislation will be to drive the service

providers further offshore, and away from the long arm of United States jurisdiction. But to counteract the disturbing potential secondary effect, in the form of United States player paranoia, the industry must unite in its educational efforts to clearly inform United States players as to the effect, or lack thereof, on their desire to continue engaging in recreational online betting.

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