ON SECOND THOUGHT…
--WHAT DOES THE UIGEA REALLY MEAN FOR INTERNET GAMBLING?

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I. Introduction

The online gambling industry apparently decided that the United States Congress enacted a blanket prohibition on Internet gambling transactions when it passed the "Unlawful Internet Gambling Enforcement Act of 2006," ("UIGEA"). Immediate, and perhaps irreversible, decisions were made by the publicly-listed gaming companies, who announced only days after the passage of the Act that they would no longer be accepting wagers from United States citizens – their largest consumer market.[1] These decisions translated into losses of more than seven (7) billion dollars on the London Stock Exchange in a matter of days.[2] This reaction might have seemed reasonable at the time, given the media's spin on the presumed impact of the legislation, but initial interpretations were flawed or exaggerated.

So what is the real relevance and impact of the new legislation? Can it really be labeled as "prohibition?" A closer reading of the law compels a more nuanced conclusion.

II. Historical Background

In 1998, Congress began its attempts to pass some form of Internet gambling legislation. Although such legislation previously passed in both the House and the Senate, both houses of Congress were never able to agree during a single session. The bills became bogged down in

[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).

objections by special interest groups and their lobbyists, 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, all raised concerns. Each year, Congress ran 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. Republicans, having effectively controlled Congress since 1994, were now in trouble. Allegations of corruption and mismanagement dominated the news cycles, and the polls confirmed that control both houses of Congress was at stake. In the attempt to energize their base voting block, 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.[3]

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."[4] Leach claimed: "The potential threat of identity theft and fraud is high for the individual bettor just as the risk posed to our national security from terror and criminal organizations that control such sites."[5] He further alleged that online gambling has become a "haven for money laundering activities."[6] Senator John Kyl (R-AZ), another anti-gambling zealot, attempted to link online

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[3] 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.
[4] Rep. Robert Goodlatte, *Richmond Times Dispatch* (April 6, 2006).
[5] Rep. Jim Leach, *Wall Street Journal*(April 4, 2006).
[6] *Id.*

gambling with the occasionally-popular War on Drugs by calling online gambling the "crack cocaine of gambling."[7]

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.[8] 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. As it turned out, the American public turned over control of both the House and the Senate to the Democrats. Nevertheless, 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 completely unrelated Homeland Security bill destined to sail through the Senate without any real opposition.

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 wagering operations at the federal level failed, for a variety of reasons. In 2006, however, the political environment on Capitol Hill 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 Jack Abramoff, the beltway lobbyist who had been involved in opposing various gambling bills in the past. Passage of this year's online gambling legislation provided an opportunity to demonstrate that Congress was no longer beholden to his influence,

[7] Sen. John Kyl, *MSNBC.com* (April 10, 2001).

[8] 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.

and had cleaned up its act. In addition, the effort to vilify Internet gambling provided a convenient distraction from the increasingly unpopular War in Iraq.

Many industry analysts and commentators, including this author, predicted that the online gambling industry was at its most vulnerable point in history, in regards to passage of Internet prohibition legislation.[9] Those predictions 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 Bill[10] and the Goodlatte Bill.[11] 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 Act[12] 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.

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[9] See, *Life After Prohibition,* which can be viewed at: http://www.gamblinglawupdate.com/archives/Life%20After%20Prohibition.pdf.
[10] HR 4411, "The Unlawful Internet Gambling Enforcement Act."
[11] HR 4777, "The Internet Gambling Prohibition Act."
[12] 18 U.S.C. § 1953(a).

On July 11, 2006, the House passed a consolidated Leach/Goodlatte Bill by a vote of 317-93.[13] 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,[14] 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.[15] 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 widely-reported 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.

[13] 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.

[14] "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

[15] 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. Criminal Responsibility Under the UIGEA

The criminal prohibitions of the UIEGA are 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].

The Act contemplates the imposition of criminal penalties against individuals and entities who receive funds or credit instruments intended for use in online gaming. These persons previously only faced liability under the criminal law concepts of "aiding and abetting" or "conspiracy."[16] After passage of the UIGEA, the government is 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 to use against those who 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.

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.[17]

[16] One who substantially assists another individual in committing a criminal offense is punished the same as the principal actor who committed that offense. Title 18, USC § 2. 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. *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980). Conspiracy does not require a completed crime, while "aiding and abetting" does not expressly require proof of an agreement to violate the law.*Perenira v. United States,* 347 U.S. 1, 11, 74 S.Ct. 358, 364, 98 L.Ed.2d 435 (1954).

[17] § 5362(1)(A). The Statute also includes various exemptions to the activities covered by the Act, including securities activity, commodities, derivative instruments, state law bucket shop/gambling exemptions,

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.”[18] 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.[19]

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 whether its prohibitions could ever be directly applied to a “financial service provider” which is the primary category of business intended to be governed by the Act.[20]

In order to establish a violation of the UIGEA, it must be shown that:

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insurance/contracts indemnity, bank deposits, “free play” games/contests, and certain fantasy sports games. § 5362(1)(E)(j)-(ix).

[18] § 5362(1)(A-D).

[19] § 5362(2).

[20] 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.

(1) A "person"[21] 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."[22]

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.[23]

Therefore, the UIGEA only applies to online gambling transactions that are already prohibited by other state, federal, or tribal laws. This concept is critical to understanding the impact of the Act on the future of the industry. The law does not prohibit any new form of gaming activity, but, instead, relies on existing prohibitions. This prohibition is similar to the language found in the Organized Crime Control Act,[24] 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

[21] This includes an individual or a company.
[22] § 5363. (Emphasis added).
[23] 18 U.S.C § 5362(10) (emphasis added).
[24] 18 U.S.C. § 1955 (also known as the Illegal Gambling Act).

political subdivision in which it is conducted," amongst other requirements.[25] These laws both look to preexisting, substantive gambling prohibitions to determine whether a violation occurred.

Thus, in order for receipt of a gaming proceeds 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 of 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.[26]

A. Impact of Federal Laws

In order to evaluate the potential applicability of the UIEGA 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,"[27] 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.[28] 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 Appeal has concluded that the Wire Act does not apply to Internet casino gambling that does not involve sports betting.[29]

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[25] *Id.*

[26] The UIGEA also imposes duties in connection with the receipt of 'restricted transactions' by 'financial service providers' under § 5364, discussed *infra*.

[27] Title 18, U.S.C. § 1084.

[28] *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).

[29] *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).

A variety of other federal laws also address gambling activity. Those include the Travel Act,[30] the Wagering Paraphernalia Act,[31] the Organized Crime Control Act,[32] and (less specifically) the Racketeer Influenced Corrupt Organizations Act.[33] While one early state court decision recognized that some of these federal statutes apply to Internet gambling operations,[34] the federal courts have only confirmed the applicability of the Wire Act when it comes to online gambling.[35] 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.[36]

B. Impact of 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.

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 massive effort would be required for one to properly analyze

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[30] Title 18, U.S.C. § 1952.
[31] Title 18, U.S.C. § 1953(a).
[32] Title 18, U.S.C. § 1955.
[33] Title 18, U.S.C. § 1961.
[34] *New York v. World Interactive Gaming Corp,* 714 N.Y.S.2d 844 (N.Y. Sp. Ct. 1999).
[35] *Cohen, supra; In Re MasterCard International, supra.*
[36] 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).

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,[37] while others prohibit the operation of various types of an Internet gambling business.[38] 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.[39]

Read in its narrowest sense, the UIGEA may only apply to online wagers that are prohibited by a specific state's law. The act of placing a bet online is not specifically prohibited by federal law.[40]

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 evident, 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 unconstitutional under the "dormant" Commerce Clause of the United States Constitution.[41]

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[37] E.g., Illinois and Washington.

[38] E.g., Louisiana, Nevada, Oregon, South Dakota, Wisconsin, and Indiana, and possibly others.

[39] 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.

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

[41] *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).

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.[42] Virtually all state-level restrictions on Internet commerce have been struck down on this basis.[43] 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 invalided state laws attempting to restrict commercial adult websites.[44]

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 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

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[42] *Id.*
[43] *Id.*
[44] *Id.*

UIGEA liability militates against use of state law for this purpose, from a constitutional perspective.

V. Civil Liability Under Financial Transaction Blocking Requirements

A separate section of the UIGEA, § 5364, imposes obligations upon the Secretary of the Treasury, the Board of Governors of the Federal Reserve System, and the Attorney General, to consult and develop regulations outlining the procedure to be utilized by designated payment systems to identify and block restricted financial transactions. The obligations imposed under this section do not appear to implicate criminal liability. In fact, unless the financial transaction provider or payment system can be alleged as having actual knowledge and control of the bets and wagers, as well as being an owner or operator of the wagering website, civil liability – even mere injunctive relief – also appears to be precluded.[45] Although Section 5365 authorizes civil remedies to restrain restricted transactions, that same section prohibits such remedies against a financial transaction provider "to the extent that the person is acting as a financial transaction provider." Either this wording is unintentionally ambiguous, or intentionally under-inclusive in its restriction of civil remedies. Either way, banks, payment systems, and other financial transaction providers who are not involved with the gaming website itself may be insulated from both criminal and civil remedies based on this language.

To remove the final teeth from this law with respect to financial transaction providers, §362(2) notes that the term "business of betting or wagering" does not include the activities of a "financial transaction provider." Therefore, it appears that the only exposure facing financial transaction providers under the new law are administrative in nature. Section 5364 requires that

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[45] Section 5367 imposes civil and criminal liability against financial transaction providers only in the instance where the company or individual has actual knowledge and control of the bets and wagers, and owns, manages, supervises, or directs the Internet website at which unlawful bets or wagers are placed, or owns or controls, or is owned or controlled by any person who operates, manages, supervises, or directs Internet website at which unlawful bets or wagers may be placed. § 5367(1)-(2).

the Federal Reserve Board and the Secretary of the Treasury, in consultation with the Attorney General, promulgate regulations implementing this Section within 270 days from its enactment. Therefore, the devil will be in the details of these regulations, which may or may not be published by the anticipated deadline. The complexity of the task facing the Federal Reserve Board and the Secretary of the Treasury cannot be understated. The government will need to come up with a means by which merchant banks, third party billing processors, and e-wallet solutions like NetTeller® will be required to identify financial transactions intended for online gaming purposes, and block those transactions before they occur. Bearing in mind the almost incomprehensible number of transactions that flow through the systems of some financial services providers, this effort will be Herculean at the very least.

If the intent of this law was to prohibit credit card companies from processing online gaming transactions, the entire effort was wasted, because the industry has already been dealing with that reality for several years.[46] Therefore, the only real-world impact that could be felt by the adoption of this law, and the ensuing regulations, with respect to financial transactions, would be its impact on alternative payment processors, or perhaps the use of paper checks by United States gamblers. Banks currently do not physically read paper checks, and the Fed is unlikely to impose that heavy financial burden on the United States banking industry, despite the desires of Congress. Equally difficult is the ability to anticipate the intended purpose of funds held in a bank account or e-wallet, before they are transmitted to an online gambling site.

The American banking industry spares no expense when it comes to lobbyists in Congress. That is evidenced by the "kid gloves" manner in which financial transaction providers are treated by the UIGEA. Therefore, the likelihood of any significant burden being imposed

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[46] "Busted Flush," *The Economist* (October 5, 2006), which can be viewed at: http://www.economist.com/business/displaystory.cfm?story_id=7997055.

upon the United States banking industry in order to comply with the Act is minimal. Foreign providers will be put into a position of deciding whether to voluntarily comply with United States law and administrative regulations, ignore those regulations, or pull out of the online gambling industry altogether. Nevertheless, it is unlikely that United States enforcement authorities will be able to successfully pursue foreign-based financial services providers under the UIGEA, despite Congressional desire for foreign cooperation.[47]

VI. <u>Website Blocking Provisions</u>

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

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[47] *See,* Sec. 803, "Internet Gambling In Or Through Foreign Jurisdictions."
[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 unsettling. 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. <u>Impact on Foreign Jurisdictions</u>

For the most part, the Internet gambling industry operates outside the jurisdiction of the United States. Online gaming websites commonly obtain licenses from jurisdictions such as Antigua and Barbuda, the Isle of Man, Gibraltar, Malta, and Curaçao. Soon, the UK will be issuing remote gaming licenses. 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 lip service devoted to foreign cooperation with the United States' decision to crack down on Internet gambling.

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[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*.

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 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

[53] SEC. 803.
[54] *Id.*
[55] SEC. 803(a)(2).
[56] SEC. 803(b).

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 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. As noted above, regulatory authorities must enact regulations instructing financial service providers how to identify and block the restricted financial transactions by June, 2007.[58] The adoption 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 Board. To the extent these financial institutions decide 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 achieved through a creative use of the conspiracy or aiding and abetting laws already in existence.[59] Given the glaring loopholes in federal law for online casinos and pokerrooms, large portions of the industry may remain

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[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).
[59] *See,* Title 18 U.S.C. § 371, and Title 18 U.S.C. § 2.

unaffected. The prohibitions directed at foreign online gaming website operators are unenforceable, as a practical matter, given the issues of jurisdiction. The URL blocking procedure is patently unconstitutional. The criminal prohibitions on acceptance of EFT's border on incomprehensible – particularly if each state's laws must be consulted.

But for better or for worse, the mere passage of the UIGEA has changed the Internet gambling industry dramatically. No longer will "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 other, privately-held companies to fill the void. U.S. gamblers have not stopped betting, and will continue to find a way to deposit funds with online casinos. 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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[60] A. Sullivan, "New Law Won't Stop Internet Gambling," *PCWorld.com* (November 21, 2006).