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**Betting on Prohibition:  
The Federal Government's Approach to Internet Gambling**

*Kraig P. Grahmann*



# Betting on Prohibition: The Federal Government's Approach to Internet Gambling

Kraig P. Grahmann\*

*"As smoking crack cocaine changed the cocaine experience, I think electronics is going to change the way gambling is experienced."*<sup>1</sup>

## I. INTRODUCTION

¶1 Elected officials who passed and signed into law the Unlawful Internet Gambling Enforcement Act (UIGEA)<sup>2</sup> did not speak loudly about it; Congress quietly attached the bill to the much larger Security and Accountability for Every (SAFE) Port Act, and President Bush made no reference to it at the signing ceremony.<sup>3</sup> However, the UIGEA's effective prohibition of online casinos created a roar among those who support virtual betting.<sup>4</sup> The UIGEA bans acceptance of any financial instrument used for unlawful Internet gambling.<sup>5</sup> An individual can no longer log on to the World Wide Web and use his or her credit card, bank account, or PayPal account to play casino games over the Internet. The Act had a huge impact on the more than 1,800 virtual casinos that had combined annual revenues of nearly \$15 billion prior to the ban.<sup>6</sup> Because all Internet casinos are located outside the United States, the law does not attempt to stop them directly from operating here; however, preventing these businesses from receiving their money has the same effect.<sup>7</sup>

¶2 The reasons for prohibiting Internet gambling are as numerous as the justifications for restricting traditional brick-and-mortar casino gaming. Until the UIGEA, prior laws and attempts at prohibition were ineffective. Like any government policy, the prohibitory framework used in this legislation is not perfect, and the UIGEA has some weaknesses.

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<sup>1</sup> William H. Buckley, *Feeling Lucky? Electronics Is Bringing Gambling into Homes, Restaurants and Planes*, WALL ST. J., Aug. 16, 1995, at A1 (quoting Howard J. Schaffer, Professor of Addiction Studies at Harvard University).

<sup>2</sup> 31 U.S.C. §§ 5361–5367 (2006).

<sup>3</sup> See *Bush Signs Port Security, Online Gambling Bill*, MSNBC, Oct. 14, 2006, <http://www.msnbc.msn.com/id/15247549> (noting that President Bush did not mention the anti-Internet gambling provisions of the SAFE Port Act at the bill signing ceremony).

<sup>4</sup> See *infra* Part IV (describing the UIGEA's impact on the virtual casino industry).

<sup>5</sup> See *infra* note 104 and accompanying text (explaining how the UIGEA shuts down online casinos).

<sup>6</sup> Christiansen Capital Advisors, LLC, Internet Gambling, [http://grossannualwager.com/Primary%20Navigation/Online%20Data%20Store/internet\\_gambling\\_data.htm](http://grossannualwager.com/Primary%20Navigation/Online%20Data%20Store/internet_gambling_data.htm) (last visited March 7, 2009) (a previous version of this article is cited in Joel Weinberg, Comment, *Everyone's a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 296 (2006)).

<sup>7</sup> *Id.* at 307 (“[A]ll Internet gambling websites have located themselves outside the United States.”).

However, a ban on Internet gambling is an appropriate measure when examined in the context of laws controlling the online sales of two other heavily restricted items—alcohol and cigarettes.

¶3 Part II of this Article explores the rationales for prohibiting, and not merely regulating, Internet gambling: preventing societal harm and preventing financial harm. These same rationales justify the strict regulatory environment under which traditional brick-and-mortar casinos operate. Part II argues, however, that because the intangible and uncontrollable nature of the World Wide Web makes virtual casinos impossible to regulate, a prohibition of online gambling is necessary to maintain legal consistency in our treatment of gaming.

¶4 Part III looks at the extensive attempts at prohibiting Internet casinos throughout the short time that virtual gambling has existed. It analyzes existing laws—the Wire and Travel Acts—and previously proposed legislation—the Internet Gambling Prohibition Acts of 1998 (IGPA 98) and 1999 (IGPA 99) and the Internet Gambling Enforcement Act (IGEA). The Wire and Travel Acts are laws created well before the advent of Internet technology that cannot be applied to online casinos without significant modifications. The IGPA 98, IGPA 99, and IGEA never became law for various reasons: disagreement on their merits, a presidential sex scandal, and lack of time in the Congressional session. Though these attempts at prohibition failed, the tide changed when the UIGEA became law in October 2006. Part III analyzes this law and explains how it effectively bans Internet gambling by stopping its funding mechanisms.

¶5 Part IV of this Article critiques prohibitory approaches to Internet gambling law in general and the UIGEA specifically. Shortcomings of a prohibitory framework include its protectionistic effect (i.e. allowing traditional brick-and-mortar casinos to eliminate competition), potential violation of constitutional rights, and restrictions on free trade. The UIGEA itself is also limited; the statute has possible loopholes created by an interpretation that skill gambling<sup>8</sup> is excluded and alternative financial transfers the act does not reach. Despite these problems, Part IV concludes that the UIGEA provides both an effective and immediate solution to the problem of Internet gambling, and its weaknesses are more nuisance than failure.

¶6 Part V analyzes the UIGEA prohibition on virtual casinos in the context of laws restricting the prevalence on the Internet of two other items heavily regulated in the United States: alcohol and cigarettes. This section argues that the government’s effective prohibition of Internet gambling is the appropriate action to take, considering that the sale of alcohol and cigarettes in cyberspace are also significantly restricted. Throughout history, alcohol and cigarettes have been subject to tight regulations on their production, distribution, and use. The impetus behind this strict control is the government’s duty to moderate between protecting society from these potentially harmful products and allowing individuals the liberty to consume them. The regulatory needs and historical treatment of gambling is identical to that of alcohol and cigarettes. Much power over regulation of these items is reserved to the states; however, the federal government steps in when a uniform rule is necessary to ensure the effectiveness of individual state laws. When Internet liquor stores appeared and made interstate online alcohol sales available to states where such virtual sales are outlawed, the federal government intervened to stop

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<sup>8</sup> Poker is an example of “skill gambling” because success in that game is not entirely dependent on chance. See *infra* Part IV.B.1.

the practice. After online tobacco vendors gave smokers the option of purchasing cigarettes across state lines to avoid paying legally mandated sales taxes, a government-credit card company alliance formed to ban this activity. Based on this context, Part V argues that when casinos showed up in cyberspace and allowed individuals to participate in Internet gambling—an online activity that is prohibited in all fifty states—it was only appropriate that the government shut down these virtual establishments. Part VI concludes this Article.

## II. RATIONALES FOR PROHIBITION

¶17 Conventional gambling is “subject to intense scrutiny and a myriad of licensing and other operational requirements.”<sup>9</sup> Internet gambling, to the contrary, cannot be effectively regulated to the same degree because of its intangible nature.<sup>10</sup> Prohibition of virtual casinos is the only solution to this legal disjointedness. Why should we allow unfettered betting on the Internet when land-based gambling is one of the most stringently regulated activities in the United States?<sup>11</sup> The rationales for regulating traditional brick-and-mortar gambling also strongly support prohibiting Internet casinos.<sup>12</sup> These rationales for prohibiting gambling—both traditional and online—can be separated into two broad categories of harm prevention: societal and financial.

### A. Societal

¶18 The proliferation of online casinos raises fears that the social harms of gambling will spread exponentially because of easy access and an inability to regulate Internet activity.<sup>13</sup> Among these societal harms are addiction and problem gambling, access by minors, consumer vulnerability to fraud, and criminal activity.

¶19 Gambling is addictive.<sup>14</sup> The number of problem gamblers in a jurisdiction is directly related to the number of casinos.<sup>15</sup> Online gambling creates a casino anywhere the Internet can be accessed: home, work, school, and so on. Increased access exacerbates addiction problems. Youth are particularly vulnerable to addiction. Unlike

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<sup>9</sup> H.R. REP. NO. 109-412, pt. 1, at 8 (2006) (describing regulation of land-based gambling).

<sup>10</sup> *See id.* at 9 (“[Internet gambling sites] operate effectively beyond the reach of U.S. regulators . . . as well as the statutory . . . regimes that apply to U.S.-based casinos.”).

<sup>11</sup> *See id.* (“Unregulated Internet gambling that exists today allows an unlicensed, untaxed, unsupervised operator to engage in wagering that is otherwise subject to stringent federal and state regulatory controls.”).

<sup>12</sup> Compare Timothy A. Kelly, *The Government Should Halt the Spread of Legalized Gambling*, in GAMBLING: OPPOSING VIEWPOINTS 131, 132 (James D. Torr ed., 2002) (noting harm from addictiveness as a rationale for regulating traditional gambling), with *id.* at 133 (noting the ease of access by gambling addicts as a rationale for prohibiting Internet gambling).

<sup>13</sup> John Warren Kindt & Stephen W. Joy, *Internet Gambling and the Destabilization of National and International Economies: Time for a Comprehensive Ban on Gambling Over the World Wide Web*, 80 DENV. U. L. REV. 111, 113 (2002) (emphasizing concern that technological developments will increase Internet gambling and have significant social ramifications).

<sup>14</sup> *See id.* (noting that one problem associated with gambling is addiction).

<sup>15</sup> Cf. Melissa Weinstein Kaye, *Across the Country, Most Popular Game in Town*, CONG. Q., July 20, 1996, at 2055 (describing a study that showed gambling addictions increased two hundred percent after Iowa legalized riverboat casinos). Additionally, the ability to gamble in isolation aggravates an addiction. See Gabriella Spinnato, *Online Gambling: Legal, Enticing to College Students*, DAILY FREE PRESS, Nov. 6, 2000, available at <http://www.highbeam.com/doc/1P1-36348179.html>.

brick-and-mortar casinos, Internet gaming sites have no reasonable means of verifying age at the door; therefore, minors have an easier time accessing gambling.<sup>16</sup>

¶10 Even if consumers of online casinos do not become addicted, they are still susceptible to fraudulent practices of unscrupulous operators.<sup>17</sup> Sites have the ability to steal a customer's credit card number or manipulate the odds of winning so that payouts are unfair.<sup>18</sup> Additionally, the government usually cannot remedy these deceptive practices because all Internet casinos operate outside the jurisdiction of the United States.<sup>19</sup>

¶11 Internet gambling harms not just the gamblers, but society as a whole. Gambling increases the occurrence of certain crimes.<sup>20</sup> These crimes range from less serious offenses, such as burglary and check fraud,<sup>21</sup> to high-level wrong-doing, such as money-laundering.<sup>22</sup> Organized crime has long used brick-and-mortar casinos for money laundering, and government officials suspect terrorist groups could employ Internet gambling for this same purpose.<sup>23</sup>

### B. Financial

¶12 Internet gambling does not just hurt society personally—it also hurts society financially.<sup>24</sup> This harm affects individuals—in the form of debt accumulation and bankruptcy—and the economy as a whole—through a lack of jobs and decrease in tax revenue.<sup>25</sup> At an individual level, Internet gambling causes personal financial ruin through debt accumulation and bankruptcy.<sup>26</sup> Legalized gambling, which is subject to extensive restrictions and safeguards, is already one of the leading causes of bankruptcy in the United States.<sup>27</sup> The government's inability to effectively regulate virtual casinos and the ease of accessing them will only make this financial problem more severe.<sup>28</sup>

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<sup>16</sup> Pearson Liddell, Jr. et al., *Internet Gambling: On a Roll?*, 28 SETON HALL LEGIS. J. 315, 334–35 (2004) (identifying minors as a susceptible group that can easily access online casinos). *But see id.* at 336 (citing Alan F. Areuri et al., *Shaping Adolescent Gambling Behavior*, 20 ADOLESCENCE 935 (1985)) (noting that age control has been difficult even in land-based casinos).

<sup>17</sup> See H.R. REP. NO. 109-412, pt. 1, at 9 (2006) (describing consumer vulnerability issues of Internet gambling).

<sup>18</sup> *Id.* (describing fraudulent practices of virtual casinos).

<sup>19</sup> See *supra* note 10 and accompanying text (explaining why online gambling cannot be regulated).

<sup>20</sup> See Kindt & Joy, *supra* note 13, at 113 (recognizing new crime and corruption as strategic problems caused by gambling activities).

<sup>21</sup> *Id.* at 118 (citing Cynthia R. Janower, *Gambling on the Internet*, 2 J. COMPUTER-MEDIATED COMM. 1 (1996), available at <http://jcmc.indiana.edu/vol2/issue2/janower.html>) (identifying burglary and check fraud as crimes that are more prevalent where gambling is allowed).

<sup>22</sup> *Id.* at 119 (citing *Internet Casinos Find a Haven in the Caribbean Islands*, LAS VEGAS REV. J., Nov. 10, 1997).

<sup>23</sup> See *infra* note 81 and accompanying text (discussing the use of Internet gambling for financing terrorism).

<sup>24</sup> See Liddell, Jr. et al., *supra* note 16, at 332 (recognizing financial harm as a problem of Internet gambling).

<sup>25</sup> *Id.* (identifying specific financial harms caused by Internet gambling).

<sup>26</sup> See Kindt & Joy, *supra* note 13, at 116 (demonstrating the connection between Internet gambling and bankruptcy). Personal bankruptcies also have the larger effect of destabilizing financial institutions. *Id.*

<sup>27</sup> See Liddell, Jr. et al., *supra* note 16, at 337 (“Legalized gambling is the fastest growing and third leading cause of bankruptcies.”).

<sup>28</sup> *Id.* (noting that Internet gambling “should cause alarm” because of its different nature compared to traditional gaming); see *supra* note 10 and accompanying text.

¶13 At the aggregate level, online gambling drains the economy and does not provide many of the financial benefits associated with conventional gaming.<sup>29</sup> For example, Harrah's Entertainment built its New Orleans hotel and casino at a cost of \$345 million dollars; the construction created 4,259 new jobs in the multi-county metropolitan area and boosted household earnings by a total of \$107.5 million.<sup>30</sup> Internet Casinos, Inc. spent just \$1.5 million establishing a virtual casino and created only seventeen new jobs.<sup>31</sup> Not only are the economic benefits of Internet gambling miniscule compared to traditional brick-and-mortar casinos, all operations occur outside the United States, resulting in no domestic benefit.<sup>32</sup>

¶14 Though traditional gambling causes societal and financial harm, the resulting tax revenue often compensates for the damage done.<sup>33</sup> Land-based gambling generates tax revenue from a wide variety of sources: casino profits, tourism dollars, employment income, and property value increases.<sup>34</sup> Virtual casinos provide no such benefit because they operate outside the United States.<sup>35</sup> Even if they did operate within the government's jurisdiction, the gain from online gambling is disproportionately smaller because of its business model.<sup>36</sup>

### III. PROGRESSION OF LAW

¶15 Since its founding, the United States has struggled with the question of how much, if at all, it should restrict gambling.<sup>37</sup> Indecision over gaming regulation did not originate in America—early lawmakers imported it when they based gambling rules on a mix of English laws that swayed between toleration and prohibition.<sup>38</sup> Indecision resulted in inconsistency<sup>39</sup> and ambiguity.<sup>40</sup> It is no surprise that the same lack of order plaguing

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<sup>29</sup> See Liddell, Jr. et al., *supra* note 16, at 332–33 (describing the negative economic consequences of Internet gambling).

<sup>30</sup> Stewart Yerton, *Millions Trickle from Casino; Economist Studies from '98 to Debut*, NEW ORLEANS TIMES-PICAYUNE, Nov. 3, 1999, at C1 (describing economic benefits of Harrah's New Orleans casino). Further economic benefits flow from the casino's role as a tourist attraction. See Liddell, Jr. et al., *supra* note 16, at 342–43 (“Traditional casinos attract many patrons to their land-based gambling locations.”).

<sup>31</sup> See Kindt & Joy, *supra* note 13, at 129 (describing the minimal economic impact of an online casino).

<sup>32</sup> See *supra* Part I (stating that all virtual casino businesses are located outside the U.S.). In addition to creating very few jobs, Internet gambling operations actually hinder workplace productivity. See Jon Kyl, *The Government Should Prohibit Gambling on the Internet*, in GAMBLING: OPPOSING VIEWPOINTS, *supra* note 12, at 156, 157 (“[A] business with 1,000 workers can anticipate increased personnel costs of \$500,000 a year due to job absenteeism and declining productivity simply by having various forms of legalized gambling available.”).

<sup>33</sup> See Liddell, Jr. et al., *supra* note 16, at 332–33 (describing how gaming tax revenues remedy gambling harm).

<sup>34</sup> *Id.*

<sup>35</sup> See *supra* Part I (stating that the entire Internet gambling industry is located offshore).

<sup>36</sup> See *supra* note 31 and accompanying text (explaining that virtual casinos cost little to establish and employ few workers).

<sup>37</sup> DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 12 (2005).

<sup>38</sup> See *id.* (describing English influence on American gaming laws).

<sup>39</sup> See, e.g., NEV. REV. STAT. ANN. § 463.0129 (West 2006) (allowing casino gambling in Nevada); TENN. CODE ANN. § 39-17-501 (2006) (prohibiting any form of casino gambling in Tennessee, but allowing a lottery if it is established by an amendment to the state constitution); 720 ILL. COMP. STAT. ANN. 5/28-1 (West 2006) (prohibiting casino gambling unless it is conducted on a riverboat); UTAH CODE ANN. § 76-10-1102 (2006) (prohibiting gambling in Utah).

<sup>40</sup> See Justin D. Anderson, *Snowshoe Cut Fees for Poker Run; Resort Made Change After Concerns*

regulation of traditional gaming carried over to Internet gambling. Throughout history, the federal government viewed gaming regulation as primarily a matter reserved to the states by the Tenth Amendment, except when a national response was necessary to ensure uniformity among the states.<sup>41</sup> The jurisdictional uniqueness of the Internet called for a national answer to online gambling.<sup>42</sup> However, even at the federal level, the government failed to get a handle on the virtual gaming problem until the passage of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) because existing laws and attempts at new prohibitions proved ineffective.<sup>43</sup>

### A. Wire Act

¶16 One of the first laws used to question the legality of Internet gambling—the Wire Act—finds its inception well before the advent of broadband technology, e-mail, web sites, and even personal computers.<sup>44</sup> The Wire Act made it a criminal offense to use a wire communication facility in interstate commerce to place a bet or wager on any sporting event or contest.<sup>45</sup> A safe harbor provision in the Wire Act allows electronic sports betting if it is legal at both ends of the wire.<sup>46</sup> The Act’s original purpose was to shut down the “race wire,” a national telegraph network that transmitted information and results from horse races to “thousands of illegal, untaxed betting dens and bookie stands.”<sup>47</sup>

¶17 Though government prosecutors attempted to use the Wire Act to battle online gambling,<sup>48</sup> the courts determined that its application on the World Wide Web was limited to sports betting and did not include traditional casino games.<sup>49</sup> Even if Congress had expanded the scope of the Wire Act to cover traditional casino games, the question remains as to whether an Internet connection provided by a cellular phone would

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*Were Raised over Legality of Event*, CHARLESTON DAILY MAIL (West Virginia), July 22, 2008 (illustrating confusion in determining whether a poker tournament is legal or illegal under West Virginia law).

<sup>41</sup> See *Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1998) (“Licensed gaming is a matter reserved to the states . . . .”); *Chun v. New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (“[G]ambling and lotteries [are] clearly a matter of . . . state concern.”).

<sup>42</sup> See H.R. REP. NO. 106-655, pt. 1, at 11 (2000) (Federal Internet gambling regulation “addresses a growing problem that no single State, or collection of States, can adequately address.”).

<sup>43</sup> See *infra* Part III.A–C (describing existing laws that affect Internet gambling and federal attempts at regulating online gaming).

<sup>44</sup> Wire Act, Pub. L. No. 87-216, 75 Stat. 491 (1961) (codified as amended at 18 U.S.C. §§ 1081, 1084 (2006)).

<sup>45</sup> 18 U.S.C. § 1084(a) (2006).

<sup>46</sup> § 1084(b) (“Nothing in this section shall . . . prevent the transmission . . . for placing bets . . . from a State or foreign country where betting . . . is legal into a State or foreign country in which such betting is legal.”). There is no requirement that placing bets be a specific crime in the state. *United States v. Cohen*, 260 F.3d 68, 74 (2d Cir. 2001), *cert. denied*, 536 U.S. 922 (2002) (“[The safe harbor provision] does not stand for the proposition that § 1084 permits betting that is illegal as long as it is not criminal.”). As long as sports betting is merely illegal in a jurisdiction, the safe harbor provision cannot apply. *Id.*

<sup>47</sup> SCHWARTZ, *supra* note 37, at 6–7.

<sup>48</sup> A federal prosecutor’s investigation forced Internet search sites Yahoo! and Google to stop accepting advertisements from online casinos. See Matt Richtel, *Celebrities Taking a Gamble*, N.Y. TIMES, Nov. 16, 2005, at C2, available at <http://www.nytimes.com/2005/11/16/business/media/16adco.html>.

<sup>49</sup> See *In re Mastercard Int’l Inc.*, 313 F.3d 257, 262–63 (5th Cir. 2002) (holding that the Wire Act only prohibits gambling on sporting events). Though not effective against traditional online gaming, prosecutors successfully used the Wire Act to convict the president of an Internet sports gambling operation. *Cohen*, 260 F.3d at 73 (allowing the conviction of an Internet sports betting operator under the Wire Act).

constitute a wire communication facility.<sup>50</sup> If the scope of the Wire Act does not reach this wireless technology, the law will be limited in curing the virtual gaming problem. These limitations prevent the Wire Act from serving as a significant authority for prohibiting Internet gambling.

### B. Travel Act

¶18 Another relatively ancient tool used in the modern fight against Internet gambling is the Travel Act.<sup>51</sup> The Travel Act prohibits intentionally conducting an unlawful activity using a facility of interstate commerce.<sup>52</sup> Gambling over wires is an unlawful activity that can be prosecuted under the Travel Act, and unlike the Wire Act, there is no limitation on the type of gaming within the scope of the law.<sup>53</sup> However, like the Wire Act, only operators—not bettors—can violate the Travel Act.<sup>54</sup> Therefore, only virtual casino operators are subject to criminal liability under the Travel Act.

¶19 Though the Travel Act provides stronger authority for challenging all forms of Internet gambling, it is not without limits. It suffers from the same downside as the Wire Act—there is no indication that wireless communications are within the scope of the Travel Act.<sup>55</sup> Weaknesses in the Wire and Travel Acts cause neither law to have the impact necessary to eliminate the Internet gambling problem in the United States; therefore, the government sought a modern statutory remedy.

### C. Modern Unsuccessful Attempts at Prohibition

¶20 Considering that the Internet is a new forum for gaming, there is a relatively long history of federal legislative attempts to prohibit online gambling.<sup>56</sup> Prior to the UIGEA, none of those efforts became law, for reasons ranging from disagreements over the appropriate number of exceptions to a presidential sex scandal.

#### 1. Internet Gambling Prohibition Act of 1998

¶21 The first major effort to criminalize Internet gambling occurred through an attempted amendment to the Wire Act, rather than the creation of an independent law.<sup>57</sup>

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<sup>50</sup> See Liddell, Jr. et al., *supra* note 16, at 321–22 (discussing limitations of the Wire Act in prohibiting Internet gambling).

<sup>51</sup> Travel Act, Pub. L. No. 87-227, 75 Stat. 498 (1961) (codified as amended at 18 U.S.C. § 1952 (2006)).

<sup>52</sup> 18 U.S.C. § 1952(a) (2006).

<sup>53</sup> *United States v. Villano*, 529 F.2d 1046, 1052–53 (10th Cir. 1976) (holding that gambling over phone lines violates the Travel Act); *United States v. Smith*, 209 F. Supp. 907, 916 (E.D. Ill. 1962) (holding that the use of telecommunications to gamble is a violation of the Travel Act).

<sup>54</sup> CHARLES DOYLE, CONG. RES. SERV., REP. NO. RS21984, INTERNET GAMBLING: AN ABRIDGED OVERVIEW OF FEDERAL CRIMINAL LAW (2004), available at [https://www.policyarchive.org/bitstream/handle/10207/4008/RS21984\\_20041129.pdf](https://www.policyarchive.org/bitstream/handle/10207/4008/RS21984_20041129.pdf).

<sup>55</sup> See Liddell, Jr. et al., *supra* note 16, at 321–22 (discussing limits of the Travel Act).

<sup>56</sup> Not all proposed legislation sought prohibition; one House bill advocated a regulatory framework. See *infra* Part IV.A.2 (describing legislation proposing a commission that would study the feasibility of regulating online casinos).

<sup>57</sup> Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997). This bill was introduced in 1997, but later modified in committee and referred to as the Internet Gambling Prohibition Act of 1998. 144 CONG. REC. S8815, S8820 (1998) (statement of Sen. Leahy).

Legislating through amendment allows the government to rest on the authority of a well-established law while asserting its power in a contemporary area of regulation. The Internet Gambling Prohibition Act of 1998 (IGPA 98) sought to expand the scope of the Wire Act to include non-sports betting<sup>58</sup> and to prohibit using the Internet to place bets or assist in the placing of bets.<sup>59</sup> By making it unlawful to place bets, in addition to assisting in their placement, the IGPA 98 targeted not just the Internet gambling operators, but also their customers. Under the bill, violators could be fined, imprisoned,<sup>60</sup> or have their sites terminated by their Internet service provider (ISP).<sup>61</sup> The bill would require ISPs to block all access to virtual casinos and to refuse advertisements from Internet gambling sites.<sup>62</sup>

¶22 Rationales for the IGPA 98 included maintaining regulatory consistency amongst non-Internet gambling laws, protecting children from casino access, and preventing addiction and abuse.<sup>63</sup> The Justice Department questioned the bill's enforceability and overreaching nature.<sup>64</sup> Despite these concerns, the Senate voted 90 to 10 in support of the IGPA 98 on July 23, 1998.<sup>65</sup> This high level of support carried over to the House Judiciary Committee, but the bill never reached a final vote on the floor of the House during the 105<sup>th</sup> Congressional session because of a big obstacle congesting the legislative process: the Monica Lewinsky scandal.<sup>66</sup>

## 2. Internet Gambling Prohibition Act of 1999

¶23 While debate over presidential impeachment unintentionally killed the IGPA 98, very little time passed before its original sponsor resurrected the bill in a new form: the Internet Gambling Prohibition Act of 1999 (IGPA 99).<sup>67</sup> The wording of the bill is almost identical to the IGPA 98; however, a few differences significantly impacted the law's effect. Under the IGPA 99, only online casino operators would be held liable—

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<sup>58</sup> S. 474, 105th Cong. § 2 (1998) (defining bet or wager as “the staking or risking by any person of something of value upon the outcome of a contest of others, sporting event of others, or of any game of chance”).

<sup>59</sup> S. 474, 105th Cong. § 3 (1998).

<sup>60</sup> *Id.*

<sup>61</sup> S. 474, 105th Cong. § 4 (1998).

<sup>62</sup> *Id.*

<sup>63</sup> Bill Pietrucha, *Justice Calls Online Gambling Bill Unenforceable*, NEWSBYTES, June 19, 1998.

<sup>64</sup> *Id.* Of particular concern was the bill's attempt to criminalize “office pools, fantasy sports games, and ‘casual’ bets conducted using e-mail or the Internet.” *Id.* Lobbyists were also concerned that it would be impossible for ISPs to filter legal from illegal activities. *Id.*

<sup>65</sup> 144 CONG. REC. S8815, S8825 (1998). The IGPA 98's bipartisan sponsorship contributed to its overwhelming support in the Senate. See Pietrucha, *supra* note 63. However, critics question the make-up of this odd coalition. See D. Dowd Muska, *www.prohibition.gov*, NEV. J., June 1999, available at [http://nj.npri.org/nj99/06/cover\\_story.htm](http://nj.npri.org/nj99/06/cover_story.htm) (noting that supporters include brick-and-mortar casino operators, family values interest groups, the Nevada congressional delegation, and religious organizations); see *infra* Part IV.A.1 (describing conventional gambling institutions' support of online casino prohibition).

<sup>66</sup> Muska, *supra* note 65 (noting that President Clinton's impeachment referral consumed the remainder of the congressional session).

<sup>67</sup> Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. (1999). The House also proposed a version of the bill. Internet Gambling Prohibition Act of 1999, H.R. 3125, 106th Cong. (1999). The differences between the House and Senate versions were minimal. See CHARLES DOYLE, CONG. RES. SERV., REP. NO. RS20485, INTERNET GAMBLING: A SKETCH OF LEGISLATIVE PROPOSALS IN THE 106TH CONGRESS 3 (2003), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-1515>.

individual gamblers could not be prosecuted for wagering in cyberspace.<sup>68</sup> The improved act also lifted the burden on ISPs; they were still required to remove the account of a business violating the law, but they only had to make “reasonable” steps to filter illegal gambling websites.<sup>69</sup> Advertising Internet casinos was once again forbidden, but the IGPA 99 granted ISPs immunity for hosting advertisements for non-Internet gambling.<sup>70</sup>

¶24 With many concerns of the IGPA 98 addressed, the IGPA 99 unanimously passed in the Senate on November 19, 1999.<sup>71</sup> However, the House once again served as a source of defeat—this time on the actual merits of the bill and not legislative congestion.<sup>72</sup> Members disagreed over the IGPA 99’s exceptions for individual bettors and fantasy sports leagues.<sup>73</sup>

¶25 In addition to killing the Senate’s IGPA 99, members of the House also failed to bring their own alternative piece of anti-Internet gambling legislation to life. H.R. 4419 was an Internet gambling funding prohibition bill that banned virtual casinos from accepting a bettor’s credit cards, electronic fund transfers, or checks in connection with illegal Internet wagers.<sup>74</sup> The bill required banks, credit card companies, and other financial institutions to help with enforcement by detecting and blocking illegal transactions.<sup>75</sup> Though H.R. 4419 did not become law, it strongly influenced the design of the current Internet gambling prohibition.<sup>76</sup>

### 3. Internet Gambling Enforcement Act

¶26 Much like H.R. 4419, the Internet Gambling Enforcement Act (IGEA) placed less emphasis on directly stopping online gambling participants—the individual bettors and operators—and focused more on payment systems that support the activity.<sup>77</sup> The bill prohibited Internet gambling businesses from accepting credit cards, checks, electronic transfers, and other financial transactions.<sup>78</sup> Like many of its predecessors, the IGEA

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<sup>68</sup> Compare S. 692, 106th Cong. (1999) (“It shall be unlawful for a person engaged in a gambling business” to use the Internet to place or assist in placing a bet.) (emphasis added), with S. 474 (prohibiting using the Internet to “place, receive, or otherwise make a bet or wager with any person”). This modification is significant because much of the controversy over IGPA 98 surrounded the provision holding individual bettors criminally liable. Pietrucha, *supra* note 63.

<sup>69</sup> S. 692, 106th Cong. (1999).

<sup>70</sup> *Id.* (“Prohibition of [Internet gambling] does not apply to advertising or promotion of any activity that is not prohibited by [this Act.]”).

<sup>71</sup> *Id.* Ironically, the Justice Department expressed concern about allowing an exemption for fantasy sports in IGPA 99, even though it criticized IGPA 98 for not having such an exemption. Compare Letter from Jon P. Jennings, Acting Assistant Attorney General, United States, to Honorable Patrick J. Leahy, Ranking Minority Member, Committee on the Judiciary, United States Senate (June 9, 1999), available at <http://www.cybercrime.gov/s692ltr.htm> (supporting provisions affecting fantasy sports games), with Pietrucha, *supra* note 63 (“[The Justice Department] expressed serious reservations about the bill’s attempt to criminalize . . . fantasy sports games.”).

<sup>72</sup> See 146 Cong. Rec. H6057, H6057-68 (1999).

<sup>73</sup> *Id.*

<sup>74</sup> DOYLE, *supra* note 67, at 3 (explaining how H.R. 4419 prohibited Internet gambling).

<sup>75</sup> *Id.* (illustrating how H.R. 4419 blocked funding).

<sup>76</sup> See *infra* Part III.D (describing the currently enacted Unlawful Internet Gambling Prohibition Act of 2006).

<sup>77</sup> See Internet Gambling Enforcement Act, H.R. 556 § 3, 107th Cong. (2002) (establishing a “prohibition on acceptance of any bank instrument for unlawful Internet gambling”).

<sup>78</sup> H.R. 556 § 3(a) (prohibiting acceptance of “credit extended through the use of a credit card,” “an electronic fund transfer,” “any check, draft or similar instrument,” or “the proceeds of any other form of

would have amended the Wire Act rather than create an independent prohibition.<sup>79</sup> In addition to the usual rationales of consumer protection and preventing access by children,<sup>80</sup> the IGEA also addressed concerns about terrorist groups using Internet gambling as a vehicle for money-laundering.<sup>81</sup> The House passed the IGEA on October 1, 2002.<sup>82</sup> In the Senate, it was referred to committee; however, the bill never reached the Senate floor.<sup>83</sup> The IGEA did not become law, but fighting Internet gambling through payment systems ultimately prevailed as the preferred method of prohibition in the recently passed UIGEA.<sup>84</sup>

#### D. Unlawful Internet Gambling Enforcement Act of 2006

¶27 The funding prohibition approach of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) is not entirely novel; prior proposed legislation restricted Internet gambling by blocking payments to operators.<sup>85</sup> However, one major difference is found in the UIGEA: it creates an independent law under Title 31, the Money and Finance Code,<sup>86</sup> whereas previous efforts at regulation attempted to amend the Wire Act.<sup>87</sup> By choosing creation of new law over amendment of established law, Congress emerges into an area of regulation—the Internet—alone and cannot rely on the laurels of the Wire Act as authority for its actions. However, Congress also avoids many challenges the Wire Act faced in prohibiting online gaming.<sup>88</sup>

¶28 Absent from the UIGEA’s “Congressional findings and purpose” are some of the most commonly cited rationales for restricting Internet gambling, such as prevention of access by children and avoidance of social harms.<sup>89</sup> Most of the findings are money-

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financial transaction”).

<sup>79</sup> See H.R. 556 § 5 (inserting provisions of the IGEA into the Wire Act).

<sup>80</sup> See H.R. REP. NO. 107-339, pt. 1, at 6 (2001) (“Internet gambling [] can lead to personal and family hardships, such as lost savings, excessive debt, bankruptcy, foreclosed mortgages, and divorce.”); see also Pietrucha, *supra* note 63 (discussing problems caused by Internet gambling); *supra* Part II (identifying rationales for prohibiting Internet gambling).

<sup>81</sup> H.R. REP. NO. 107-339 (“Internet gambling serves as a vehicle for money laundering and can be exploited by terrorists for that purpose.”). The FBI expressed this concern at a committee hearing for the IGEA held just three weeks after September 11, 2001. *Id.*

<sup>82</sup> 148 CONG. REC. H6848 (2002) (“The rules were suspended and the bill was passed.”).

<sup>83</sup> 148 CONG. REC. INDEX (2002) (noting that the last recorded action on H.R. 556 was the referral to the Committee on the Judiciary); Thomas.gov, Bill Summary & Status File, <http://www.thomas.gov/cgi-bin/bdquery/z?d107:HR00556:@@R>.

<sup>84</sup> SAFE Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952-1962 (codified as amended at 31 U.S.C. §§ 5361–5367 (2006)) (“Prohibition on acceptance of any payment instrument for unlawful Internet gambling.”).

<sup>85</sup> H.R. 556, 107th Cong. (2002) (blocking acceptance of electronic financial transactions by Internet gambling operators); H.R. 4419, 107th Cong. (2002) (prohibiting specified financial instruments from being used to pay online gaming businesses).

<sup>86</sup> SAFE Port Act of 2006 § 802(a) (“Chapter 53 of title 31, United States Code, is amended by *adding at the end the following*: SUBCHAPTER IV--PROHIBITION ON FUNDING OF UNLAWFUL INTERNET GAMBLING . . .”) (emphasis added).

<sup>87</sup> See *supra* notes 57–59 and accompanying text (demonstrating IGPA 98’s proposed amendments to the Wire Act).

<sup>88</sup> See *supra* Part III.A (discussing the limited applicability of the Wire Act to Internet gambling).

<sup>89</sup> Compare 31 U.S.C. § 5361(a) (2006) (listing the UIGEA’s Congressional findings and purpose), with *supra* Part II (discussing rationales for prohibiting Internet gambling). But see H.R. REP. NO. 109-412, at 8–10 (discussing both money-oriented and traditional findings in the UIGEA’s House report).

oriented, recognizing the use of credit cards in online gaming,<sup>90</sup> recommendations to prohibit wire transfers,<sup>91</sup> and debt-collection problems tied to Internet gambling.<sup>92</sup> The emphasis on financial—not social—harms is likely a result of the UIGEA’s inclusion in the Money and Finance Code instead of the Criminal Code.<sup>93</sup>

¶29 The largest portion of the UIGEA consists of definitions.<sup>94</sup> In defining “bet or wager,” the UIGEA is careful to distinguish between casino-style Internet gambling and the online purchase or sale of securities, commodities, over-the-counter derivative instruments, and insurance contracts.<sup>95</sup> Fantasy sports games are also excluded from the definition of “bet or wager,” as long as any prize given to a participant is not determined by the amount of fees paid to enter the competition.<sup>96</sup> “Payment system” is broadly defined to include a wide variety of financial transactions.<sup>97</sup> This is necessary because one of the greatest threats to the effectiveness of the UIGEA is a creative banking industry that could construct financial instruments not restricted by anti-gambling funding prohibitions.<sup>98</sup>

¶30 Though far-reaching in the Internet gambling world, the UIGEA treads lightly on established state and federal gaming laws.<sup>99</sup> States are not prohibited from allowing *intrastate* Internet gambling as long as age and location verification reasonably prevent access by minors and persons located outside of the state.<sup>100</sup> The federal government’s longstanding view that authority over gambling is primarily reserved to the states justifies this exception.<sup>101</sup> Tribal gambling is subject to a provision similar to the intrastate allowance; however, both *intra* and *intertribal* virtual gaming is allowed.<sup>102</sup> In addition,

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<sup>90</sup> § 5361(a)(1) (“Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.”).

<sup>91</sup> § 5361(a)(2) (“The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.”).

<sup>92</sup> § 5361(a)(3) (“Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.”).

<sup>93</sup> See *supra* note 86 and accompanying text (describing the UIGEA’s placement in the Money and Finance Code).

<sup>94</sup> See 31 U.S.C. § 5362 (2006) (defining terms in the act).

<sup>95</sup> § 5362(1)(E) (excluding numerous financial instruments from the definition of “bet or wager”). *But cf.* Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 373 (2006) (advocating that Internet gambling should receive the same treatment as online trading because “many investors buy stock for some of the same reasons that gamblers may choose certain slot machines, lottery numbers, or squares on a roulette table, or choose to bet or fold a certain poker hand”).

<sup>96</sup> See § 5362(1)(E)(ix) (excluding “participation in any fantasy or simulation sports game”). A fantasy sports exclusion was controversial in prior attempts at prohibition. See *supra* notes 64, 71 and accompanying text.

<sup>97</sup> See § 5362(3) (“Any system utilized by a financial transaction provider that . . . could be utilized in connection with, or to facilitate, any restricted transaction.”).

<sup>98</sup> See *infra* Part IV.B.2 (discussing alternative financial instruments that may fall outside the UIGEA’s scope).

<sup>99</sup> *Cf. infra* Part IV.A.1 (explaining the brick-and-mortar casinos’ support of a ban on Internet gambling).

<sup>100</sup> See § 5362(10)(B) (“The term ‘unlawful Internet gambling’ does not include . . . a bet or wager . . . [that] is initiated and received or otherwise made exclusively *within a single State*.”) (emphasis added).

<sup>101</sup> See *supra* note 41 and accompanying text.

<sup>102</sup> See § 5362(10)(C) (“‘Unlawful Internet gambling’ does not include . . . a bet or wager . . . within the Indian lands of a single Indian tribe.”). The act also authorizes limited *intertribal* Internet gaming. *Id.* (allowing gaming between the Indian lands of two or more Indian tribes if authorized by the Indian Gaming Regulatory Act).

the UIGEA is careful to recognize that its restrictions have no effect on horseracing, which is currently allowed under state and federal law.<sup>103</sup>

¶31 After extensively laying out definitions, inclusions, and exclusions, the UIGEA briefly describes what the Act prohibits: acceptance of any financial instrument for unlawful Internet gambling.<sup>104</sup> The details of enforcing this prohibition are left up to the Federal Reserve System,<sup>105</sup> which prescribes regulations that banks and credit card companies must follow to identify and block restricted transactions.<sup>106</sup>

¶32 A person who violates the UIGEA is subject to both civil and criminal penalties.<sup>107</sup> These remedies include removal of the virtual casino website,<sup>108</sup> fines, imprisonment not greater than five years, and a permanent injunction against the operator.<sup>109</sup>

#### IV. CRITIQUE OF THE PROHIBITORY FRAMEWORK

¶33 Two words describe the UIGEA's impact on Internet gambling: effective and immediate.<sup>110</sup> Upon the prohibition being signed into law on October 13, 2006, PartyPoker.com suspended its gaming business with United States residents. Online casino Sportingbet stopped providing gambling services in the U.S. and sold its operations for one dollar. Believing a ban on virtual gaming was imminent, Casino-on-Net actually stopped taking bets from U.S. gamblers before President Bush signed the UIGEA into law.<sup>111</sup> Being denied access to the U.S. market is a move the virtual casinos are not happy about; some are even resisting it.<sup>112</sup> The value of online casinos fell as much as eighty percent<sup>113</sup> due to the loss of their biggest customer bases.<sup>114</sup> Though a

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<sup>103</sup> See § 5362(10)(D)(iii) (“It is the sense of Congress that this subchapter shall not change which activities related to horse racing may or may not be allowed under Federal law.”).

<sup>104</sup> 31 U.S.C. § 5363 (2006) (“Prohibition on acceptance of any financial instrument for unlawful Internet gambling.”).

<sup>105</sup> 31 U.S.C. § 5364(a) (2006) (“[T]he Federal Reserve System . . . shall prescribe regulations . . . requiring each designated payment system . . . to identify and block or otherwise prevent or prohibit restricted transactions . . .”).

<sup>106</sup> Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382 (Nov. 18, 2008) (to be codified at 12 C.F.R. pt. 233 & 31 C.F.R. pt. 132).

<sup>107</sup> See §§ 5364–5365 (adopting civil and criminal remedies for violation of the UIGEA).

<sup>108</sup> Congress is careful not to create “any obligation on an [ISP] to monitor its service.” *Id.* The IGPA 98 imposed much tougher duties on ISPs. See *supra* Part III.C.1 (discussing the IGPA 98’s requirement that ISPs block all access to Internet gambling websites). Congress also notes that ISPs do not violate the Wire Act by unknowingly hosting a web site prohibited by the UIGEA. See § 5365(c)(2) (“An [ISP] . . . shall not be liable under section 1084(d) of title 18 [the Wire Act], except that the limitation in this paragraph shall not apply if an [ISP] has actual knowledge and control of bets and wagers.”).

<sup>109</sup> §§ 5364–5365 (listing penalties for violating the UIGEA).

<sup>110</sup> *But see MSNBC: Don’t Bet on It! Online Gambling Ban* (MSNBC television broadcast Oct. 14, 2006) (arguing that less reputable casinos that are more likely to defraud customers are the only operations still doing business with the U.S.).

<sup>111</sup> See *888 Suspends Business from US Customers, Warns of Adverse Impact on FY Results*, FORBES, Oct. 2, 2006, available at <http://www.forbes.com/business/feeds/afx/2006/10/02/afx3058492.html> (reporting Casino-on-Net’s parent company’s decision to cease operating in the United States).

<sup>112</sup> See *infra* note 137 and accompanying text (describing efforts to resist the UIGEA).

<sup>113</sup> *Gaming Groups Lose Billions*, NEWCASTLE J., Oct. 3, 2006, at 27 (“Shares in the sector tumbled by as much as 80% as investors reacted with dismay to [the UIGEA].”).

<sup>114</sup> See *Internet Gambling Effectively Dies in U.S.*, UNITED PRESS INT’L, Oct. 13, 2006, available at [http://www.redorbit.com/news/technology/692478/internet\\_gambling\\_effectively\\_dies\\_in\\_us/index.html](http://www.redorbit.com/news/technology/692478/internet_gambling_effectively_dies_in_us/index.html) (“The new restriction will affect as many as 23 million U.S. residents who bet \$6 billion on the Internet last

few virtual gaming operators are not complicit with the prohibition, almost all have been forced to take their business elsewhere.

¶34 However, a prohibitory framework, such as the one used in the UIGEA, is not without flaws. Domestically, critics attack the prohibition of Internet gambling because some of its main proponents are traditional casinos, who are looking out for their own interests, not those of the consumers. Critics also argue that the ban is potentially ineffective and unconstitutional. Internationally, members of the World Trade Organization criticize prohibition because numerous exceptions in the framework lead to trade discrimination. In addition to the general problems of prohibition, the UIGEA has specific weaknesses that will test its effectiveness: an interpretation of the statute that excludes skill gambling from prohibition and the inability to restrict difficult-to-track alternative financial instruments. Despite these issues, a careful analysis demonstrates the UIGEA is still effective in fulfilling its purpose.<sup>115</sup>

### A. Shortcomings of a Prohibitory Approach

#### 1. Self-serving Alliance

¶35 The credibility of the movement to ban online gambling is often attacked because of the alliance of otherwise opposing interest groups that supports prohibition over regulation. Predictable proponents of banning online gambling—such as religious, family, and conservative organizations—have teamed up with the major brick-and-mortar casinos.<sup>116</sup> Conventional gambling institutions claim they support prohibition because virtual operations cannot be regulated to the degree necessary to ensure fairness, minimize social harm, and prevent problem gambling.<sup>117</sup> However, prohibition critics argue that the true reason for this alliance is that brick-and-mortar casinos “[worry] that Internet gambling [will] cannibalize their preexisting multi-million-dollar gambling operations.”<sup>118</sup> Online operators see the desire to corner the market as the reason prohibitionist casino institutions are not willing to give regulation a try.<sup>119</sup>

#### 2. Potentially Unconstitutional and Ineffective

¶36 Not every previously proposed legislative action concerning Internet gambling takes a prohibitive approach. Despite the powerful alliance of conservatives and casinos

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year.”)

<sup>115</sup> See *infra* Part IV.A–B (describing how the UIGEA survives its weaknesses).

<sup>116</sup> See MICHAEL MARGOLIS & DAVID RESNICK, *POLITICS AS USUAL: THE CYBERSPACE REVOLUTION* 160 (2000) (detailing the powerful alliance between those who fear the evils of gambling and the casinos that see Internet gambling as business competition).

<sup>117</sup> See Kindt & Joy, *supra* note 13, at 139 (noting that traditional casinos argue that Internet gambling cannot be effectively regulated).

<sup>118</sup> Matt Richtel, *Companies in U.S. Profiting from Surge in Internet Gambling*, N.Y. TIMES, July 6, 2001, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9406EEDA1438F935A35754C0A9679C8B63>.

<sup>119</sup> The November 2006 election increased the brick-and-mortar gambling establishment’s influence in Congress. See Deena Beasley, *U.S. Gambling Group Likes New Congress Leaders*, WINNERONLINE, Nov. 14, 2006, <http://www.winneronline.com/articles/november2006/grouplikesnucongress.htm>. Senators and Representatives from states with casinos obtained a significant number of leadership positions, such as Senator Harry Reid of Nevada (majority leader) and Senator Trent Lott of Mississippi (minority whip). *Id.*

against them, proponents of a regulatory framework have had a voice in the political process. They used that voice to propose a solution for two potential pitfalls of a prohibitory framework: ineffectiveness and unconstitutionality.<sup>120</sup>

¶37

The Internet Gambling Licensing and Regulation Commission Act (IGLRCA), a bill that advocates regulation, focused on these weaknesses in its attempt to shift legislative attitude toward a regulatory approach.<sup>121</sup> The House received the IGLRCA in 2003, which suggested establishing a commission to analyze the viability of allowing strictly regulated online casinos.<sup>122</sup> The IGLRCA did not offer any explanation on how regulation would work or why it would be superior to prohibition<sup>123</sup> in solving the many problems associated with Internet gambling.<sup>124</sup> However, findings in the act identified potential ineffectiveness<sup>125</sup> and violation of individual due process and privacy rights as disadvantages of a prohibitory framework.<sup>126</sup> Though the IGLRCA went before the House Subcommittee on Crime, the Act's concerns about the practical and the constitutional problems related to the prohibition of online casinos did not change many minds—the House never voted on the measure.<sup>127</sup>

### 3. WTO Issues

¶38

Challenges to the United States' prohibition of Internet gambling do not just come from the domestic front—there is significant international pressure to take a regulatory approach. In 2003, before the enactment of the UIGEA, a foreign country—Antigua and Barbuda—filed a complaint against the United States with the World Trade Organization.<sup>128</sup> It alleges that the Wire and Travel Acts,<sup>129</sup> read in conjunction with the laws of several states,<sup>130</sup> amount to a prohibition of foreign online gaming providers in violation of the General Agreement on Trade in Services (GATS).<sup>131</sup> The WTO's Dispute Settlement Panel agreed with the complainant and determined that U.S. law at

<sup>120</sup> See Internet Gambling Licensing and Regulation Commission Act (IGLRCA), H.R. 1223, 108th Cong. (2003) (introduced by Rep. Conyers).

<sup>121</sup> *Id.* (proposing a commission to study the possibility of allowing strictly regulated Internet casinos).

<sup>122</sup> *Id.* (describing the objectives of the IGLRCA).

<sup>123</sup> See 149 CONG. REC. H5144 (2003) (statement of Rep. Conyers) (stating that the IGLRCA will determine whether a ban or regulation is more effective).

<sup>124</sup> See *supra* Part II (identifying rationales for prohibiting—and not regulating—Internet gambling).

<sup>125</sup> See 149 CONG. REC. H5144 (2003) (“Because of the nature of the Internet, legislative attempts to prohibit Internet gambling are unlikely to be effective.”). But see Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1592 (1999) (“Because offshore gambling operations are beyond the reach of . . . regulatory laws, there is no way for regulators to ensure fair games and aboveboard accounting practices.”).

<sup>126</sup> See Internet Gambling Licensing and Regulation Commission Act, H.R. 1223, 108th Cong. (2003) (“Because of the nature of the Internet, legislative attempts to prohibit Internet gambling . . . may adversely impact American's rights to due process and individual privacy.”). But see Keller, *supra* note 125, at 1596 (“Due process concerns can be satisfied.”).

<sup>127</sup> See 149 CONG. REC. DIGEST 417, 108th Cong. (2003) (describing congressional action taken on H.R. 1223).

<sup>128</sup> See Hurt, *supra* note 95, at 437 (describing complaints filed against the United States at the World Trade Organization).

<sup>129</sup> See *supra* Part III.A–B (analyzing the Wire and Travel Acts).

<sup>130</sup> The states mentioned in the complaint are Louisiana, South Dakota, Massachusetts, and Utah. See Hurt, *supra* note 95, at 437.

<sup>131</sup> See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ¶ 7.1, WT/DS285/R (Nov. 10, 2004) (describing the issues in dispute).

the time of the ruling prohibited certain forms of Internet gambling in a discriminatory manner.<sup>132</sup> Exceptions in anti-gambling laws that allow limited online betting from domestic operators under the Interstate Horseracing Act are the main source of discrimination.<sup>133</sup> These same exceptions are found in the UIGEA, providing a ground for foreign countries to object with the World Trade Organization to this more encompassing prohibition.<sup>134</sup> But the United States settled current and potential trade disputes surrounding its prohibition of online gambling by granting concessions in other sectors to the complaining countries.<sup>135</sup> The White House refused to disclose what those concessions were, and they are currently the subject of a Freedom of Information Act lawsuit.<sup>136</sup>

### B. Limitations of the UIGEA

#### 1. Skills Gambling Interpretation

¶139 In an effort to preserve their operations, some Internet casinos distinguish between chance and skill gambling. Drawing a narrow interpretation of the UIGEA, these sites conclude that the new law does not prohibit games of skill, such as poker, because these games rely more on the player's ability than chance.<sup>137</sup> However, a broad reading of the UIGEA proves this is not a solid interpretation.

¶140 The definition of "bet or wager" clearly includes "a game *subject to chance*."<sup>138</sup> Therefore, if the online casino game in any way involves chance, the UIGEA prohibits it. Despite involving more skill than other games, such as slots or roulette, poker is still subject to chance. One Internet casino that advocates the view that poker is excluded from the UIGEA actually acknowledges that poker is subject to chance in its online

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<sup>132</sup> See *id.* ¶ 7.2 (concluding that "the United States fails to accord . . . service suppliers of Antigua treatment no less favourable than that provided for [its domestic suppliers]").

<sup>133</sup> See Hurt, *supra* note 95, at 438 ("The Panel did not believe the United States applied its prohibition . . . in a nondiscriminatory manner because . . . the United States allows for gambling over the Internet for horse racing . . .").

<sup>134</sup> See *supra* Part III.D (describing provisions of the UIGEA stating that the prohibition does not affect any online betting allowed under current horseracing laws); see also *infra* Part IV.B (identifying specific weaknesses of the UIGEA).

<sup>135</sup> Sarah Polson, *Congressmen Request Trade Settlement Details*, POKER NEWS, Apr. 2, 2008, <http://www.pokerlistings.com/frank-paul-request-gats-agreement-24836>.

<sup>136</sup> Sarah Polson, *Group Sues Government for Settlement Info*, POKER NEWS, May 21, 2008, <http://www.pokerlistings.com/group-sues-government-for-wto-info-27079>.

<sup>137</sup> PokerStars.com—Safe Port Act Legislation, <http://www.pokerstars.com/legislation/uigea/> (last visited Dec. 1, 2008) ("PokerStars has . . . concluded that [the UIGEA does] not alter the U.S. legal situation with respect to our offering of online poker games . . . [because] PokerStars believes that poker is a game of skill.").

<sup>138</sup> 31 U.S.C. § 5362(1)(A) (2006) (defining 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") (emphasis added).

glossary when defining gaming terms such as “equity,”<sup>139</sup> “expectation,”<sup>140</sup> and “favorite.”<sup>141</sup>

¶41 This challenge to the UIGEA is more of a nuisance to enforcement than a serious threat to effectiveness of the law; however, it should be addressed by regulators to ensure continuity in the Act’s implementation. An online poker ban is an essential inclusion in the UIGEA prohibitions because poker is subject to an additional fraud risk not found in other forms of Internet gambling: collusion among players at a table.<sup>142</sup> Arguing for an interpretation of the UIGEA that excludes poker and other skills gambling from the law is weak at best, and the most these advocates can probably hope to achieve is a brief delay in their dismissal from the U.S. market.

## 2. Alternative Financial Transfers

¶42 Prohibition of financial transfers to online casinos through payment systems is the primary way the UIGEA bans Internet gambling.<sup>143</sup> Despite a broad definition of “payment systems,”<sup>144</sup> alternative financial instruments not covered by the Act remain a threat to the effectiveness of the prohibition.<sup>145</sup> Bank and credit card payments are easy to control; however, “mobile payment systems, smart cards, . . . [and] gift certificates that are encrypted” will be more difficult to track and ban.<sup>146</sup> While the creativity of the financial industry prevents the UIGEA from being airtight, a provision of the Act requiring ISPs to block virtual casino web sites fills in the gap left by the funding prohibition.<sup>147</sup> Congress takes a belt and suspenders approach with the UIGEA by both prohibiting financial transfers and requiring ISPs to block online gambling web sites.

## V. INTERNET ALCOHOL AND CIGARETTE CONTEXT

¶43 In the United States, gaming—both traditional and online—is a \$70 billion a year industry.<sup>148</sup> Betting is clearly an American pastime;<sup>149</sup> however, this activity poses many

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<sup>139</sup> Poker Terms and Glossary—Poker Dictionary, <http://www.pokerstars.com/poker/terms> (last visited Dec. 1, 2008) (“If the pot contains \$80, and you have a 50% *chance* of winning it, you have \$40 equity in the pot.”) (emphasis added).

<sup>140</sup> *Id.* (“The amount you *expect* to gain on average if you make a certain play.”) (emphasis added).

<sup>141</sup> *Id.* (“A poker hand which is the *statistical favorite* to win.”) (emphasis added).

<sup>142</sup> See Hurt, *supra* note 95, at 429 (“If three friends join in a hand of Texas Hold’em against one stranger on the Internet, the three friends, either physically together in a computer lab, in a laptop huddle, or in communication via Instant Messenger or cell phone, can collude.”).

<sup>143</sup> See *supra* note 104 and accompanying text (explaining how the UIGEA works).

<sup>144</sup> See *supra* note 97 and accompanying text (defining “payment system”).

<sup>145</sup> See, e.g., Mike Bruner, *Will Ban End Internet Gambling? Don’t Bet on It*, MSNBC, Oct. 17, 2006, <http://www.msnbc.msn.com/id/15240569/> (describing threats to the effectiveness of the UIGEA).

<sup>146</sup> *Id.* (identifying alternative financial instruments that will be difficult to regulate).

<sup>147</sup> See 31 U.S.C. § 5365(c)(1) (2006) (“Relief granted under this section against an interactive computer service shall . . . specifically identify the location of the online site or hypertext link to be removed or access to which is to be disabled.”). *But cf.* Bruner, *supra* note 145 (claiming previous attempts to prohibit online casino advertising were not effective).

<sup>148</sup> CHARLES DOYLE, CONG. RES. SERV., REPORT NO. 97-619A, INTERNET GAMBLING: OVERVIEW OF FEDERAL CRIMINAL LAW 1 (2004), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-6004> (“Americans spend almost \$73 billion a year on legalized gambling. Estimates on the amount Americans spend on illegal gambling vary widely, ranging from over \$30 billion to over \$380 billion a year.”).

risks that threaten the personal welfare and economic health of society.<sup>150</sup> Because of these threats, the government carefully regulates gambling activity to achieve a balance between freedom to engage in this form of entertainment and protection from harm.<sup>151</sup> Prohibition of online casinos is not a statement that all forms of gambling are wrong; rather, it reflects a desire to prohibit an Internet activity that otherwise skews a carefully moderated balance upheld by existing regulations. By shutting down virtual casinos, the government preserves the precarious integrity of the gaming industry as a whole, allowing casino activity to continue in a well-moderated form. Subjecting activities that have the potential to cause harm to tight restrictions is nothing new. Alcohol and cigarettes are both controlled in a manner similar to gambling.<sup>152</sup> A ban on a type of betting—online gambling—is no different than restrictions on Internet alcohol and cigarette purchases. Therefore, by prohibiting online casinos, the United States is merely acting in accordance with its past approach to the emergence of items with high risks of harm on the World Wide Web.

#### A. Internet Alcohol Sales

¶44

There is no question that alcohol, like gambling, is potentially damaging to society and must be carefully controlled to achieve the appropriate balance between allowing individuals to drink and protecting people from harm.<sup>153</sup> The production, sale, and consumption of alcohol are subject to strict rules imposed at the state and federal levels.<sup>154</sup> Like gambling control, alcohol regulation is a power primarily reserved to the states.<sup>155</sup> However, the U.S. government imposes restrictions on both of these activities when one state's laws prevent another state's laws from being effective.<sup>156</sup>

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<sup>149</sup> Half of Americans played the lottery and greater than a third visited a casino in 2000. Frank J. Fahrenkopf, Jr., *Responsible Gambling Is Harmless Fun*, in *GAMBLING: OPPOSING VIEWPOINTS* 26, 27 (James D. Torr ed., 2002). Gambling is supported even by those who do not gamble regularly. *Id.* (“[M]ore than 94 percent of Americans view casino gambling as a social activity, while 75 percent believe casino gambling can be a fun night out.”).

<sup>150</sup> See *supra* Part II (describing rationales for regulating traditional gambling and prohibiting Internet gambling).

<sup>151</sup> Cf. Craig Lang, Comment, *Internet Gambling: Nevada Logs In*, 22 *LOY. L.A. ENT. L. REV.* 525, 526 (2002) (acknowledging government leaders' view that gambling is a form of entertainment, but recognizing that the casino industry is the most heavily regulated business in the United States).

<sup>152</sup> See *infra* Part V.A–B.

<sup>153</sup> See Kenneth B. Baren, *If a Picture Is Worth a Thousand Words, Then Advertising Is Worth a Thousand Deaths*, 30 *S. ILL. U. L.J.* 469, 470 (2006) (identifying alcohol and tobacco as two most dangerous and addictive substances). Alcohol consumption is linked to crime, deaths, illness, injuries, and poor work and school performance. See *id.* at 477–78.

<sup>154</sup> See Michael Conlin et al., *The Effect of Alcohol Prohibition on Illicit-Drug-Related Crimes*, 48 *J.L. & ECON.* 215, 215 (2005) (describing the United States' long history of extensive regulation of alcoholic beverages).

<sup>155</sup> See Matthew J. Patterson, Comment, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-First Amendment*, 2002 *U. ILL. L. REV.* 761, 769 (2002) (“[T]he repeal of the Eighteenth Amendment constituted a rejection of the notion that the country should adopt a one-size-fits-all policy on intoxicating beverages.”); Sidney J. Spaeth, Note, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 *CAL. L. REV.* 161, 165 (1991) (arguing that the failure of prohibition led to a desire by Congress and the states to leave alcohol regulation in the power of the states).

<sup>156</sup> Cf. Tom Lundin, Jr., Note, *The Internet Gambling Prohibition Act of 1999: Congress Stacks the Deck Against Online Wagering but Deals in Traditional Gaming Industry High Rollers*, 16 *GA. ST. U. L. REV.* 845, 855 (2000) (“The handful of existing federal gambling laws control gambling activity that . . . affects

¶45 All states prohibit individuals under the age of twenty-one from purchasing alcohol.<sup>157</sup> States usually restrict when<sup>158</sup> and how alcohol can be sold.<sup>159</sup> Laws prevent intoxicated persons from operating automobiles,<sup>160</sup> and vendors can be held liable for harm caused by patrons they serve.<sup>161</sup> While this strict regulatory environment for alcohol may seem onerous, it is no different than the high level of restrictions placed on traditional gambling that are designed to prevent harm from that activity.<sup>162</sup>

¶46 Since gambling services and alcoholic products have a comparable need for regulation, it is natural that their existence on the Internet is treated similarly. Internet casinos are illegal in all states, and the UIGEA prevents bettors from accessing and using them.<sup>163</sup> Purchasing alcohol online is against the law in most states, and federal law prevents buyers from obtaining it over the Internet in those jurisdictions that prohibit virtual alcohol sales.<sup>164</sup> The federal government imposes restrictions on Internet alcohol purchases and virtual gambling to the extent necessary to make state laws effective. Though the online alcohol sales ban is not as encompassing as the Internet gambling prohibition—out-of-state virtual liquor stores can sell to customers in states where online sales of such products are legal—the two restrictions are analogous.<sup>165</sup>

¶47 In the case of alcohol, an all-encompassing federal ban on online liquor sales is not necessary to make individual state laws effective. This is because alcohol is a good, and not a service like gambling. To complete the transaction, the virtual liquor store must

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more than one state.”).

<sup>157</sup> See, e.g., N.Y. ALCO. BEV. CONT. LAW § 65-b (Consol. 2006) (making it an “[o]ffense for one under age of twenty-one years to purchase or attempt to purchase an alcoholic beverage”); TEX. ALCO. BEV. CODE ANN. § 106.07 (Vernon 2006) (prohibiting individuals from fraudulently claiming to be under the age of twenty-one when attempting to purchase alcohol). Cf. National Minimum Drinking Age Act, 23 U.S.C. § 158 (2006) (withholding federal highway funds from states that do not prohibit individuals under the age of twenty-one from purchasing alcohol).

<sup>158</sup> See, e.g., TEX. ALCO. BEV. CODE ANN. § 105.01 (Vernon 2006) (disallowing the sale of alcohol on New Year’s, Thanksgiving, and Christmas day, Sundays, and between the hours of 9:00 p.m. and 10:00 a.m.).

<sup>159</sup> See, e.g., TEX. ALCO. BEV. CODE ANN. § 104.02 (Vernon 2006) (barring an alcohol vendor from installing signs, curtains, or other obstructions in his or her store windows).

<sup>160</sup> See, e.g., OHIO REV. CODE ANN. § 4301.64 (LexisNexis 2006) (prohibiting the driver of an automobile from consuming an alcoholic beverage in the vehicle); 625 ILL. COMP. STAT. ANN. 5/6-304.1 (LexisNexis 2006) (forbidding a person under the influence from operating a vehicle).

<sup>161</sup> See, e.g., *Cusenbary v. Mortensen*, 987 P.2d 351 (Mont. 1999) (holding a bar owner liable for a car wreck caused by a patron who became intoxicated at the bar).

<sup>162</sup> Compare *supra* notes 157–161 and accompanying text (describing laws regulating alcohol sales), with, e.g., NEV. REV. STAT. § 436B.170 (2006) (requiring casinos to maintain books and records evidencing financial activity and to make all deposits with banks in Nevada), § 465.075 (prohibiting bettors from using devices for calculating probabilities), § 465.070 (establishing a crime for committing fraudulent acts in gambling), § 463.408 (mandating that casinos apply for additional permits to increase operations during holidays and special events), and § 463.350 (preventing individuals under the age of twenty-one from gambling or being employed as gambling employees).

<sup>163</sup> See *supra* Part III.D (describing the UIGEA).

<sup>164</sup> See 27 U.S.C. § 122 (2006) (prohibiting shipment of alcohol into a state that is sold in violation of the state’s laws); see also Jeri Clausing, *House Passes Bill to Restrict Online Liquor Sales*, N.Y. TIMES ON THE WEB, Aug. 3, 1999, <http://old.law.columbia.edu/CPC/archive/commreg/online-liquor.html> (discussing a House bill that restricts Internet liquor sales). But cf. *Granholtz v. Heald*, 544 U.S. 460 (2005) (holding states that allow intrastate online wine sales cannot prohibit residents from purchasing wine over the Internet from out-of-state sellers). The case does not affect the virtual sale of liquor, beer, and other intoxicants. *Id.*

<sup>165</sup> See 27 U.S.C. § 122 (allowing purchases from virtual liquor stores in states that do not prohibit sales from them).

enter the real world and mail the alcoholic good to a physical address; therefore, it is able to easily block alcohol purchases from states where buying liquor online is illegal.<sup>166</sup> The virtual casino, on the other hand, stays entirely in cyberspace; everything it delivers is intangible, so the operator has a difficult time determining from what state the bettor is playing.<sup>167</sup>

¶48 In the UIGEA, Congress recognizes the importance of prohibiting Internet gambling only to the extent necessary to make state gambling laws that ban virtual casinos effective.<sup>168</sup> The Act gives a state the ability to legalize intrastate virtual gambling as long as the online casino can verify that bettors are playing from that state.<sup>169</sup> This is identical to the exception in the federal law banning Internet liquor purchases that allows customers to buy alcohol online in states where that purchase is legal.

¶49 By prohibiting Internet gambling, the government is not labeling casinos immoral or overreaching into the personal lives of Americans. It merely performs its duties of moderating potentially harmful activity and supporting an environment where states have the right to choose their own direction. A resident of a state that prohibits Internet alcohol purchases cannot buy a bottle of vodka online, so why should a citizen of a state that bans Internet gambling be allowed to play roulette from his or her living room?

### B. Internet Cigarettes

¶50 Cigarettes join alcohol and gambling as part of the group of legal, potentially harmful, and heavily restricted items that must be carefully moderated. Unlike alcohol and gambling, which have a “love-hate” relationship with the government and general public,<sup>170</sup> the modern attitude toward cigarettes is better described as “hate-hate.”<sup>171</sup> Of

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<sup>166</sup> See Mission Liquor & Wines: Fine Wines, Spirits & Cigars, <http://www.missionliquor.com/Store/Qstore/Qstore.cgi?CMD=042> (last visited Feb. 9, 2009) (“Mission Liquor does NOT ship Alcohol to Alabama, Arizona, Georgia, Ohio (ship wine only), Utah, Michigan, New Hampshire, Massachusetts, Tennessee, Texas, Oregon, Washington, Montana, DC, Indiana, Kentucky, Delaware, Florida, Maryland, Virginia, Pennsylvania, Connecticut, North Carolina and South Carolina.”). However, the ability to block online alcohol purchases in states where they are illegal does not solve the problem of preventing minors from obtaining intoxicants in states that permit virtual liquor stores. See Lea Thompson, *Who Is Minding the Internet Liquor Store?*, MSNBC, Aug. 9, 2006, <http://www.msnbc.msn.com/id/14271378/> (reporting an undercover investigation where minors successfully obtained alcohol from online liquor stores).

<sup>167</sup> One potential solution is for a user’s ISP to identify from where the bettor is gambling. See David Whyte, *Following the Journey of a Spoofed Packet* § 1.0, <http://www.scs.carleton.ca/~dlwhyte/whypapers/ipspooft.htm> (describing how a TCP/IP protocol identifies an Internet user with an IP address). However, it is also possible for an Internet user to manipulate his or her identification and location. *Id.* (“IP address spoofing can be defined as the intentional misrepresentation of the source IP address in an IP packet in order to conceal the identity of the sender or to impersonate another computing system.”).

<sup>168</sup> See *supra* notes 99–101 and accompanying text (explaining the UIGEA’s federal assertion of power that simultaneously respects the states’ right to have the final decision on intrastate Internet gambling).

<sup>169</sup> See 31 U.S.C.A. § 5362(10)(B) (West 2009) (“The term ‘unlawful Internet gambling’ does not include . . . a bet or wager . . . [that] is initiated and received or otherwise made exclusively *within a single State* . . . .”) (emphasis added). In addition to verifying a gambler’s location, the UIGEA also requires intrastate virtual casinos to ensure that all participants are of legal age. *Id.* (“[A]ge and location verification requirements reasonably designed to block access to minors and persons located out of such State . . . .”).

<sup>170</sup> See SCHWARTZ, *supra* note 37, at 13 (“Never shy about experimenting with licensing and taxing a supposed vice to enrich the public coffers, Americans have not been exactly resolute in their determination to harness gaming for the public benefit either.”).

<sup>171</sup> See Marc Kaufman, *Smoking in U.S. Declines Sharply: Cigarette Sales at a 54-Year Low*, WASH.

the three items, cigarettes at one time were the most widely accepted; this attitude quickly changed around the middle of the twentieth century when the public learned of the harmful effects of smoking.<sup>172</sup> With citizens' health at stake, a flurry of laws and restrictions were imposed on Big Tobacco to reduce smoking.<sup>173</sup> The federal government plays a role in regulating smoking;<sup>174</sup> however, like alcohol and gambling, most of the control over cigarettes is reserved to the states.<sup>175</sup> Only when federal uniformity is necessary to ensure consistency among multiple state laws does the U.S. government step in.<sup>176</sup>

¶51 Much like gambling and alcohol, states heavily restrict cigarette smoking. All states set a minimum age for purchasing cigarettes, though it varies by jurisdiction.<sup>177</sup> They also restrict where individuals can smoke cigarettes.<sup>178</sup> A number of states have increased these prohibitions in recent years;<sup>179</sup> however, a handful of states—primarily those with a strong tobacco industry—impose very few limits on where cigarettes can be lit.<sup>180</sup> To ameliorate the harmful effects of smoking on society, states generate tax revenue from the purchase of cigarettes,<sup>181</sup> just as economic benefits produced by legalized gambling are used to remedy the ills that result from that activity.<sup>182</sup> Some states even offer government employees programs designed to help them quit smoking.<sup>183</sup> These programs are comparable to the private efforts of the casino industry to assist

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POST, Mar. 9, 2006, at A01 (describing a record-breaking low consumption of cigarette use in the United States partially caused by negative perceptions surrounding smoking).

<sup>172</sup> See *Tobacco Use: United States, 1900–1999*, ONCOLOGY, Dec. 1999, available at <http://www.cancernetwork.com/journals/oncology/o9912d.htm> (reporting a significant drop in smoking since the 1960s).

<sup>173</sup> See *id.* (“Substantial public health efforts to reduce the prevalence of tobacco use began shortly after the risk was described in 1964.”).

<sup>174</sup> See 15 U.S.C. § 376 (2006) (authorizing the federal government to enforce collection of state cigarette taxes); Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (2006) (requiring a specified warning label on all cigarette products and advertisements and prohibiting the marketing of cigarettes through certain forms of electronic and print media); 49 U.S.C. § 41706 (2006) (banning smoking on airplanes).

<sup>175</sup> See *infra* notes 177–184 and accompanying text (providing examples of state laws that restrict cigarette smoking).

<sup>176</sup> See *supra* note 156 and accompanying text (describing the federal government's limited intervention in matters primarily reserved to the states).

<sup>177</sup> Compare TEX. HEALTH & SAFETY CODE ANN. § 161.082 (Vernon 2006) (“Sale of Cigarettes or Tobacco Products to Persons Younger Than 18 Years of Age Prohibited . . .”), with N.J. STAT. ANN. § 2A:170-51.4 (West 2006) (prohibiting sale or distribution of tobacco products to persons under nineteen years of age).

<sup>178</sup> See, e.g., N.Y. PUB. HEALTH LAW § 1399-o (Consol. 2006) (prohibiting smoking in places of employment, bars, food service establishments, public means of mass transportation, public and private universities, child care centers, hospitals, and bingo facilities).

<sup>179</sup> Dennis Cauchon, *Smoke Free Zones Extend Outdoors*, USA TODAY, Nov. 2, 2005, at 1A (discussing the success of wider indoor smoking bans introduced in more than 2,000 cities and towns).

<sup>180</sup> See KY. REV. STAT. ANN. § 438.050 (LexisNexis 2006) (allowing smoking at schools, but imposing a \$1 to \$5 dollar fine for smoking outside designated smoking areas).

<sup>181</sup> See CAL. REV. & TAX. CODE § 30101 (West 2006) (imposing a tax on the sale and distribution of cigarettes); § 30131.4 (appropriating a portion of cigarette tax revenues to the California Children and Families Trust Fund Account).

<sup>182</sup> See *supra* notes 30 and 33–34 and accompanying text (explaining how legalized gambling provides economic benefits and tax revenue).

<sup>183</sup> See CAL. GOV'T. CODE § 19994.33 (West 2006) (“The State Department of Health Services may develop guidelines for the content and effective presentation of tobacco smoking control programs designed to assist an individual in either a self-help or group environment.”).

individuals who have a gambling problem.<sup>184</sup> Heavy regulations imposed on cigarettes, much like those imposed on the gaming industry, ultimately reduced harm from smoking while allowing individuals the liberty to consume these products.

¶52 Cigarettes and gambling services are treated identically on the Internet: an individual cannot use an electronic financial transfer to obtain them online.<sup>185</sup> While congressional action was necessary to prohibit Internet gambling funding,<sup>186</sup> an alliance of attorneys general, credit card companies, and the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives teamed up to prevent the sale of cigarettes over the Internet.<sup>187</sup> The alliance decided that credit card companies and other financial transaction providers, such as PayPal, would no longer make payments to Internet cigarette vendors.<sup>188</sup> The primary concern over virtual cigarette purchases is an economic one: states cannot collect tax revenue used to ameliorate the harmful effects of smoking on society.<sup>189</sup> The Jenkins Act requires distributors to report the shipment of cigarettes to the state tobacco tax administrator;<sup>190</sup> however, many Internet vendors ignored this law, cutting states and cities out of millions of dollars in sales-tax revenue.<sup>191</sup> Through the efforts of the government-credit card company alliance, virtual cigarette stores cannot use electronic financial transactions to do business in the United States.<sup>192</sup> Additionally, the vendors have been forced to release sales records so that states may collect unpaid taxes on prior sales.<sup>193</sup>

¶53 The non-legislative prohibition of virtual cigarette sales has limits. Not all vendors are deterred by the obstruction of financing mechanisms; one store in cyberspace claims to offer *intrastate* cigarette sales over the Internet.<sup>194</sup> In actuality, *interstate* customers

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<sup>184</sup> See Bellagio Hotel and Casino, Las Vegas: Responsible Gaming, <http://www.bellagio.com/casino/responsible-gaming.aspx> (last visited Mar. 6, 2009) (providing a twenty-four hour problem gambling help line).

<sup>185</sup> Compare 31 U.S.C. § 5363 (2006) (“Prohibition on acceptance of any payment instrument for unlawful Internet gambling.”), with Holly Danks, *Aloha Man Gets Mixed Verdict for Selling Cigarettes on Web Site*, OREGONIAN, Aug. 17, 2005, at B5 (“[C]redit card companies have quit accepting online cigarette purchases.”).

<sup>186</sup> See *supra* Part III.D (analyzing the UIGEA).

<sup>187</sup> See Dan Englander, *Groups Aim to Cut Online Cigarette Sales*, DUKE U. CHRON., Mar. 21, 2005, available at <http://www.pbs.org/weta/washingtonweek/voices/200503/0321nat0.html> (explaining how an alliance formed to enforce existing state bans on virtual cigarette purchases and prevented the need for federal legislative action).

<sup>188</sup> *Id.*

<sup>189</sup> See *supra* note 181 and accompanying text.

<sup>190</sup> Jenkins Act, 15 U.S.C. § 376 (2006) (requiring any person who sells cigarettes in interstate commerce to report sales to the states where they are purchased).

<sup>191</sup> See Sewell Chan, *Settlement Reached to Pursue Online Cigarette Sales Taxes*, N.Y. TIMES, Mar. 8, 2006, at B4, available at <http://www.nytimes.com/2006/03/08/nyregion/08cigarettes.html> (announcing a settlement that allows New York to pursue residents for \$33 million in unpaid cigarette excise taxes).

<sup>192</sup> See PayPal Acceptable Use Policy: Tobacco Policy, [https://www.paypal.com/us/cgi-bin/webscr?cmd=p/gen/ua/use/index\\_frame-outside](https://www.paypal.com/us/cgi-bin/webscr?cmd=p/gen/ua/use/index_frame-outside) (last visited Dec. 1, 2008) (not allowing the use of PayPal for the prohibited purchasing of tobacco products).

<sup>193</sup> See Leila Atassi, *Online Cigarette Deals Snuffed Out; Taxes Due, but its Illegal Anyway*, CLEVELAND PLAIN DEALER, Nov. 13, 2006, at B1 (reporting that a “windfall of consumer information” has been provided about Internet cigarette purchases by online vendors).

<sup>194</sup> See Cigarettes Marlboro and Winston, [http://www.americancigaretteshop.com/cigarette\\_policies.html](http://www.americancigaretteshop.com/cigarette_policies.html) (last visited Dec. 1, 2008) (claiming to sell cigarettes in accordance with the laws of North Carolina and stating that it does not advertise its products in any state except North Carolina).

are able to purchase cigarettes at this web site.<sup>195</sup> This vendor considers the sale complete in the state it operates from and claims that the buyer takes ownership at purchase.<sup>196</sup> Shipment of the order is an act by the purchaser, not the seller.<sup>197</sup> Taxes are paid on the cigarettes, which is more restrictive than before, when virtual vendors were not paying taxes. However, the state where they are sold—which has a lower tax rate—receives the revenue.<sup>198</sup> This is problematic because the state harmed by cigarette use is not the one that obtains tax revenue; therefore, it cannot use that money to ameliorate injury caused by smoking.

¶54 An alliance between credit card companies and government law enforcement agencies effectively reduced the sale of cigarettes on the World Wide Web. While successful, weaknesses in the program that bans Internet cigarette sales demonstrate that congressional action, and not a public-private alliance, is the appropriate solution for curing the virtual gambling problem.<sup>199</sup>

## VI. CONCLUSION

¶55 Gambling is a heavily regulated activity—for good reason. It has the potential to cause a host of societal and financial harms: addiction, youth betting, fraud, crime, personal debt, bankruptcy, and a poor economy. The existence of casinos on the Internet increases the accessibility and occurrence of gambling, exacerbating the potential for harm. At the same time, offshore virtual casinos cannot be reached by the regulatory hand of the United States. This prevents the government from maintaining the control necessary to minimize these harms and obtaining the tax revenue necessary to ameliorate these ills.

¶56 The Unlawful Internet Gambling Enforcement Act of 2006 resolves the virtual gaming problem by banning the acceptance of proceeds from payment systems by a person engaged in an Internet gambling business. This law was not born overnight. Established laws—namely the Wire and Travel Acts—were outdated and not sufficiently applicable to the Internet gaming industry. A series of legislative attempts—the IGPA 98, IGPA 99, and IGEA—evolved from a ban on online casinos effected through an amendment to the Wire Act to the modern UIGEA, which stops virtual betting by prohibiting its funding.

¶57 The UIGEA has had a strong and immediate impact on stopping Internet casinos from doing business with United States gamblers. However, like any government policy, it is limited. The prohibitory framework of the UIGEA is criticized for being supported by a self-serving conventional gaming industry, potentially violating the Constitution, and violating WTO free trade agreements. Minor loopholes exist in the UIGEA: Some

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<sup>195</sup> *Id.* (describing the procedure for shipping from North Carolina and informing the customer to “allow ample time for your shipment to arrive based on shipment from North Carolina”).

<sup>196</sup> *Id.* (“Transfer of title to the goods being sold in this order is taking place in the state of North Carolina. As the buyer, you may elect to pick the goods up at the point of sale; direct the seller to ship the goods on your behalf via a common carrier or direct the seller to ship the goods on your behalf via the United States Post Office.”).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (stating that the company paid taxes required by North Carolina).

<sup>199</sup> See *supra* notes 194–198 and accompanying text (explaining weaknesses of the ban on Internet cigarette sales).

operators argue it does not prohibit online poker, and a creative finance industry can invent financial instruments outside the scope of the Act. These weaknesses are more nuisance than actual threat to enforceability; the UIGEA remains a strong tool in the fight against Internet gambling.

¶58 Even with its limitations, the prohibitive UIGEA, when viewed in the context of bans on the sale of alcohol and cigarettes on the Internet, is clearly the appropriate policy choice. Gambling services, alcohol, and cigarettes are equally subject to strict regulations on their production, distribution, and use. These items have a strong potential to cause harm, therefore the government must carefully balance moderate protection of society with liberty to use these items. Through government action, the sale of alcohol and cigarettes on the Internet has been prohibited to only include states that allow such purchases. With the enactment of the UIGEA, Internet gambling is placed on the same legal playing field as online alcohol and cigarette purchases: it is prohibited.