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Winner, Winner, No Chicken Dinner: An Analysis of Interactive Media Ent'mt & Gaming Ass'n v. Att'y Gen. of the U.S. and the Unjustified Consequences of the UIGEA

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**WINNER, WINNER, NO CHICKEN DINNER: AN
ANALYSIS OF *INTERACTIVE MEDIA ENT'MT &
GAMING ASS'N V. ATT'Y GEN. OF THE U.S. AND
THE UNJUSTIFIED CONSEQUENCES OF THE
UIGEA***

This note observes the deficiencies of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), placing special emphasis on the 2009 Third Circuit decision in *Interactive Media Entertainment and Gaming Association v. Attorney General of the United States*, which upheld the constitutionality of the UIGEA. Since the initial preparation of this note, the federal government has initiated its enforcement and shut down of some of the largest United States internet gaming sites, referencing the UIGEA as the source for its authority. This note proposes a complete overhaul of the present enforcement tactics by means of repealing the UIGEA and instead establishing a statutory scheme which would allow for internet gaming in the United States.

I. INTRODUCTION

You are seated at a poker table with nine other faces glaring back and forth between you and the four cards sprawled on the table, studying your every move. They wait for you to make a move as adrenaline pumps through your veins and anxiety sets in. With thousands on the line and two clubs on the table, all you need is one more club to make your Ace high flush and the best possible hand in play. The dealer slowly turns the defining card, but does it really even matter?

Poker players and card players alike often insist they play the game solely for money—a business endeavor of sorts. Whether players admit to it or not, it is all about the action. As recent scientific studies have shown, it is not entirely true that gamblers are purely in it for the win—rather, it is the rush of the risk that leaves people coming back for more.¹ As an individual's gambling habits progress, studies show that physical changes take

1. Randy Shore, *Gambling Affects Brain, Research Finds*, VANCOUVER SUN, Feb. 29, 2008, at A12.

place in the brain, including the release of dopamine and transformations in areas of the brain “associated with planning and forming strategies.”² Many of these physical symptoms are said to parallel those of drug addiction.³ As a result, there are concerns that this recreational activity will lead to increases in pathological gambling, underage gambling, and criminal behavior.⁴

Due to these and other financial concerns, several states within the United States, and more recently the United States in its federal capacity, have enacted legislation limiting access to gambling.⁵ The most recent legislation concerns the modern-day phenomenon of Internet gambling. Gambling today “no longer evokes the images of Frank Sinatra and Dean Martin playing on a neon stage with well-dressed, wealthy patrons.”⁶ Like never before, gamblers can relax at home and try to beat the odds with just a click of a mouse. To curb the growth of this industry, the federal government has passed legislation, including the Wire Act of 1961,⁷ the Travel Act,⁸ and the Illegal Gambling Business Act.⁹ With little to no success in ceasing Internet gambling, Congress has enacted the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA” or “Act”), greatly impacting financial institutions involved in the industry.¹⁰

This Note analyzes the effects of the UIGEA as it has been interpreted in recent court decisions. Specifically, it focuses on a recent Third Circuit case that upheld the constitutionality of the Act.¹¹ Part II provides a his-

2. *Id.*

3. *Gambling's Rush Pushes Lawyer to Brink of Losing Big*, MASS. BAR ASS'N LAWYERS J., July-Aug. 2009, at 10, <http://www.massbar.org/publications/lawyers-journal/2009/julyaugust/gambling-rush> (discussing the effects that online gambling has on lawyers).

4. U.S. GEN. ACCOUNTING OFFICE, GAO-03-89, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES 1-2 (2002), available at <http://www.gao.gov/new.items/d0389.pdf> [hereinafter *U.S. GEN. ACCOUNTING OFFICE*].

5. Katherine A. Valasek, Comment, *Winning the Jackpot: A Framework for Successful International Regulation of Online Gambling and the Value of the Self-Regulating Entities*, 2007 MICH. ST. L. REV. 753, 756, 759-60 (2007).

6. Lisa Lester, Comment, *Beating the Odds: Regulation of Online Gaming Stateside and Abroad*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 621, 621 (2008).

7. 18 U.S.C. § 1084 (2006).

8. 18 U.S.C. § 1952 (2006).

9. 18 U.S.C. § 1955 (2006); Yevgeniya Roysen, Note, *Taking Chances: The United States' Policy on Internet Gambling and Its International Implications*, 26 CARDOZO ARTS & ENT. L.J. 873, 876-78 (2009).

10. Roysen, *supra* note 9, at 879.

11. See *Interactive Media Entm't & Gaming Ass'n v. Att'y. Gen. of the U.S.*, 580 F.3d 113 (3d Cir. 2009) (finding that gambling does not involve constitutionally protected individual interests).

torical analysis of federal legislation and case analysis with respect to Internet gambling. Part III focuses on the Third Circuit decision upholding the UIGEA. Part IV analyzes the implications of the Act or any ban on Internet gambling. Part V offers an alternative explanation of the effects of the UIGEA and recent court decisions upholding the Act. This Note argues that the financial burdens far outweigh the benefits of the UIGEA. Part VI proposes that gambling should not be banned in its entirety, but instead regulated for the benefit of the government and the public as a whole.

II. BACKGROUND

Before the 1990s, the only legal form of gambling took place at traditional brick-and-mortar casinos.¹² Over the past few decades, legalized gambling in the United States has transformed into a “commonplace activity undertaken by the masses.”¹³ In 1995, the first online gambling site was created.¹⁴ Internet gambling more than doubled by 1998, both in players and in revenue.¹⁵ In 2002, United States gamblers constituted fifty to seventy percent of the total revenues for United States Internet gambling operators.¹⁶ Concerns about the social and moral repercussions resulting from the ease of access to this growing industry were mounting.¹⁷

A. Unsuccessful Attempts at Regulation

The first piece of legislation passed to limit the use of Internet gambling was created long before the problem of such gambling itself arose. Congress enacted the Wire Act of 1961 to discourage organized crime.¹⁸ The Wire Act makes it illegal for people participating in the “business of betting or wagering [to] knowingly [use] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or in-

12. U.S. GEN. ACCOUNTING OFFICE, *supra* note 4, at 6.

13. Jason A. Miller, Note, *Don't Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions Than Internet Gambling*, 12 N.C. BANKING INST. 185, 186 (2008).

14. Lester, *supra* note 6, at 621.

15. *Id.* at 621–22 (stating that Internet gambling doubled from \$300 million in 1997 to \$651 million in 1998, and the number of gamblers increased from 6.9 million to 14.5 million).

16. U.S. GEN. ACCOUNTING OFFICE, *supra* note 4, at 6.

17. Mark Reutter, *Social Costs of Gambling Nearly Half That of Drug Abuse*, New Book Concludes, NEWS BUREAU U. ILL., Mar. 8, 2004, <http://news.illinois.edu/news/04/0308grinols.html>.

18. Brant M. Leonard, Note, *Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens*, 57 DRAKE L. REV. 515, 518 (2009).

formation assisting in the placing of bets or wagers on any sporting event or contest.”¹⁹ The Department of Justice (“DOJ”) has argued that the Wire Act should be interpreted to include Internet gambling communications.²⁰ Two cases played a critical role in defining the boundaries of the Wire Act as it pertains to Internet gambling.²¹

In *United States v. Cohen*, the defendant owned and operated an Antigua-based bookmaking business, primarily servicing United States customers.²² A customer would create an account, based in Antigua, for the purposes of using the funds therein to place bets and wagers on sporting events.²³ The court upheld the defendant’s conviction under the Wire Act, finding that Cohen “knowingly transmitted information assisting in the placing of bets.”²⁴ This ruling was significant because it was the first to hold that the Wire Act applied to Internet gambling activities.²⁵ Still, one issue remained unresolved. Because the Wire Act specifically states that its purpose is to regulate “sporting events or contests,”²⁶ the ruling left open the question of whether the Wire Act would apply to all Internet gaming in general.²⁷

The Fifth Circuit soon addressed this issue in *In re MasterCard International, Inc.*²⁸ There, the two plaintiffs had engaged in Internet gambling by using their credit cards to place wagers.²⁹ The plaintiffs argued that MasterCard, and the other named defendant credit card companies, knowingly engaged in unlawful activity by allowing their cardholders to place wagers on off-shore Internet sites with the purpose of profiting on gambling debts.³⁰ The court refused to apply the Wire Act to the defendant credit card companies, holding that “a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest.”³¹ In effect, the Wire Act does not apply to any Internet gambling activities outside sports wagering, leaving poker and several other card and

19. 18 U.S.C. § 1084(a) (2006).

20. Leonard, *supra* note 18, at 518.

21. See *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001); *In re MasterCard Int’l, Inc.*, 132 F. Supp. 2d 468 (E.D. La. 2001).

22. *Cohen*, 260 F.3d at 70.

23. *Id.*

24. *Id.* at 76.

25. *Id.*

26. 18 U.S.C. § 1084(a) (2006).

27. Leonard, *supra* note 18, at 519.

28. *In re MasterCard Int’l, Inc.*, 132 F. Supp. 2d 468 (E.D. La. 2001).

29. *Id.* at 474.

30. *Id.* at 475.

31. *Id.* at 480.

game sites untouched.

Several more laws passed in the 1960s, such as the Travel Act, the Interstate Transportation of Wagering Paraphernalia Act (“ITWPA”), and, later, the Illegal Gambling Business Act (“IGBA”) appeared to apply to Internet gambling.³² All three pieces of legislation aimed to curtail organized crime associated with gambling and bookmaking.³³

The Travel Act states: “Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with [the] intent to—distribute the proceeds of any unlawful activity; or . . . otherwise promote . . . any unlawful activity . . . shall be fined under this title”³⁴ The Travel Act defines “unlawful activity” as “any business or enterprise involving gambling . . . in violation of the laws of the State”³⁵ The Travel Act seemingly mended the problems with the Wire Act by omitting the enumeration of activities deemed illegal, and thereby expanding its scope.³⁶ Nonetheless, it suffers from many of the same defects as the Wire Act. Namely, the Travel Act applies only to the operators of illegal businesses, not to the bettors themselves.³⁷ Additionally, it is not clear whether wireless communications would be covered by the Travel Act.³⁸

Alternatively, the “ITWPA criminalizes the introduction into interstate commerce of ‘any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing or other device used, or to be used’ in illegal gambling.”³⁹ Unlike the Travel Act, it is enough under the ITWPA that the perpetrator knowingly moves such paraphernalia into interstate commerce.⁴⁰ Specific intent is not required, which means that a subscriber to an Internet gambling site who downloads the required software is in violation of the ITWPA.⁴¹

32. 18 U.S.C. § 1952 (2000); 18 U.S.C. § 1953 (2006); 18 U.S.C. § 1955 (2006).

33. *See* 18 U.S.C. § 1952 (2000); 18 U.S.C. § 1953 (2006); 18 U.S.C. § 1955 (2006).

34. 18 U.S.C. § 1952(a) (2000).

35. 18 U.S.C. § 1952(b) (2000).

36. Kraig P. Grahmann, *Betting on Prohibition: The Federal Government's Approach to Internet Gambling*, 7 NW. J. TECH. & INTELL. PROP. 162, 168 (2009).

37. *Id.*

38. *Id.*

39. Michael D. Schmitt, Note, *Prohibition Reincarnated? The Uncertain Future of Online Gambling Following the Unlawful Internet Gambling Enforcement Act of 2006*, 17 S. CAL. INTERDISC. L.J. 381, 387 (2008) (citing 18 U.S.C. § 1953(a) (2006)).

40. *Id.*

41. *Id.*

The IGBA prohibits the operation of illegal gambling businesses.⁴² An illegal gambling business is one which: (1) violates the laws of the State in which it is conducted; (2) involves five or more persons; and (3) has been in continuous operation for a period of more than thirty days, or generates or has generated a gross revenue of at least \$2,000 on any given day.⁴³ “Like the Wire Act, the IGBA only applie[s] to gambling businesses, not individual gamblers.”⁴⁴

Congress attempted to pass a further prohibition on Internet gambling that focused on the financial institutions supporting the industry with the Internet Gambling Enforcement Act (“IGEA”).⁴⁵ However, the IGEA failed in the Senate,⁴⁶ leaving the legality of Internet gambling unresolved. As a result, Internet gambling sites continued their operations into the early 2000s.⁴⁷

Although Internet gambling sites seem to violate a number of the laws addressed above, “[t]he Wire Act ... has been the predominant tool used to prosecute Internet gambling across state and international lines.”⁴⁸ Presumably, this is because it is easier to obtain a conviction under the Wire Act since it does not require a violation of any state law.⁴⁹ However, recent case law has limited the “applicability of the Wire Act to certain forms of Internet gambling[.]” leaving the Department of Justice in need of alternative means by which to target this arena.⁵⁰

B. The Unlawful Internet Gambling Enforcement Act (“UIGEA”)

Despite the unsuccessful enforcement of the Wire Act and its legislative counterparts as they applied to Internet gambling, many financial institutions were buckled down by pressures from local law enforcement agencies to cease their participation in the online gambling industry.⁵¹ In 2003, then-New York Attorney General Eliot Spitzer signed agreements with ten banks that promised to block cardholders from using their credit cards for online gambling purposes.⁵² Spitzer assured the public that “[t]he

42. Roysen, *supra* note 9, at 877.

43. 18 U.S.C. § 1955(b)(1)(i)-(iii) (2006).

44. U.S. Gen. Accounting Office, *supra* note 4, at 14.

45. Grahmann, *supra* note 36, at 170.

46. *Id.* at 171.

47. Schmitt, *supra* note 39, at 389.

48. *Id.* at 387.

49. *Id.*

50. *Id.*

51. Miller, *supra* note 13, at 191.

52. Spitzer, *Banks Target Internet Gambling Via Credit Card*, BUS. J. – CENT. N.Y., Feb.

vast majority of credit card issuers . . . [had] recognized their legal, ethical, and business obligation [sic] to block credit-card transactions identified as online gambling.”⁵³ These self-regulatory practices may have been the “catalyst[s] for a shift in focus with many federal legislators [eventually leading] to the adoption of the UIGEA.”⁵⁴

Congress passed the UIGEA in 2006 during its last days in session as an earmark to the SAFE Port Act.⁵⁵ The UIGEA makes it illegal for any “person engaged in the business of betting or wagering [to] knowingly accept, in connection with the participation of another person in unlawful Internet gambling” various forms of payment, including credit.⁵⁶ Like its unsuccessful predecessors, the UIGEA targets the financial institutions that profit from Internet gambling, not the individual gamblers themselves.⁵⁷ The Act defines unlawful Internet gambling as “plac[ing], receiv[ing], or otherwise knowingly transmit[ing] a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law . . . in the State” where it was made.⁵⁸ In effect, it manages to maintain individual state autonomy by continuing to grant states the right to determine Internet gambling laws within their boundaries.⁵⁹

III. THE THIRD CIRCUIT UPHOLDS THE UIGEA

In the most recent appellate court decision regarding online gambling, the Third Circuit upheld the Unlawful Internet Gambling Enforcement Act (“UIGEA”) as constitutional.⁶⁰ The appellant, Interactive Media Entertainment and Gaming Association, Inc. (“Interactive”), was a New Jersey non-profit organization that collected and distributed information

21, 2003, at 14.

53. *Id.*

54. Miller, *supra* note 13, at 193.

55. *Id.* at 195; *see also* U.S. GOV’T. ACCOUNTABILITY OFFICE, GAO-08-86T, MARITIME SECURITY: THE SAFE PORT ACT AND EFFORTS TO SECURE OUR NATION’S SEAPORTS 1-3 (2007), *available at* <http://www.gao.gov/new.items/d0886t.pdf> (explaining that the SAFE Port Act was a post-9/11 attempt to secure seaport boundaries by establishing heightened security criteria).

56. 31 U.S.C. § 5363 (2006).

57. Roysen, *supra* note 9, at 879.

58. 31 U.S.C. § 5362(10)(A) (2006).

59. *See generally id.*

60. Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d 113, 119 (3d Cir. 2009).

regarding Internet gambling.⁶¹ Interactive's clients were businesses that provided Internet gaming services throughout the world, including in the United States.⁶²

A. Procedural Posture

In its complaint, Interactive sought to enjoin the government from enforcing the Act on two grounds: (1) the Act was unconstitutional on its face; and (2) it violated United States treaty obligations.⁶³ The government moved to dismiss the complaint for lack of standing.⁶⁴ Although the lower court found that Interactive had standing to sue, it nonetheless dismissed the action on its merits.⁶⁵

B. The Appeal

Article III of the Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies'" which can be properly resolved by means of the judicial process.⁶⁶ This notion is referred to as the doctrine of standing, and it prohibits courts from issuing advisory opinions.⁶⁷ The plaintiff in a lawsuit bears the burden of showing that he or she has brought forth a case or controversy so that the court can establish jurisdiction over the claim.⁶⁸ To assert standing, a plaintiff must show that he or she suffered (1) an injury in fact; (2) which is concrete and particularized; and (3) which is actual or imminent.⁶⁹ In the present case, Plaintiff Interactive struggled to show that it suffered an injury in fact or "an invasion of a legally protected interest."⁷⁰

Interactive claimed that it could prove injury in fact on the basis of three separate "injuries suffered by its members under the UIGEA: (1) a threat of criminal prosecution or civil liability; (2) a chilling effect on the exercise of First Amendment rights; and (3) imminent financial ruin."⁷¹

61. *Id.* at 114

62. *Id.*

63. *Interactive Media Entm't & Gaming Ass'n v. Att'y. Gen. of the U.S.*, 580 F.3d 114-15 (3d Cir. 2009).

64. *Interactive Media Entm't & Gaming Ass'n v. Gonzales*, No. 07-2625, 2008 U.S. Dist. LEXIS 16903, at 5 (D.N.J. Mar. 4, 2008).

65. *Id.* at 14-15, 36.

66. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

67. *Id.* at 560.

68. *Id.* at 561

69. *Id.* at 560

70. *Id.*

71. *Interactive Media Entm't & Gaming Ass'n v. Gonzales*, No. 07-2625, 2008 U.S. Dist.

The court held that because Interactive alleged First Amendment harm on behalf of its members, and because the UIGEA did not create a provision which exempted Interactive's members from criminal prosecution if it did not conform its actions in accordance with the statute, Interactive's members did have an injury in fact.⁷² Furthermore, this injury was not a subjective unsubstantiated fear, but rather an immediate threat of criminal penalties and financial burdens, which are distinct and palpable,⁷³ and therefore sufficient for standing purposes.⁷⁴ However, this analysis applied only to the members of Interactive's association.⁷⁵ As to whether Interactive itself could establish associational standing to bring a claim on behalf of its members,⁷⁶ the District Court found that the organization's goal of "represent[ing] the interests of persons and companies which provide Internet interactive [gaming and gambling services]" was germane to the members' interests of protecting their First Amendment rights.⁷⁷ On appeal, the Third Circuit affirmed these holdings without further elaboration.⁷⁸

1. Constitutional Claims

Interactive's claims regarding the facial constitutionality of the Act were as follows: (1) expressive association; (2) commercial speech; (3) overbreadth and vagueness; (4) privacy; (5) World Trade Organization

LEXIS 16903, at 7 (D.N.J. Mar. 4, 2008).

72. *Id.* at 13.

73. As part of the test for establishing injury in fact for standing purposes, a plaintiff must show that he or she suffered a "distinct and palpable" harm as opposed to an "abstract" or "conjectural" harm. Richard A. Epstein, *Standing in Law and Equity: A Defense of Citizen and Taxpayer Suits*, 6 GREEN BAG 2D 17, 17-18 (2002) ("In essence there is a requirement that the defendant's conduct be the cause of a distinct injury to the plaintiff not shared by other individuals for which the legal system can provide an appropriate remedy.").

74. *Interactive Media Entm't & Gaming Ass'n v. Gonzales*, 2008 U.S. Dist. LEXIS 16903, at 13.

75. *Id.* at 14-15.

76. Associations are generally able to represent their injured members in court in order to provide greater public access to government agency action. However, such representation must adhere to appropriate guidelines. *Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec.*, 412 So.2d 351, 353 (Fla. 1982) ("An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are *germane* to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.") (emphasis added).

77. *Interactive Media Entm't & Gaming Ass'n v. Gonzales*, 2008 U.S. Dist. LEXIS 16903, at 17. *See supra* text accompanying note 73.

78. *Interactive Media Entm't & Gaming Ass'n v. Att'y. Gen. of the U.S.*, 580 F.3d 113, 118 (3d Cir. 2009).

claims; (6) an *ex post facto* clause claim; and (7) a Tenth Amendment claim.⁷⁹ On appeal, the court reviewed only the allegations pertaining to vagueness and privacy.⁸⁰

a. Vagueness

Interactive alleged that the UIGEA was unconstitutionally vague and ambiguous because “the statutory phrase ‘unlawful Internet gambling’ lack[ed] an ‘ascertainable and workable definition.’”⁸¹ A statute is unconstitutionally vague if it fails to provide notice to a person of ordinary intelligence or where it lacks standards, which may promote discriminatory enforcement of the statute.⁸² Furthermore, a claim that a statute is unconstitutionally vague *on its face* requires the plaintiff to prove that it is vague in *all possible applications* of the statute.⁸³

The court’s response was three-fold. First, it noted that the statute was clear because it unambiguously made it illegal for any gambling business to knowingly accept payment in a jurisdiction that does not allow Internet gambling or from a person who places a bet in such a jurisdiction.⁸⁴ The court did not elaborate, but merely concluded that this sufficiently provided a person of ordinary intelligence with proper notice as to what conduct the Act prohibits.⁸⁵

Second, the court found that the UIGEA was not vague in *all* of its applications.⁸⁶ The court demonstrated that the application of the statute would be clear in states where a law barred Internet gambling. For example, because Hawaii has statutes illegalizing Internet gambling,⁸⁷ if a person in Hawaii places a bet a gambling business that knowingly accepts payment on that bet would be in violation of the Act.⁸⁸ Additionally, Oregon has similarly enacted statutes illegalizing Internet gambling.⁸⁹

79. Interactive Media Entm’t & Gaming Ass’n v. Gonzales, No. 07-2625, 2008 U.S. Dist. LEXIS 16903, at 2-3 (D.N.J. Mar. 4, 2008).

80. Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d at 115–17.

81. *Id.* at 115.

82. United States v. Williams, 553 U.S. 285, 304 (2008).

83. Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d at 116 (3d Cir. 2009) (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)).

84. Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d at 116.

85. *Id.*

86. *Id.*

87. HAW. REV. STAT. §§ 712-1220(4), 712-1223 (1993).

88. Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d at 116.

89. OR. REV. STAT. § 167.109 (2003). See also *Interactive Media Entm’t & Gaming Ass’n*,

In dicta, the court in *Interactive* added another scenario that would violate the Act—namely, when a person places a bet from a state where Internet gambling is illegal and the gambling business accepting the bet was in another country.⁹⁰ Because a “country can regulate conduct occurring outside its territory which causes harmful results within its territory,” a bid accepted in a foreign territory violates the Act.⁹¹ In sum, the court held the Act was not vague in all applications and, therefore, not facially unconstitutional on such grounds.⁹²

Lastly, the court considered the allegation that the Act was overly vague. Appellant *Interactive* claimed the UIGEA did not establish the illegality of any particular conduct in and of itself, “but rather incorporate[d] other Federal or State law related to gambling.”⁹³ While the court conceded that the Act did not create a distinct offense, it refused to find vagueness on these grounds.⁹⁴ It recognized that incorporation of other provisions does not render a statute unconstitutional because “a reasonable person of ordinary intelligence would consult the incorporated provisions.”⁹⁵ Furthermore, the court recognized that the fact that the Act would be legal in some states but illegal in others is insufficient to render it unconstitutionally vague.⁹⁶

Interactive also pointed out the difficulty in determining jurisdiction over Internet activities.⁹⁷ It argued that because it would be difficult to determine from which jurisdiction a person placed the online wager, it would be nearly impossible to know whether acceptance of such a wager was unlawful.⁹⁸ In response, the court noted that the determining factor for vagueness was not “the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.”⁹⁹ The court re-

580 F.3d at 116 (providing the example that if a gambling business located in Oregon knowingly accepts payment in connection with Internet gambling, it too would violate the UIGEA).

90. *Interactive Media Entm't & Gaming Ass'n v. Att'y. Gen. of the U.S.*, 580 F.3d at 116 n.5.

91. *Id.* (quoting *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984)).

92. *Id.* at 116.

93. *Id.*

94. *Id.* at 117.

95. *Id.* at 116 (quoting *United States v. Iverson*, 162 F.3d 1015, 1021 (9th Cir. 1998)).

96. *Interactive Media Entm't & Gaming Ass'n v. Att'y. Gen. of the U.S.*, 580 F.3d at 116.

97. *Id.*

98. *Id.*

99. *Id.* at 116–17 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)).

garded the issue as a substantive matter to be determined on its merits, not one which fails to put a gambling business on notice of the legal consequences of its actions.¹⁰⁰

b. Privacy

In its second argument, appellant Interactive claimed that the UIGEA “violate[s] a constitutional right of individuals to engage in gambling-related activity in the privacy of their homes.”¹⁰¹ Before evaluating the claim on its merits, the court first addressed the preliminary issue of whether Interactive could assert third-party standing on behalf of its individual members.¹⁰² To assert third-party standing, the plaintiff must prove: (1) injury; (2) a “close relationship” with the third party; and (3) the third party faces some obstacle that prevents it from bringing forth its own claim.¹⁰³ Here, the court ultimately concluded that Interactive did not satisfy the prerequisites to assert third-party standing because it did not share a close relationship with the gamblers whose rights it claimed were violated; rather, Interactive’s member companies did.¹⁰⁴ Nonetheless, the court noted that third-party standing requirements were merely prudential and developed by the courts themselves, and not jurisdictional requirements imposed by the Constitution.¹⁰⁵ Accordingly, the court went on to determine that Interactive’s claim failed on its merits.¹⁰⁶

Appellant Interactive focused its argument on the opinions in *Lawrence v. Texas* and *Reliable Consultants, Inc. v. Earle*.¹⁰⁷ Both cases “involved . . . sexual conduct between consenting adults in the privacy of the home.”¹⁰⁸ The court distinguished these two scenarios, finding that “[g]ambling, even in the home, simply does not involve any individual interests of the same constitutional magnitude,” and is therefore not protected by any constitutional right to privacy.¹⁰⁹ With no more than a few superfi-

100. *See* Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d at 117.

101. *Id.*

102. *Id.* at 117–18.

103. *Id.* at 118 (citing *Nasir v. Morgan*, 350 F.3d 366, 376 (3d Cir. 2003)).

104. Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d at 118.

105. *Id.*

106. *Id.*

107. *Id.*; *see also* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008).

108. Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d at 118; *see also* *Lawrence*, 539 U.S. at 564 *see also* *Reliable Consultants, Inc.*, 517 F.3d at 744.

109. Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d at 118.

cial statements, the court affirmed the district court's decision and refused to find any constitutional protection for adult gaming in the privacy of the home.¹¹⁰

IV. A MERITORIOUS OPINION?

As indicated above, a plaintiff, whether a natural person or a legal entity, must have standing to challenge a statute's enforcement.¹¹¹ The court in *Interactive* suggested that even an entity such as appellant Interactive, which had no direct relationship with individual gamblers, may bring a constitutional claim based on vagueness via associational standing if it and its member entities suffer from the harms that give rise to the cause of action.¹¹² Still, the court denied standing on the privacy claim because neither Interactive nor its member entities were allegedly harmed as a result of privacy violations; rather, it was the individual gamblers who were harmed.¹¹³ But, if Interactive lacked standing to assert the privacy claim in the first place, does the court's continuing analysis on the merits hold any validity or is it mere dicta?

Although the Third Circuit failed to address this issue in *Interactive*, the U.S. Supreme Court has found that “[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.”¹¹⁴ In making this assertion, however, the Supreme Court in *Steel Co. v. Citizens for a Better Environment* referred only to standing issues arising under Article III of the Constitution.¹¹⁵ The Court articulated that determining the existence of a cause of action prior to an issue of *statutory* standing is proper, since “[i]t has nothing to do with whether there is a case or controversy under Article III.”¹¹⁶ In effect, prudential standing issues, like the third-party standing issues determined in *Interactive*, “do not carry a risk of plunging a court into issuing advisory opinions.”¹¹⁷ Therefore, the Third Circuit in *Interactive* properly analyzed the merits of appellant's constitutional privacy claim, despite its assertion that appellant Interactive lacked

110. *Id.* at 118–19.

111. *Id.* at 117.

112. *Id.* at 118.

113. *Id.*

114. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998).

115. *Id.* at 102.

116. *Id.* at 97.

117. *Grand Council of the Crees v. FERC*, 198 F.3d 950, 960 (D.C. Cir. 2000).

third-party standing to bring the claim on behalf of individual gamblers.

A. *The Vagueness of the UIGEA*

On the issue of vagueness, the court in *Interactive* found the provisions within the Act were sufficient to provide a person of reasonable intelligence notice of what activity is prohibited.¹¹⁸ Yet, in its own analysis, the court failed to exact a consistent definition of the terms of the Act. The court opined that the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) focuses solely on businesses, like that of appellant, which are directly affiliated with the industry of Internet gaming.¹¹⁹ In fact, the court specifically pointed to the language of the Act itself, indicating that the phrase “the business of betting or wagering”:

“ . . . does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service.” . . . Thus, the criminal prohibition contained in § 5363 of the Act applies only to gambling-related businesses, not any financial intermediary or Internet-service provider whose services are used in connection with an unlawful bet.¹²⁰

This phrase suggests that the UIGEA applies only to those companies that directly provide Internet gaming services and their advertising counterparts.

However, the court later stated the UIGEA itself requires that certain financial institutions create regulations to block transactions prohibited by the UIGEA.¹²¹ By doing so, the court expanded its earlier interpretation to allow for broader umbrella coverage of the UIGEA as it applies to any financial institution that in any way participates in an Internet gaming wager.¹²² The court ultimately upheld the UIGEA despite the vagueness argument and the fact that the court could not consistently define the UIGEA’s terms and conditions.¹²³

The court in *Interactive* suggested two alternative interpretations of the UIGEA. The first interpretation limits the application of the UIGEA to

118. *Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S.*, 580 F.3d at 116.

119. *Id.*

120. *Id.* at 114 n.1 (quoting 31 U.S.C. § 5363 (2006)).

121. *Id.* at 114.

122. See Eli Lehrer, *Time to Fold the Unlawful Internet Gambling Enforcement Act: A Bad Law with Perverse Outcomes*, CEI ONPOINT, (Mar. 27, 2008), available at <http://cei.org/studies-point/time-fold-unlawful-internet-gambling-enforcement-act> (“[The UIGEA] touches every sort of financial service provider: banks, credit unions, credit card companies, wire transfer services, and even brokerages.”).

123. *Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S.*, 580 F.3d at 116.

companies directly providing Internet gambling services.¹²⁴ The second interpretation expands the UIGEA's scope to include financial institutions.¹²⁵ Interestingly, the interpretation which quotes from the UIGEA—the first interpretation—would actually frustrate the UIGEA's purpose by limiting its application only to those industries directly related to gaming. Only under the court's second interpretation would the UIGEA apply to financial institutions. This second, broader interpretation has been the standard for interpreting the UIGEA.¹²⁶

B. The UIGEA: Void for Vagueness

A statute is unconstitutional under the Due Process Clause of the Fourteenth Amendment if it is imprecise and indefinite, thereby encouraging subjective enforcement.¹²⁷ The Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") is thus argued to be unconstitutionally vague on its face because it fails to properly and workably define the term "unlawful Internet gambling," which has no generally accepted definition.¹²⁸ The court in *Interactive* responded to this concern by dramatically oversimplifying the issue, finding that the UIGEA is meant to defer to state laws, so that Internet gambling is only unlawful when a state law says it is.¹²⁹ Yet, the court failed to address the additional ambiguity created by such a response due to the drastic inconsistencies between state laws.¹³⁰ For instance, nearly all states allow for some form of gambling, including "skill gaming" and "sweepstakes," which have become multi-million dollar industries.¹³¹ The popularity of skill gaming and sweepstakes has increased because most state laws prohibit lottery and gambling, which involve: "(1) the award of a prize, (2) determined on the basis of *chance*, and (3) where

124. *Id.* at 114 n.1.

125. *Id.* at 114.

126. See Lehrer, *supra* note 122.

127. *City of Chicago v. Morales*, 527 U.S. 41, 59–60 (1999).

128. *Court Rejects iMEGA Challenge to UIGEA-Unlawful Internet Gambling Enforcement Act*, POKERPAGES.COM, Sept. 9, 2009, <http://www.pokerpages.com/poker-news/news/court-rejects-imega-challenge-to-uigea-unlawful-internet-gambling-enforcement-act-31885.htm>.

129. *Interactive Media Entm't & Gaming Ass'n v. Att'y. Gen. of the U.S.*, 580 F.3d 113, 117 (3d Cir. 2009).

130. See generally, Adam Richards, *Court of Appeals Upholds UIGEA*, CASINOADVISOR.COM, Sept. 3, 2009, <http://www.casinoadvisor.com/court-of-appeals-upholds-uigea-new-item.html> (stating that there are only a half-dozen states with laws against Internet gambling, and forty-four where it is still potentially legal).

131. Louis V. Csoka, *Three Persisting Myths of Gaming Technology Law*, 16 NEV. LAW. 10, 10 (2008).

consideration was paid.”¹³²

Similarly, the UIGEA places great focus on the distinction between those games which are primarily determined on the basis of chance, and those which are not.¹³³ The UIGEA creates special exemptions for only a few selected games of chance, such as fantasy sport contests, provided that:

- (1) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game
- (2) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals . . . in multiple real-world sporting or other events.
- (3) No winning outcome is based (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.¹³⁴

However, the UIGEA does not establish a list of unlawful activities to be regulated by banks and credit unions.¹³⁵ One questionable activity is Texas Hold ‘Em Poker, which has “exploded in popularity in recent years,” with televised professional tournaments and cash games becoming a part of mainstream coverage.¹³⁶ Most professional players of the game make a living from it because they understand the fundamental concepts that render it a game of skill.¹³⁷ Yet, critics of the game often insist that it is a game of

132. *Id.* (emphasis added).

133. See 31 U.S.C. § 5362(1)(A) (2006) (stating that a bet or wager “means 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).

134. 31 U.S.C. § 5362(1)(E)(ix)(I)–(III) (2006).

135. Lehrer, *supra* note 122.

136. DeeDee Correll, *The Art of Poker Goes to Court: Whether the Game is Based on Luck or Skill is at the Heart of a Spate of Recent Cases*, *L.A. TIMES*, Sept. 3, 2009, at A14.

137. Michael A. Tselnik, Note, *Check, Raise, or Fold: Poker and the Unlawful Internet*

“imperfect information and chance outcomes.”¹³⁸

To understand why poker is a game of skill rather than chance, it is necessary to start with a basic understanding of the laws of probability. Consider a coin toss where the probability of landing on heads or tails is fifty percent. The result of one coin toss is generally referred to as a gamble.¹³⁹ If the tosses were done repeatedly, however, any such gamble would be eliminated since any “positive expectation” of repeatedly choosing one side would eventually be zero.¹⁴⁰ In other words, gambles do exist in short-term, single experiment analyses. However, it is always true that “mathematical probability is not overcome in the long term”¹⁴¹ Poker statistical calculations operate similarly. While a player may lose a hand or two despite heavy odds in his or her favor, the poker player envisions the game in terms of long-term expectations, calculating the statistics of each hand as though it would be performed an infinite number of times.¹⁴² The player who can skillfully calculate his or her odds and continue to play tends to win in the long run, making poker a true game of skill, not chance.¹⁴³ After all, it is no surprise that “the same five guys make it to the final table of the World Series of Poker every single year[.]”¹⁴⁴

Despite clear indications to the contrary, courts have reached different results on the status of poker as a game of skill.¹⁴⁵ For instance, in a recent case involving illegal gambling, Colorado District Judge James Hartmann concluded, “[a] poker player may give himself a statistical advantage through skill or experience, but that player is always subject to defeat when the next card is turned.”¹⁴⁶ While technically true, this phenomenon does not account for a player’s long-term expectations.¹⁴⁷ Regardless of their validity, these conflicting opinions create confusion for those attempting to interpret the UIGEA. In *Interactive*, the court made it clear that the

Gambling Enforcement Act, 35 HOFSTRA L. REV. 1617, 1646 (2007).

138. Darse Billings et al., *Approximating Game-Theoretic Optimal Strategies for Full-Scale Poker*, 2003 INT’L JOINT CONF. ON ARTIFICIAL INTELLIGENCE 661, 661 (2003), available at <http://ijcai.org/Past%20Proceedings/IJCAI-2003/content.htm>; Correll, *supra* note 136.

139. See Tselnik, *supra* note 137, at 1643–44.

140. *Id.* at 1644.

141. *Id.*

142. *Id.*

143. *Id.* at 1648–49.

144. *Id.* at 1643 (quoting *ROUNDERS* (Miramax Films 1998)).

145. Correll, *supra* note 136.

146. *Id.*

147. Tselnik, *supra* note 137, at 1648.

UIGEA is to be clarified by state statutes.¹⁴⁸ State legislatures, in turn, have established a practice of creating statutes that distinguish between games of skill and chance.¹⁴⁹ Yet, state courts that are reviewing these statutes cannot determine whether poker falls into the category of skill or chance.¹⁵⁰ In effect, the UIGEA defers to state laws that are essentially incognizable.

Adding to the confusion, the UIGEA goes on to specifically exempt certain games of skill, including “investments in securities, commodities, over-the-counter derivatives, and insurance.”¹⁵¹ The UIGEA also includes various activities which incorporate a high element of chance, creating more uncertainty. After all, “the only difference between gambling at a casino and day trading stock online is that you have to serve yourself drinks when sitting at your home computer.”¹⁵² While poker deals primarily with statistical calculations,¹⁵³ stock predictions generally take into account the actions of other living human beings who are agents of free will and ultimately unpredictable.¹⁵⁴

For these reasons, the UIGEA’s “skill versus chance” distinction becomes utterly incomprehensible, leaving the interpreter of the UIGEA in a position of not knowing which activities are outlawed and which are allowed. Consequently, as the pressure mounts on United States financial institutions to begin implementing the regulatory provision of the UIGEA, they are faced with the immense burden of figuring out what exactly they are meant to enforce.¹⁵⁵

C. UIGEA’s Effects on Financial Institutions

One of the primary concerns with the vagueness of the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) and its failure to successfully define “unlawful Internet gambling” is the effect it will have on financial institutions throughout the nation. Aside from the requirement

148. Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S., 580 F.3d 113, 114 (3d Cir. 2009).

149. Correll, *supra* note 136.

150. *Id.*

151. Lehrer, *supra* note 122.

152. Tselnik, *supra* note 137, at 1654 (quoting Jimmy Cox, *The Pitfalls of Day Trading Stock Online*, available at http://www.articles2k.com/article/176/76174/The_Pitfalls_of_Day_Trading_Stock_Online/ (last visited Sept. 7, 2007)).

153. *Id.* at 1654–55.

154. *Id.* at 1617.

155. Leonard, *supra* note 18, at 541.

that financial institutions determine which games are unlawful based on state laws, financial institutions will have to bear an even more cumbersome burden of locating transactions that fall within the elusive definition.¹⁵⁶

The UIGEA specifically states that financial institutions are to adopt policies and procedures for the purpose of blocking Internet gambling activities.¹⁵⁷ The UIGEA directs the Secretary of the Treasury and the Board of Governors of the Federal Reserve System to work with the U.S. Attorney General in identifying and blocking illegal Internet gambling transactions.¹⁵⁸ By late 2007, these agencies had used a macro approach to develop a set of proposed rules, whereby they identified five distinct categories of payment systems: (1) card; (2) check collection; (3) wire transfer; (4) money transmission; and (5) automated clearing house.¹⁵⁹ The agencies set up specific regulations for each of these payment systems so that financial institutions would not have to bear the burden of establishing their own regulations.¹⁶⁰ Thus, when a payment system complies with an agency's proposed set of rules, it will be deemed to comply with the UIGEA.¹⁶¹ Alternatively, the agency could choose to establish its own set of procedures.¹⁶²

Realizing that it would be nearly impossible for most financial institutions to identify which of its transactions were associated with Internet gambling using their current infrastructure, the agencies established a set of broad exemptions.¹⁶³ These included exemptions for all automated clearing house systems, check collections systems, and wire transfer system participants without direct relationships with customers involved in the Internet

156. Michael Hiltzik, *Calling America's Bluff on Online Gambling*, L.A. TIMES, Oct. 19, 2009, at B2.

157. Miller, *supra* note 13, at 196.

158. *Id.*

159. Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. 56,683-85 (proposed Oct. 4, 2007) (to be codified at 12 C.F.R. pt. 233) (stating that these groups can be defined as follows: (1) card systems, including credit cards, debit cards, pre-paid cards, and gift cards; (2) check collection systems, or systems between banks which are used to facilitate paper check transactions; (3) wire transfer systems, which process paper check data electronically; (4) money transmitting businesses, which include businesses which facilitate transfers of money between business and people; and (5) automated clearing house systems, which facilitate transactions between financial institutions).

160. Miller, *supra* note 13, at 198.

161. *Id.*

162. *Id.*

163. *Id.* at 200.

gambling business.¹⁶⁴ The exemptions were a response to the companies' inability to "accurately identify and block certain restricted transactions."¹⁶⁵ Yet, the agencies created no exemptions for card systems and money transmitting businesses, effectively leaving them with the burden of analyzing each processed transaction to determine whether it is directly associated with illegal Internet gambling.¹⁶⁶ Such a system would require extensive resources in an effort to investigate each transaction and determine if it violates the law of any one of the fifty United States jurisdictions.¹⁶⁷ Costs associated with recordkeeping in this type of system have been estimated to be four million dollars annually, not including preliminary expenses, such as the implementation of the system.¹⁶⁸ With no mention of any government reimbursement for such expenses, it becomes apparent that financial institutions will be left to cover the tab.¹⁶⁹

In addition to the aforementioned burdens, financial institutions would also have to reconcile state laws with UIGEA exemptions.¹⁷⁰ The Act currently bans "staking or risking . . . something of value . . . upon an agreement or understanding that . . . another person will receive something of value in the event of a certain outcome[.]"¹⁷¹ As previously discussed, the Act makes specific exemptions for insurance, over-the-counter derivatives, securities investments, and commodities.¹⁷² The problem is that "hedge funds and offshore reinsurance contracts do not fit neatly into any of these categories."¹⁷³ When faced with these transactions, financial institutions must determine, on an individual basis, whether they should be included within the UIGEA exemptions.¹⁷⁴ Compliance with the Act is essentially left to an individualized interpretive methodology, whereby institutions are given little to no guidelines to assist them in determining how to treat these unaccounted-for transactions.¹⁷⁵

Another problem arises with online transactions, which have generally been accepted as legal but appear to fit the mold for "unlawful Internet

164. *Id.* at 199.

165. *Id.* at 200.

166. *See* Hiltzik, *supra* note 156.

167. Leonard, *supra* note 18, at 541.

168. *Id.* at 542.

169. *See id.*

170. *See id.* at 540.

171. 31 U.S.C. § 5362(1)(A) (2006).

172. 31 U.S.C. § 5362(1)(E)(i)-(vii) (2006).

173. Lehrer, *supra* note 122.

174. *See* Leonard, *supra* note 18, at 540.

175. Lehrer, *supra* note 122.

gambling” created by Congress via the UIGEA.¹⁷⁶ More specifically, on-line auctions, like those on eBay, could easily be construed as chance-based transactions since their values “depend[] on the number of participants, and the outcome is uncertain.”¹⁷⁷ The UIGEA does not properly address these common transactions, leaving financial institutions to interpret the boundaries of legislative provisions, a task better suited for the legislative or judicial branches. Moreover, where a state law does not exempt the same activities as the UIGEA, financial institutions will have to reconcile the federal and state laws.¹⁷⁸ Not only is this role of lawmaker and law interpreter inappropriate for an entity which is unelected and inexperienced, it also creates a massive burden of having to determine the legality of each transaction on an ad hoc basis. This could lead to an absurd scenario wherein two financial institutions enforce the same Internet gambling regulation upon the same individual in two distinct ways.¹⁷⁹

D. Privacy Rights and the UIGEA

Comments on a proposed rule to implement the Act have shown that many consumers agree with *Interactive* that gambling in one’s own home should be a private determination.¹⁸⁰ These consumers argue that the Act allows too much “inappropriate governmental intrusion into citizens’ private affairs.”¹⁸¹ Should gamblers choose to play from their own homes, it should be their prerogative to do so. As Massachusetts Democratic Representative, Barney Frank, put it, “If American citizens . . . want to gamble, let them.”¹⁸²

Aside from the Unlawful Internet Gambling Enforcement Act of 2006’s (“UIGEA”) infringement on individual choice, serious privacy concerns arise as to the regulatory methods financial institutions will resort to

176. *See id.*

177. *Id.*

178. Leonard, *supra* note 18, at 540.

179. Miller, *supra* note 13, at 202.

180. *See Proposed UIGEA Regulations: Burden Without Benefit?: Hearing Before the Subcomm. on Domestic and Int’l Monetary Pol’y, Trade, and Tech. of the H. Comm. on Fin. Serv.*, 110th Cong. 98 (2008) (statement of Louise L. Roseman, Dir., Div. of Reserve Bank Operations and Payment Sys.), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr040208.shtml.

181. *Id.*

182. Mijnonlinegokken.net, Online Gokken Quotes, <http://www.mijnonlinegokken.net/online-gokken-quotes.html> (last visited Sept. 5, 2010); *see also* Edward Epstein, *Online Gambling Bill in Congress Far From Being Sure Bet*, S.F. CHRON., June 14, 2002, at A4.

when regulating Internet gambling.¹⁸³ The Financial Services Roundtable, a representative of several United States financial institutions, has made clear that the UIGEA, “[u]nder the proposed rules, forces financial services entities to perform police functions more appropriate for law enforcement agencies.”¹⁸⁴ These institutions will have to take measures to establish an entirely revised system of internal controls, requiring vast additional resources for implementing the system, including training and maintenance.¹⁸⁵ Because online gambling transactions are often of small value, systematic oversight will require the monitoring of nearly every transaction that passes through a company’s database.¹⁸⁶ This responsibility exacerbates the already immense burden financial institutions bear in applying the UIGEA.¹⁸⁷

More importantly, this ad hoc system of review by financial institutions likely threatens individual privacy, for companies become more willing to reject legitimate transactions than risk the possibility that they fall outside the boundaries of the UIGEA.¹⁸⁸ Bank of America, for example, has expressly indicated that it will likely be forced to block legitimate transactions in an effort to enforce a potentially ambiguous act.¹⁸⁹ This is because the UIGEA “requires banks and other institutions to know the purpose and legality of payments in an industry.”¹⁹⁰ Thus, the UIGEA effectively becomes a threat, not only to the privacy of individuals that participate in Internet gambling, but to everyone who utilizes financial institutions for any monetary transaction.¹⁹¹

While financial institutions are most concerned with the costly implementations of the UIGEA, they are not who will ultimately suffer from UIGEA regulation.¹⁹² Banks and credit unions will be inclined to pass the expenses to consumers by lowering interest rates on deposits and investments as well as increasing the rates on loans.¹⁹³ While banks and other in-

183. See generally Leonard, *supra* note 18, at 541.

184. *Id.* at 540–41.

185. *Id.* at 543.

186. *Id.*

187. See generally *id.*

188. Stephanie Kirchgaessner, *Banks Attack Conflicting U.S. Gambling Rules*, FIN. TIMES, Dec. 18, 2007, <http://www.ft.com/cms/s/0/30810968-ada1-11dc-9386-0000779fd2ac.html>.

189. *Id.*

190. *Id.*

191. See generally *id.*

192. See generally Letter from Eli Lehrer, Senior Fellow, Competitive Enter. Inst., to House Fin. Serv’s Comm. Members (Sept. 15, 2008), available at <http://cei.org/cletters/2008/09/15/letter-uigea-house-financial-services-committee-members>.

193. *Id.*

stitutions will be left with the tasks of establishing the necessary protocol and determining how to comply with the UIGEA's provisions, ultimately, "[c]onsumers, not stockholders, will end up paying the bills."¹⁹⁴

V. THE REAL EFFECTS OF THE UIGEA

Proponents of the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") are certain that the Act is destined to minimize Internet gambling throughout the nation.¹⁹⁵ However, even with the proper infrastructure, it is questionable whether the UIGEA would ultimately serve that purpose.¹⁹⁶ After all, Internet sports betting and virtual casino sites are already illegal in the United States, but nothing has stopped American gamblers from reaching the thousands of sites based overseas.¹⁹⁷ Even with the recent FBI takeover of three of the largest internet gambling sites in the nation, the UIGEA will not be the effective tool for curbing the widespread hobby that the legislature hopes it will be.¹⁹⁸

A. Internet Gambling Continues to Flourish

The American Banking Association ("ABA") has declared the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") "an unprecedented delegation of governmental responsibility with no prospect of practical success in exchange for all the burden it imposes."¹⁹⁹ According to the ABA, the proposed rules would promote foreign correspondent banks to help identify and block illegal Internet gambling transactions, but,

194. *Id.*

195. Doug Carlson, *Internet Gambling Law a Success, But Faces Scrutiny*, ETHICS & RELIGIOUS LIBERTY COMMISSION, Nov. 27, 2007, available at <http://erlc.com/article/internet-gambling-law-a-success-but-faces-scrutiny>.

196. See generally Epstein, *supra* note 182.

197. *Id.*

198. Popper, Nathaniel, *Three Largest Online Poker Sites Indicted and Shut Down by FBI*, L.A. TIMES, April 15, 2011, available at http://latimesblogs.latimes.com/money_co/2011/04/three-largest-online-poker-sites-indicted-and-shut-down-by-fbi.html. (Eleven executives from Pokerstars, Full Tilt Poker, and Absolute Poker were arrested under the alleged authority of the UIGEA and charged with bank fraud and money laundering. The domain names of these online gambling sites were seized and efforts were made to shut down ongoing gambling activities); see generally Lisa Boikess, *The Unlawful Internet Gambling Enforcement Act of 2006: The Pitfalls of Prohibition*, 12 N.Y.U. J. LEGIS & PUB. POL'Y 151, 192–195 (2008-09).

199. PokerPages.com, *Poker Page News: Am. Banking Ass'n Report Cites Major Objections to UIGEA*, Mar. 10, 2008, <http://www.pokerpages.com/poker-news/news/american-banking-association-report-cites-major-objections-to-uigea--30510.htm>.

at the same time, could “rais[e] more problems than [they] solv[e].”²⁰⁰

Many financial institutions have taken a direct approach to the problem by negotiating settlement agreements and non-prosecution agreements with the Department of Justice.²⁰¹ For instance, Electronic Clearing House, a Nevada-based corporation, negotiated a non-prosecution agreement with the Department of Justice when the Department learned that the corporation was involved in money transfers for “e-wallets,” or online payment services.²⁰² However, several online gamblers have resorted to less legitimate overseas-based gambling operations, which effectively “forc[e] these problems into the shadows where they’re harder to address and mak[e] it impossible to enlist the industry in helping to fight them.”²⁰³ Instead of minimizing Internet gaming, the UIGEA punishes reputable and responsible Internet gambling services by turning gamblers to less legitimate offshore providers that can evade UIGEA enforcement.²⁰⁴ Ironically, the UIGEA only promotes industry fraud and corruption, which is what its proponents have said it was meant to prevent.²⁰⁵

B. How Applicable is the UIGEA?

Assuming, *arguendo*, that the UIGEA is successfully implemented, companies will be prohibited only from accepting wagers of players within a state *whose laws prohibit Internet gambling*.²⁰⁶ The reality is that only six states have laws that ban Internet gambling, while the remaining forty-four have not enacted any legislation making Internet gambling illegal.²⁰⁷ Consequently, in addition to ignoring the numerous flaws in the UIGEA, the Act would likely not result in an actual ban of Internet gambling in the entire United States until the legislators in the remaining forty-four states pass legislation explicitly banning Internet gambling.²⁰⁸ Again, the Act falls short of its intended outcome, resulting in a heavy burden of enforcement

200. *Proposed UIGEA Regulations: Burden Without Benefit?*, *supra* note 180 (statement of Wayne Abernathy, Executive Vice President, American Bankers Association).

201. *See, e.g., Electronic Clearing House in Pact with Prosecutors*, REUTERS, Mar. 28, 2007, <http://www.reuters.com/article/idUSN2829250520070328>.

202. *Id.*

203. Hiltzik, *supra* note 156.

204. Letter from Eli Lehrer, *supra* note 192.

205. *Id.*

206. *Interactive Media Entm’t & Gaming Ass’n v. Att’y. Gen. of the U.S.*, 580 F.3d 113, 117 (3d Cir. 2009).

207. Richards, *supra* note 130.

208. *See generally id.*

that outweighs any benefits.²⁰⁹

VI. REGULATION AS AN ALTERNATIVE TO THE UIGEA

On a practical level, the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) is simply unenforceable.²¹⁰ The President and Chief Executive Officer of the Governmental Employees Credit Union has even stated that the “check-processing systems would come to a stand-still if financial institutions [had] to review each check to determine if the payment was made to fund illegal gambling activities.”²¹¹ As a result of this practical impossibility, most financial services favor the possibility of regulating Internet gambling as opposed to implementing an outright ban.²¹²

Modern financial institutions are more equipped to regulate Internet gambling than to enforce a total ban.²¹³ With respect to the issue of minors engaging in Internet gambling, modern-day age-verification software and government databases, in combination with strict operating procedures, would serve to easily prevent underage players from accessing gambling sites.²¹⁴ Sites could also cross-reference drivers’ licenses and voter registration lists to verify that a player is not underage.²¹⁵ The mere possibility of underage gambling does not justify an outright ban on Internet gambling, since simple, alternative solutions already exist to solve this problem.²¹⁶

Even more compelling a reason to regulate Internet gambling is the potential for great social benefit.²¹⁷ Rather than establishing a guise of

209. See generally Press Release, U.S. Dep’t of the Treasury, Prohibition on Funding of Unlawful Internet Gambling (Nov. 12, 2008), available at <http://www.ustreas.gov/press/releases/reports/unlawfuinternetgambling11.12.08.pdf> (noting that proposed regulation would be unduly burdensome and would result in compliance costs greater than any offsetting societal benefit).

210. See Boikess, *supra* note 198, at 193–94.

211. *Proposed UIGEA Regulations: Burden Without Benefit?*, *supra* note 180 (prepared statement of Harriet May, President & CEO, Gov’t Employee Credit Union of El Paso, Tex., on behalf of the Credit Union Nat’l. Assoc.), available at <http://financialservices.house.gov/hearing110/may040208.pdf>.

212. See generally Lehrer, *supra* note 122.

213. See generally *id.*

214. Frank Catania, *Regulate, Don’t Ban, Internet Gambling*, PHILA. INQUIRER, May 25, 2006, at A27.

215. *Id.*

216. See *id.*

217. Valasek, *supra* note 5, at 773 (noting that by regulating Internet gambling, federal and state governments could tax business revenues as well as gamblers’ winnings; additionally the governments can create new jobs and businesses).

prohibition while allowing Internet gambling to thrive in an underground arena, the government could instead regulate it and impose a hefty tax.²¹⁸ In 2005, Internet gambling revenues reached ten billion dollars.²¹⁹ The Internal Revenue Service taxed none of it, since the “agency had no way of tracking or regulating profits and winnings.”²²⁰ Meanwhile, the United States remained at a budget deficit of \$455 billion during the fiscal year ending September 2008.²²¹ The nation could have yielded as much as \$43 billion in tax revenue from online gambling, over the course of ten years, as estimated by the consulting firm PricewaterhouseCoopers.²²² If not for any of the aforementioned reasons, the United States should follow its foreign counterparts in regulating Internet gambling for the financial incentives.²²³ In the current economic downturn, Congress should consider repealing the highly ineffective UIGEA and substituting a regulatory provision that would benefit a troubled United States economy.²²⁴ Steve Wynn, Chairman and CEO of Wynn Resorts Ltd., stated that “[they] are convinced that the lack of regulation of Internet gaming within the U.S. must change. . . . We must recognize that this activity is occurring and that law enforcement does not have the tools to stop it. . . . It is time that the thousands of jobs created by this business and the potentially significant tax dollars come home to the U.S.”²²⁵

In May 2009, Barney Frank sought to make this a reality when he proposed the Internet Gambling Regulation Consumer Protection and Enforcement Act (“IGRCPEA”) to replace the ban imposed by the UIGEA with a federal system for regulating online gaming.²²⁶ The IGRCPEA seeks to regulate and tax online gambling and to push back the December 1, 2009 date on which the proposed UIGEA rules were scheduled to take effect.²²⁷ Although Frank introduced the legislation in May 2009, it was set

218. Boikess, *supra* note 198, at 194.

219. Valasek, *supra* note 5, at 772.

220. *Id.*

221. Joint Statement of Henry M. Paulson, Jr., Sec’y of the Treasury, and Jim Nussle, Dir. of the Office of Mgmt. and Budget on Budget Results for Fiscal Year 2008 (Oct. 14, 2008), available at <http://www.treasury.gov/press/releases/hp1213.htm>.

222. Hiltzik, *supra* note 156.

223. Valasek, *supra* note 5, at 772–73.

224. *See supra* Part VI.

225. Ceasar, Stephen, *Efforts to Legalize Online Poker in the U.S. Pick Up Steam*, L.A. TIMES, Mar. 26, 2011, available at <http://www.latimes.com/news/nationworld/nation/la-na-online-poker-20110326,0,7533311.story>.

226. Christine Hall, *Barney Frank Internet Gambling Bill Aims at Legalization*, COMPETITIVE ENTER. INST., May 6, 2009, <http://cei.org/news-releases/barney-frank-internet-gambling-bill-aims-legalization>.

227. *Id.*; Tom Jones, *Barney Frank Online Gambling Bill Hits Sixty Co-Sponsors*,

aside as a result of the legislative need to focus on the deteriorating United States economy.²²⁸ However, in late 2009, Frank was able to win over his sixtieth co-sponsor for the bill.²²⁹ By delaying the implementation of the UIGEA for one more year, Frank's prospects for overturning the Act and implementing his proposed regulatory legislation are promising.²³⁰ Meanwhile, major gambling Nevada corporations, including Ceasars Entertainment Corp., MGM Resorts, and Wynn Resorts, along with representatives like Senate Majority Leader, Harry Reid, have undertaken their own efforts to push for federal regulation of internet gaming, as opposed to an outright ban.²³¹

VII. CONCLUSION

The history of the United States is filled with ongoing disfavor towards gambling institutions.²³² While this disfavor is seemingly consistent over all forms of gambling, certain gaming has been given preferential treatment by the nation's regulating entities.²³³ This preference has been masked by the cloak of a "chance versus skill" analysis.²³⁴ Clear games of skill, such as poker, have been regularly categorized as games of chance by observers unfamiliar with the long-term analyses on which the games are based.²³⁵ The most recent attack on gambling, the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"), is the first to successfully target the Internet gambling arena.²³⁶ In *Interactive Media Entertainment & Gaming Association v. Attorney General of the U.S.*, the Third Circuit upheld the constitutional validity of the UIGEA.²³⁷ However, the Act should be found unconstitutionally vague in defining what unlawful Internet gambling actually is²³⁸ and the threat that it poses to individual privacy.²³⁹

CASINOGAMBLINGWEB.COM, Oct. 2, 2009, http://www.casinogamblingweb.com/gambling-news/gambling-law/barney_frank_online_gambling_bill_hits_sixty_co_sponsors_54579.html.

228. Jones, *supra* note 227.

229. *Id.*

230. *See generally id.*

231. *Id.*

232. Valasek, *supra* note 5, at 754 (citing James H. Frey, *Federal Involvement in U.S. Gaming Regulation*, 556 ANNALS AM. ACAD. POL. SOC. SCI. 138 (1998)).

233. *Id.* at 756–60.

234. Correll, *supra* note 136.

235. *See generally id.*

236. Miller, *supra* note 13, at 195.

237. *Interactive Media Entm't & Gaming Ass'n v. Att'y. Gen. of the U.S.*, 580 F.3d 113, 119 (3d Cir. 2009).

238. *See id.* at 116.

Apart from its constitutional defects, the Act also fails for several other reasons: (1) it poses excessive burdens on financial institutions;²⁴⁰ (2) it is inapplicable in the majority of jurisdictions it seeks to regulate;²⁴¹ and (3) its enforcement would be counterproductive to the legislature's stated intent, since most online gambling providers are simply relocating themselves overseas, beyond the reach of regulation.²⁴² The Supreme Court should overturn the decision and declare the UIGEA unconstitutional on its face. Alternatively, Congress should consider the recently proposed legislation seeking to overturn the UIGEA and implement a federal regulatory mechanism that could establish credible and responsible Internet gambling businesses and significantly contribute to national tax revenue.²⁴³ The UIGEA is yesterday's bill which deals with yesterday's issues, not tomorrow's.²⁴⁴

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239. *See id.* at 118.

240. *See supra* Part IV.C.

241. Richards, *supra* note 130.

242. Valasek, *supra* note 5, at 767.

243. *See* Hall, *supra* note 226.

244. Epstein, *supra* note 182.

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