

RECONSIDERING REGULATION: A HISTORICAL VIEW OF THE LEGALITY OF INTERNET POKER AND DISCUSSION OF THE INTERNET GAMBLING BAN OF 2006

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I) INTRODUCTION

It's the hottest new thing in sports. George Steinbrenner, outspoken owner of perpetual World Series contenders the New York Yankees, admonished his star shortstop, Alex Rodriguez, to stop playing it.¹ Former NBA all-star and basketball hall of fame-nominee Charles Barkley plays it recreationally.² Yevgeny Kafelnikov, former winner of both the Australian and the French tennis Opens, is now considered a professional player.³ Hollywood actors Ben Affleck⁴ and Tobey McGuire are taking lessons⁵ and Academy Award nominee Jennifer Tilly recently won a world championship in it.⁶

No, I am not referring to the American revival of soccer: I am talking about poker—more specifically, “Texas Hold’Em Poker.”⁷ Noted poker author Jim McManus estimated that in 2001

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¹ Associated Press, *Yankees Tell A-Rod to Avoid Illegal Poker Clubs*, ESPN NEWS, November 2, 2005, <http://sports.espn.go.com/mlb/news/story?id=2211201> [hereinafter **AROD**]

² *Everybody Loves Brad Garrett*, Magazine Archives, BLUFF MAGAZINE, October, 2005, http://www.bluffmagazine.com/magazine/2005_10_72.asp

³ *Biography: Yevgeny Kafelnikov*, <http://www.answers.com/topic/yevgeny-kafelnikov>

⁴ Associated Press, *Ben Affleck Poker King*, CBS NEWS ONLINE, June 22, 2004, <http://www.cbsnews.com/stories/2004/06/22/entertainment/main625235.shtml>

⁵ See Phil Hellmuth, *Spider-Man Can Play*, CARDPLAYER MAGAZINE Volume 17 No. 25, December 3, 2004; Poker professional Phil Hellmuth comments of the increasing progress Tobey McGuire has made after taking lessons with him.

⁶ James Joyner, *Actress Jennifer Tilly Wins World Series of Poker*, OUTSIDE THE BELTWAY, June 29, 2005, http://www.outsidethebeltway.com/archives/2005/06/actress_jennifer_tilly_wins_world_series_of_poker/

⁷ See http://en.wikipedia.org/wiki/Texas_hold%27em. “Texas hold ‘em (often referred to as simply “hold’em”) is the most popular of the community card poker games as of 2006. It is also the most popular poker variant played in casinos in the United States, and its no-limit betting form is used in the main event of the World Series of Poker (WSOP), as seen on ESPN, widely recognized as the world championship of the game. It is also the main game in the World Poker Tour (WPT) that hosts international poker tournaments around the globe. Play begins with each player being dealt two cards face down. These cards are the player’s hole cards. These are the only cards each player will receive individually, and they will only (possibly) be revealed at the showdown, making Texas hold ‘em a closed poker game. The hand begins with a “pre-flop” betting round, beginning with the player to the left of the big blind (or the player to the left of the dealer, if no blinds are used) and continuing clockwise. After the

there were between 60 and 80 million poker players in the United States,⁸ and the numbers have only increased since then. It is hard to turn on ESPN without seeing a televised poker tournament or an advertisement for an upcoming one. Nowhere has the increasing popularity of poker been more evident than at the World Series of Poker (WSOP). The WSOP is an annual series of poker tournaments usually held in Las Vegas in late July or early August. Entry is available to anyone who pays an entrance fee. These fees range from \$500 for some of the smaller events to \$10,000 for the main event. The entrance fees are combined to form the prize pool. The winner of the tournament typically receives 25 percent of the prize pool and lower finishers receive less; typically, only the top 10 percent of finishers receive a portion of the prize pool.⁹

The WSOP was started in 1970 by Benny Binion, owner and manager of Binion's Horseshoe Casino in Las Vegas, Nevada.¹⁰ The first WSOP tournament was held in 1971 and had only 7 entrants.¹¹ Now owned by Harrahs,¹² the most recent WSOP was held at the Rio Hotel and Casino in 2006.¹³ The tournament had 45 events and the main event had 8,773 registered participants.¹⁴ The amount of prize money has also increased dramatically; the first place prize for the main event was \$30,000 in 1971, a mere pittance when compared to the \$12 million awarded in 2006.¹⁵ To put this figure in prospective, the \$12 million prize represents the largest payout in the history of sporting events, more than 3 times the combined prizes of the 2006 Masters Golf Tournament and the 2006 US Open tennis tournament.¹⁶

The massive prize money and record number of entrants in the WSOP is even more staggering when viewed in light of their recent increases. For example, in 2002, the WSOP main event had only 631 entrants. There was nearly a 1400 percent increase from 2002 to 2006.

pre-flop betting round, the dealer deals a burn card, followed by three face-up community cards called the flop. The flop is followed by a second betting round. This and all subsequent betting rounds begin with the player to the dealer's left and continue clockwise. After the flop betting round ends, another card is burned, and a single community card called the turn (or fourth street) is dealt, followed by a third betting round. A final burn card is followed by a single community card called the river (or fifth street), followed by a fourth betting round and the showdown, if necessary. Betting structures: In casino play, it is common to use a fixed limit and two blinds. The limit for the first two rounds of betting is called a small bet, while the limit for the third and fourth betting rounds is called a big bet and is generally double the small bet. In casino and most tournament play, a professional dealer who is not a player in the game deals the cards. A dealer button is used to represent the player in the dealer position; the dealer button rotates clockwise after each hand, changing the position of the dealer and blinds. The small blind is posted by the player to the left of the dealer and is usually equal to half of a small bet, and the big blind, posted by the player to the left of the small blind, is equal to a full small bet. After the flop one can bet an amount equal to the big blind, after the turn and the river one can bet or raise two big blinds. Most tournaments use a no-limit structure where a player may bet any amount at any time."

8. See JIM MCMANUS, *POSITIVELY FIFTH STREET* (Farrar, Straus, and Giroux, 2003).

9. See *generally* http://en.wikipedia.org/wiki/World_Series_of_Poker and http://en.wikipedia.org/wiki/2006_WSOP [hereinafter WikiWSOP]

10. *Id.*

11. *Id.*

12. See *id.* Harrahs bought out Binion's and the rights to the WSOP in 2005.

13. *Id.*

14. *Id.*

15. See WikiWSOP, *supra* note 9.

16. See <http://www.chiff.com/a/us-open-tickets.htm> and <http://www.augusta.com/masters/history/leaderboards/2006leaderboard.shtml> respectively.

Two significant factors that caused the sudden emergence of poker in the mainstream of American pop-culture: first, the televised broadcasts of major poker tournaments; and second, Chris Moneymaker, an “every-man,” winning the 2003 WSOP main event.¹⁷

Poker’s popularity is reflected by the television coverage devoted to it, as poker tournaments are carried by at least four channels. ESPN covers the WSOP, the Travel Channel broadcasts the newly developed World Poker Tour (WPT), NBC shows the National Heads-Up Poker Championship, and Fox Sports Net televises various other poker events.¹⁸ It is not simply the televising of poker that caused its boom, but more the innovations in poker televising. ESPN actually began broadcasting the WSOP in the mid-1980s, but because very few hands involved players showing their cards to the audience face up, the televised event had little entertainment value for viewers. It was, as WSOP director of operations Gary Thompson put it, “as fun as watching paint dry.”¹⁹ This changed in 2003, when ESPN began using the “pocket-cam,” a small camera inserted in the sides of the poker table that enables viewers to see each player’s “down-cards” (cards that are unexposed to the other players at the table). This allows viewers to see each player’s cards and play along with the game, making watching the event more engaging. With the advent of the pocket-cam, ESPN expanded its coverage from a one-hour encapsulation of the main event, to a series that spans almost two months and contains slice-of-life profiles on various players.²⁰

The second cause of the poker explosion was Tennessee accountant Chris Moneymaker’s victory in the 2003 WSOP main event. Moneymaker won his \$10,000 entry fee through a series of smaller tournaments held on an online poker site²¹ which he entered for a fee of only \$40. Prior to Moneymaker’s win, professional players dominated WSOP events.²² The victory of Moneymaker, a novice, made the dream of winning these major tournaments tangible to recreational players everywhere. Since his victory, there has been an increase in the number of amateur players competing in the event, and two non-professional players, Greg “Fossilman” Raymer, an attorney from Connecticut, and Joseph Hachem, a former chiropractor from Australia, have won the WSOP main event.²³

Many media related organizations, such as the World Poker Tour, are trying to capture the revenue generated by the increasing popularity of poker. On May 20, 2002, a newly formed company called the World Poker Tour, LLC (“WPT”) announced its launch into the burgeoning world of televised upscale poker tournaments. The WPT was founded by Stephen Lipscomb, an attorney and television producer. In its first season, the WPT hosted 13 \$10,000+ buy-in tournaments at casinos throughout the country. The casinos keep a small portion of the players’ entrance fees and the WPT makes money from a television deal with the Travel Channel as well as from various advertising sources.²⁴ Since 2002, the WPT has expanded rapidly and will have 44 televised events in 2006.²⁵ Other television shows, such as *Celebrity Poker*²⁶ shown on the

17. See WikiWSOP, *supra* note 9.

18. THE POKER FORUM, <http://www.thepokerforum.com/pokerontv.htm>

19. <http://www.pokerplayernewspaper.com/pokerlore.php>

20. See WikiWSOP, *supra* note 9.

21. See www.Pokerstars.com

22. See Chris Moneymakers website, <http://www.chrismoneymaker.com/poker/bio/>

23. See WikiWSOP, *supra* note 9.

24. See <http://www.pokernews.com/news/2005/12/wpt-ceo-lipscomb-open-letter.htm>

25. See generally <http://www.pokerpages.com/newsletter/articles/world-poker-touro1.htm> and http://en.wikipedia.org/wiki/World_Poker_Tour (last visited May 18, 2006)

26. See Bravo’s website, http://www.bravotv.com/Celebrity_Poker_Showdown/. The show consists of 6 B-list celebrities playing Texas Hold’em where the winner receives a monetary award for the charity

Bravo network and Poker Stars Invitational on Fox Sports Net, have sprung up in the wake of the WPT's success. Television clearly has fueled America's obsession with high stakes poker.

America's heightened interest in poker, especially amongst 18–29 year-olds, has caused the rise of a new profitable industry—online poker. Since 2002, online poker sites have become a powerful presence in the online gambling market. These sites allow anyone with an Internet connection to download a program that enables them to play poker with other players anywhere in the world.

Players can choose from a wide variety of poker games on these sites—Texas Hold'Em, Omaha Hold'Em, Omaha High-Low, 7 Card Stud, and others. Players use their credit or debit cards²⁷ to deposit money on the site.²⁸ Then, just like cash at a casino, players exchange this money for virtual chips. They can then win or lose virtual chips at the poker tables with their winnings being credited to their account on the poker site and their losses being deducted; if they lose their whole deposit, they must deposit more money to continue playing.

These sites make money in the same way as brick and mortar casino poker rooms—through a concept called the “rake.”²⁹ In a cash game, the rake is generally ten percent of the amount wagered on a given poker hand up to a certain cap. The cap for smaller games is usually \$4 and even for larger games generally does not exceed \$10. Additionally, the sites take a fee from each online tournament held. For example, for a \$500 tournament, \$450 of a player's entrance fee might go into the prize pool while \$50 would be kept by the online cardroom as a charge for hosting and running the tournament. Despite these modest figures, the Internet gambling industry is estimated by Business Week to be a \$12 billion per year business.³⁰ In December 2003, it was reported that online poker revenues stood at around \$34m per month and were growing by 27% per month.³¹ By March 2005, during peak hours, approximately 100,000 people were playing for real money at various online cardrooms, and a similar number were playing free games.³² Additionally, estimates put the amount gambled on internet poker sites at upwards of \$60 billion for 2005.³³ Online poker sites generated revenues of approximately \$200 million per month in 2005.³⁴

Online poker sites are not the only entities making money from internet poker. Credit card companies, advertising agencies, and other related industries are also capturing significant profits. Additionally, internet “money transferers” such as Neteller and Firepay are also reaping profits.³⁵ These service providers act as intermediaries between banks/credit card companies and online poker accounts. Often, credit card companies refuse to allow credit card holders to

of his/her choice and the losers receive a monetary award, albeit a lesser monetary award, for the charity of their choice.

²⁷. Many sites also accept bank checks, *see, e.g.*, www.partypoker.com.

²⁸. See below for more detail on this process.

²⁹. See Fuller v. Harrah's Entertainment, Inc., 2004 WL 2452771 (E.D. La. 2004).

³⁰. See Kerry Capell, *Britain bets on Casino Games*, BUSINESS WEEK ONLINE, http://www.businessweek.com/globalbiz/content/may2006/gb20060515_495673.htm

³¹. See, generally, http://en.wikipedia.org/wiki/Online_poker [hereinafter WO]

³². *Id.*

³³. See Linda Johnson, *More Odds and Ends*, CARDPLAYER MAGAZINE VOLUME 19 NO. 4, March 7, 2006.

³⁴. See *WO*, *supra* WO, note 31.

³⁵. See, *e.g.* www.neteller.com; www.firepay.com

charge money to their online poker account directly from their credit cards.³⁶ A service such as Neteller allows users to circumvent this restriction by transferring money from either their credit cards or directly from their checking accounts to a holding account run by Neteller. The users can then transfer the funds from their Neteller account to online poker sites. The Neteller accounts also allow the inverse: one can move money from a poker site account to a Neteller account and then request that Neteller send a check. Neteller makes a profit by charging a small fee each time money is withdrawn from a Neteller account and sent back to the user. Neteller is a publicly traded company on the British stock exchange and conducted online money transfers exceeding \$3.4 billion in 2004.³⁷

While there are anywhere between ten and twenty online poker arenas, the six industry leaders, as of mid-2005, were partypoker.com, pokerstars.com, fulltiltpoker.com, ultimatebet.com, pokerroom.com and paradisepoker.com. Two of these sites are even publicly traded in England. PartyGaming, the parent company of PartyPoker, the largest online cardroom in 2005, went public on the London Stock Exchange, achieving an initial public offering market value in excess of \$8 billion dollars. “At the time of the IPO, ninety-two percent of PartyGaming’s income came from poker operations.”³⁸ “Due to concerns about the legality of online gambling in the United States, the company is incorporated in Gibraltar and has no assets in the United States. U.S. consumers represent around 60% of PartyGaming’s revenues.”³⁹ After only 5 years of being in business, PartyGaming became the seventh largest gambling entity in the world with a market capitalization of almost \$11 billion.⁴⁰ Pokerstars is the second largest online poker room. It is headquartered on the Isle of Man in the Irish Sea and is owned by Rational Enterprises, a Costa Rican company.⁴¹

There are several reasons why these online gambling ventures prove so profitable. First and foremost, these companies have very low overhead costs. Once the servers are set up, it takes a minimal staff to keep them running correctly. Additionally, unlike brick and mortar casinos, online casinos do not have to pay dealers, pit bosses, or other personnel. Nor do they have to pay for chips or cards. Second, online casinos can reach a significantly larger clientele than land-based casinos. For example, online poker rooms can reach residents of states that do not allow gambling and can also attract players who are under twenty-one years of age.⁴² Moreover, unlike land-based casino poker rooms, which lose business on weekdays or late at night, online poker rooms never shut down; given the massive array of time zones across the globe, it is always time for poker somewhere. Furthermore, whereas brick and mortar card rooms have a fixed number of dealers and tables, online sites have a virtually unlimited number. Thus, players rarely have to wait to get seats. Third, online sites can deal more hands per hour than in brick and mortar casinos because of online dealing technology. Due to these and other delays common in brick and mortar casinos, their “average rate of play is around thirty hands per hour. Online casinos, however, do not have these delays; the dealing and shuffling are instant, there are no delays relating to counting chips, and, on average, the play is faster due to

³⁶ For example, my credit card companies. *Also see, D Day CARDTRAK*, July 2002, on <http://www.cardweb.com/cardtrak/pastissues/july02.html>. This article discusses how “Citibank will block transactions that are identified by transaction code as casinos and Web sites as online gambling.”

³⁷ See <http://about.neteller.com/aboutneteller/>

³⁸ See generally, http://en.wikipedia.org/wiki/Online_poker

³⁹ See http://en.wikipedia.org/wiki/Party_Poker

⁴⁰ See <http://finance.google.com/finance?catid=60427371> (last visited May 02, 2005)

⁴¹ See http://en.wikipedia.org/wiki/Poker_Stars

⁴² Most online poker sites have an 18 year old minimum, see, e.g., www.pokerstars.com or www.partypoker.com.

“auto-action” buttons (which allow a player to select his action before his turn). It is not uncommon for an online poker table to average sixty to eighty hands per hour.”⁴³

How are these profitable businesses regulated by the United States government? In short, they are not. In order to avoid the murky question of whether it is legal to operate an online poker business on United States soil, all the major sites have chosen to incorporate in foreign jurisdictions, the most popular of which include Costa Rica, England, and Canada.⁴⁴ These countries possess the ideal qualities of lax regulation of the internet poker industry as well as having officially made the game legal.⁴⁵ The United States has chosen not to impose any regulations specifically on the online poker industry. Rather, in the Safe Port Act passed and signed into law in October of 2006, the U.S. government has attempted to ban it.^{46,47} However, as will be explained in detail below, the Safe Port Act does not prevent all internet poker sites from operating. Thus, the U.S. government’s decision to attempt to prohibit internet poker rather than to regulate it has and will lead to a host of legal and public policy quagmires. First, there is no governmental enforcement mechanism to monitor and regulate cheating or other illicit behavior by the operators of these sites.⁴⁸ Second, absent regulation, states lose the opportunity to enforce some of their social policies. For example, in some states, the legal gambling age is twenty-one. Online, a person need only be eighteen to gamble. In fact, teenagers have been some of the largest online money winners.⁴⁹ In addition, because gambling is often regulated on a state level, it also has state sovereignty implications. Also, by failing to get involved, the US loses some of its ability to control negative social spillovers that sometimes result from gambling, such as crime and addiction. Finally, the U.S. loses its ability to monitor the taxable income flowing between U.S. citizens and these sites and to tax these sites’ profits.⁵⁰

⁴³See http://en.wikipedia.org/wiki/Online_poker;

⁴⁴See generally, Mark G. Tratos, *Gaming on the Internet III: The Politics of Internet Gaming and the Genesis of Legal Bans or Licensing*, 610 PLI/PAT 711, 719–22 (2000); Seth Gorman & Antony Loo, *Black Jack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L. J. 667–9 (1996).

⁴⁵See Mike Bruner, *Australia, U.S. at Odds on Net Betting*, <http://www.msnbc.com/NEWS/287419.asp> (last visited January 7, 2006); Mike Bruner, *Britain Embraces Internet Gambling*, <http://www.msnbc.com/news/540530.asp> (last visited January, 7, 2006).

⁴⁶See CARDPLAYER MAGAZINE ONLINE (www.cardplayer.com/pokerlaw/allynshulman_testimony.pdf), “Poker and the Law section”: “This content was taken from Allyn Jaffrey Shulman’s testimony on HB 1509 to the North Dakota State Senate. Her testimony was entitled “Three Issues Regarding Online Poker: Legality, Congressional Efforts and Poker is a Game of Skill””: “The United States is a paradox when it comes to online poker. Estimates put the US share of the world’s online poker market as high as nearly 80%. Yet this is the only market that allows the \$2 billion online poker industry to operate in an unregulated environment. Without regulation, it is difficult to manage issues such as underage gambling, excessive gambling, fraud, collusion, and money laundering. The United States is moving in a direction completely opposite to the rest of the world when it comes to online poker. Rather than accept the fact that online poker is here to stay and demand safeguards to prevent underage gambling, overspending by players, and collusion during poker games, as regulators in other countries have done, the US is trying to prohibit this thriving industry.” (last visited January 19, 2006).

⁴⁷ H.R. 4954 (http://www.rules.house.gov/109_2nd/text/hr4954cr/hr49543_portsr.pdf or <http://www.pocketfives.com/68CBB9B1-C383-45BF-8308-13BBFE1C37BC.aspx>)

⁴⁸Some sites are audited by Price Waterhouse Coopers or licensed by Native American Tribal Gaming boards.

⁴⁹See www.zeejustin.com; (noting that large online money winner Justin Bonomo began his gambling career at age 19.)

⁵⁰See the section entitled “The Pros and Cons of Regulating Online Poker” *infra*, for an in-depth analysis of these public policy issues.

This paper begins with an overview of the history of the legality of internet poker. First, it examines legal scholars' opinions of whether it is legal for individuals (players) to place wagers on internet poker sites. Second, it will look at government officials' previous attempts to criminalize online gambling using state and federal law. Third, it will examine the specific federal laws, namely the Wire, Travel, and Illegal Gambling Business Acts, that the government has always claimed has criminalized the operating of an online gambling business, focusing particularly on the impact of the jurisdictional reach of these laws. Fourth, it will examine the legislature's previous attempts to specifically criminalize owning and operating an internet poker website. Fifth, it will analyze the impact of the Safe Port Act on internet gambling and once again discuss the jurisdictional problems this law might run into. Next, it examines what steps, if any, the US government has taken toward regulating the online poker industry. Then, it weighs the pros and cons of regulation and also analyzes several potential regulatory constructs. Finally, it attempts to distinguish poker from other forms of gambling.

II) HISTORY OF THE LEGALITY OF ONLINE POKER

Before examining the Safe Port Act or Congress' previous attempts to criminalize the running of an online gambling business, it is important to look at the government's previous legal assertions regarding online gambling. None of the major online poker interests have ever been the target of a prosecution by the United States government. First, it is worth considering what legal scholars have to say about the legality for players participating in online gambling. Next, it is important to examine the laws government officials have previously (and still do) cited as prohibiting the running of an online gambling institution. Only after these two issues have been addressed can previous legislation and the Safe Port Act be accurately and properly analyzed.

A) LEGAL SCHOLARS' OPINIONS

Two of the nation's preeminent gambling law scholars are Professor I. Nelson Rose and Chuck Humphrey, Esq. Professor Rose is a tenured faculty member at Whittier Law School in California and author of numerous gambling law books, including his most recent work "Internet Gaming Law."⁵¹ Mr. Humphrey is a former partner at Kirkland & Ellis, founding

⁵¹. From I. Nelson Rose's website, www.gamblingandthelaw.com : "Professor I. Nelson Rose is recognized as one of the world's leading authorities on gambling law. He is an internationally known scholar, with more than 500 published works, and public speaker, often the keynote speaker on gambling issues. A 1979 graduate of Harvard Law School, he is a tenured full Professor at Whittier Law School in Costa Mesa, California, where he teaches one of the first law school classes on gaming law. Professor Rose is best known for his internationally syndicated column, "Gambling and the Law®," and his landmark 1986 book by the same name. His most recent books are a collection of columns and analysis, co-authored with Bob Loeb, *Blackjack and the Law*, and the first casebook on gaming law, *Gaming Law: Cases and Materials* (LexisNexis/Matthew Bender 2003), co-authored with Professors Robert Jarvis, Shannon Bybee, J. Wesley Cochran and Ronald Rychlak. Professor Rose's latest book, *Internet Gaming Law*, co-authored with Martin Owens, has just been published by Mary Ann Liebert Publishers. A consultant to governments and industry, Professor Rose has testified as an expert witness in administrative, civil and criminal cases in the U.S., Australia and New Zealand, and has acted as a consultant to major law firms, international corporations, licensed casinos, players, Native American tribes, and local, state and national governments, including Arizona, California, Florida, Illinois, Michigan, New Jersey, Texas, the province of Ontario, and the federal governments of Canada and the United States. With the rising interest in

partner of Addoms and Humphrey, and principal investor/founder of Tournament of Champions Poker.⁵² While both scholars have impressive credentials and extensive knowledge of gaming law, they have slightly differing opinions about the legality of online poker for players. Therefore, this section shall initially give a brief overview of the legality of online poker for players before it considers the legality for the companies running the online poker sites, which essentially govern the question of whether online poker can legally exist in its current form.

In his article, “Is it a Crime to Play Poker On-line?” Professor Rose considers whether it is legal for a poker player to play online. Professor Rose argues that “federal law is clear” and that “the federal government’s interest in gambling is pretty much limited to organized crime.”⁵³ Therefore, he believes that internet poker players should not fear that the federal government will issue warrants for their arrest for playing online. He comments that “a regular player cannot get into trouble with the federal government even if the gambling operation is blatantly illegal, unless he does something to help the business.” He also notes that the few times the Department of Justice has charged regular players with crimes, judges dismissed the cases.⁵⁴

Looking at state rather than federal law, Professor Rose writes that “all states make it a crime to conduct some forms of unauthorized gambling. But about half the states also make it a crime to make a bet under some circumstances, even though nobody is ever charged any more.” Using California as an example, Professor Rose notes that California Penal Code Sec. 330 provides: “Every person who plays . . . any banking or percentage game played with cards . . . for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor . . .” Professor Rose concludes that in California “it seems it is not a crime to play poker online for money, if the game is not a percentage game.”⁵⁵

In his article, “Is Playing Poker Online in California Legal?” Chuck Humphrey refutes some of Professor Rose’s contentions. Specifically, he regards playing online poker as a percentage game because of the rake. Therefore, he concludes that it is illegal for a person to play poker online in California.⁵⁶ Thus, in Mr. Humphrey’s view, “the better, more legally

gambling throughout the world, Professor Rose has been invited as a public speaker to address such diverse groups as the National Conference of State Legislatures, Congress of State Lotteries of Europe, United States Conference of Mayors, and the National Academy of Sciences. He has taught classes on gaming law to the F.B.I., at the University of Ljubljana in Slovenia and as a Visiting Scholar for the University of Nevada-Reno’s Institute for the Study of Gambling and Commercial Gaming. Prof. Rose has presented scholarly papers on gambling in Nevada, New Jersey, Puerto Rico, England, Australia, Antigua, Portugal, Italy, Argentina and the Czech Republic.”

⁵² From Mr. Humphrey’s website, www.gambling-law-us.com: “Chuck Humphrey began practicing law in 1968. He was a partner in the national firm of Kirkland & Ellis when, in 1986, he became one of the two founding partners of Addoms & Humphrey, a Business Development Company that assisted in structuring and financing new ventures. In 1999 he became the principal investor in and one of the founders of the Tournament of Champions of Poker and of Team Pegasus, an association of professional tournament poker players. He is admitted to practice law in Colorado, Michigan and Texas, currently being active in Colorado, where he lives. He was a staff attorney for the Securities and Exchange Commission in Washington, D.C. early in his legal career. Chuck continues his law practice, which principally focuses on business matters, including gambling law, structuring transactions, and securities and venture capital law.”

⁵³ I. Nelson Rose, *Is It a Crime to Play Online?*, 7 GAMLR 409, 410 (December, 2003).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Charles Humphrey, Esq., *Is it a Crime to Play Online Poker in California?*, <http://www.gambling-law-us.com/Articles-Notes/play-online-california.htm>. Mr. Humphrey] believe[s]

supportable conclusion is: playing poker for money in California at the popular online poker websites is illegal, but in today's tolerant atmosphere the risk of being charged with a criminal misdemeanor is far less than the chance of getting a speeding ticket, and the actual penalty to befall anyone who is charged will be not much more serious than the speeding ticket."⁵⁷ He ends the article by quoting Professor Rose who states, "Half the states do have ancient laws on the book making it illegal to make a bet. But, probably 20 million Americans make technically forbidden wagers each year. With odds like that, you are more likely to be elected governor of California than charged with illegal gambling."⁵⁸

So Professor Rose and Mr. Humphrey seem to agree in principle that it is possible that antiquated state laws to make it illegal for a player to play poker online. However, both scholars agree that the probability or consequences of a prosecution are minimal.

The only state to explicitly outlaw internet gambling is Washington.⁵⁹ In May 2006, the Washington State Legislature passed Senate Bill 6613, which makes it a class C felony for a person situated in Washington to place a wager over the internet.⁶⁰ However, this bill will be hard to enforce. First, there is no agency set up to enforce this law. Second, it will be very difficult, if not impossible, to target individuals who are engaged in the prohibited wagering—short of placing a tracing device in a person's computer, or monitoring an individual's credit card, it would be hard to ascertain these persons' identities. The only official action the Washington state government has taken regarding this legislation is to threaten publications such as the Seattle Times for linking to poker websites.⁶¹

Given (1) the fact that it isn't illegal for an individual to play online poker under federal law, (2) the lack of enforcement of these state laws against internet gamblers, and (3) general confusion about whether state courts have the jurisdiction to apply these laws, the question of whether it is illegal under a given state's laws for an individual to play internet poker is virtually moot. The more interesting question is whether it is illegal to own, operate, or otherwise participate in an online poker business.

the existence of the rake or entry fee makes the poker game a percentage game, all of which are banned as a class by Section 330. *Sullivan v. Fox*, 189 Cal.App.3d 673, 235 Cal.Rptr. 5 (Cal.App. 1 Dist., 1987) provided the first stated "interpretation of what constitutes a percentage game under California law. . . Three different methods of calculating the amounts to be paid to the house by players were considered: (1) a portion of each participants winnings, (2) a fixed portion of the amount of each bet, or (3) the time that each participant plays. The court held that if either of the first two methods is used, then the game will be a percentage game."

⁵⁷ *See id.*

⁵⁸ *Id.* quoting I. Nelson Rose, *Guilty of Gambling Online?*, CARD PLAYER MAGAZINE Vol. 16, Mo. 21, Oct. 10, 2003.

⁵⁹ *See* Earl Burton, *Washington State Passes Online Poker and Gaming Legislation*, POKERNEWS, (<http://www.pokernews.com/news/2006/5/washington-state-online-poker-legislation.htm>)

⁶⁰ Wash. SB 6613

⁶¹ *See* Danny Westneat, *This Column May Be Illegal*, SEATTLE TIMES, (http://seattletimes.nwsourc.com/html/localnews/2003062386_danny15.html) and <http://www.neverwinpoker.com/phpnuke/html/article-498-thread-1-0.html>

B) GOVERNMENT OFFICIALS' ACTIONS/OPINIONS

Several states have gambling laws that could be construed to make the running of an online poker business illegal.⁶² However, very few prosecutions have been undertaken, and those usually have been undertaken by the US Attorney's Office rather than by state law enforcement officials. The most noteworthy instance of prosecution of a participant in online gambling occurred in *United States v. Cohen*.⁶³

In 1998, the U.S. Attorney for New York filed charges against fourteen individuals connected with six separate internet sports books.⁶⁴ Several defendants took plea bargains, but Jay Cohen, a former San Francisco options trader, took his case to trial, marking the first ever federal prosecution for internet gambling.⁶⁵ The US Attorney charged Cohen with conspiracy to violate the Wire Act (18 USC 1084). Cohen founded World Sports Exchange (WSE) in Antigua. WSE's only purpose was to take bets on sporting events over the internet.⁶⁶ A jury found Cohen guilty of conspiracy and the Second Circuit upheld his conviction holding that his belief that his actions were legal and the fact that his business was licensed in Antigua did not constitute cause to overturn his conviction.⁶⁷

Despite the 2nd Circuit's ruling, there are several important reasons why neither this case, nor the cases that resulted in plea agreements, shed much light on the legality of internet poker. First, poker was not at issue in these cases. In fact, casino gambling itself was not at issue. WSE conducted only a sports gambling operation, which is clearly under the purview of the Wire Act. Second, only Americans were charged, avoiding the ambiguous question of whether foreign nationals or foreign companies could be charged. Third, unlike the internet poker sites, these internet sports books "each took at least one bet over the telephone, giving prosecutors a fall-back position if a court rules the Wire Act does not apply to the Internet." Fourth, and most importantly, unlike any of the internet poker businesses, these sports betting companies had significant ties to the United States: the defendants sent mail within the U.S., the companies had U.S. 1-800 numbers, the defendants wrote business checks from U.S. banks, etc. As previously mentioned, internet poker sites generally go out of their way to have absolutely no ties to the United States whatsoever.⁶⁸ A criminal complaint has yet to be filed against a purely foreign corporation or a foreign national and no complaint has ever been filed against a company running an internet card room.

In addition to undertaking these peripherally applicable prosecutions, several prominent government officials took it upon themselves to weigh in on the question of whether or not internet poker is legal under laws existing before the passage of the Safe Port Act. The most significant example of this occurred in late 2003 when Assistant Attorney General John G. Malcolm sent a letter (the "Malcolm Letter") to the National Association of Broadcasters, "encouraging" them not to accept advertising from online gambling sites. Malcolm's letter reads in relevant part: "The sheer volume of advertisements [relating to internet gambling] . . . is

⁶² See generally, Charles Humphrey, Esq., *State Gambling Law Summary*, <http://www.gambling-law-us.com/State-Law-Summary/>

⁶³ *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001)

⁶⁴ See I. Nelson Rose, *The Law of Internet Gambling*, GAMBLING AND THE LAW, <http://www.gamblingandthelaw.com/internet.html> [hereinafter GL]

⁶⁵ Technically, 14 defendants were named in separate criminal complaints, but Cohen was the only one to go to trial.

⁶⁶ See GL, *supra* note 64.

⁶⁷ Cohen, *supra* note 63 at 73.

⁶⁸ See generally GL, *supra* note 64.

troubling because it misleads the public in the United States into believing that such gambling activity is legal, when, in fact, it is not. Because of the possibility that some of your organization's members may be accepting money to place such advertisements, the Department of Justice, as a public service, would like you to be aware that the entities and individuals placing these advertisements MAY be violating various state and federal laws and that the entities and individuals that accept and run such advertisements MAY be aiding and abetting these illegal activities." (emphasis added)⁶⁹ The letter goes on to state: "Notwithstanding their frequent claims of legitimacy, Internet gambling . . . operations that accept bets from customers in the United States violate Sections 1084,⁷⁰ 1952, and 1055 of Title 18 of the United States Code."⁷¹

III) EXISTING LAW

This section examines the federal laws that the government referenced as criminalizing internet poker prior to the passage of the Safe Port Act. It then considers the impact of state law. Next, it discusses whether the government, in bringing an action against an internet gambling company, can acquire jurisdiction over the company in general. Finally, it considers the particularly complex issues involved in gaining jurisdiction over a purely foreign corporation, such as PartyGaming or PokerStars, whose only contacts in the United States come via internet communication. It is particularly important for the reader to read and consider the analyses of the various laws and jurisdictional issues together, as they are inherently intertwined. Furthermore, different jurisdictional analyses will apply to different laws, e.g. state/civil, state/criminal, federal/civil, federal/criminal, which necessitates reading the sections as a whole for proper understanding.

Additionally, on occasion various laws affect poker differently than other forms of gambling. Different laws may treat all types of gambling as the same or split it into any combination of three categories: 1) table games such as blackjack, roulette, and other games of chance, 2) skill/semi-skill games, and 3) sports wagering.⁷² Enough variations exist for the subject of a whole other article. In general, the laws discussed below, while couched in terms of general gambling, encompass poker as well.⁷³

⁶⁹. For content of the letter and comments on Assistant Attorney General Malcolm's motives see Allyn Jaffrey Shulman, *Turning Up the Heat*, CARDPLAYER ONLINE NEWSLETTER, October 29, 2003 (http://www.cardplayer.com/poker_magazine/archives/?a_id=13636&m_id=7). Emphasis was added by Ms. Shulman, not I.

⁷⁰. *Id.*

⁷¹. Please see generous discussion of Sections 1084, 1952, and 1055 of Title 18 of the United States Code (The Wire Act, the Travel Act, and the Illegal Gambling Business Act, respectively) which appears below in the "Existing Law" section.

⁷². Several states that disallow table games allow for public card rooms where poker may be played. Also, some states allow for slot machines to exist but not table games. See <http://www.gambling-law-us.com/State-Laws/> for a break down of each states laws.

⁷³. It will be my contention that, in addition to the fact that the government should either regulate or deem illegal online poker, poker is a game of skill (thus negating some of its social ills and increasing its legitimacy) and as such should be treated differently by the law. See the "Conclusion" Section.

A) FEDERAL LAW

The three main laws cited by legal scholars and government officials as criminalizing online gambling prior to the Safe Port Act are the Wire Act⁷⁴, the Travel Act⁷⁵, and the Illegal Gambling Business Act⁷⁶.

B) THE WIRE ACT (18 USC §1084)

The Wire Act prohibits anyone “engaged in the business of betting or wagering” from “knowingly use[ing] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest.”⁷⁷ Upon first reading, as the authors of one of the first articles on online gambling did, it is reasonable to conclude that the Wire Act applies to online poker.⁷⁸ However, it depends on whether the clauses above are read separately or jointly. Read separately, the act prohibits ANY bets or wagers that are transmitted interstate.⁷⁹ Read jointly, the Wire Act only prohibits bets or wagers on a sporting event or contest.⁸⁰ Several experts believe that it was Congress’s intent for the Wire Act to be targeted only at bookmakers and therefore should only apply to sports wagers.⁸¹

More telling is the court’s opinion in *In Re MasterCard Intern. Inc., Internet Gambling Litigation*.⁸² In *In Re Mastercard*, the court held that the plain language of the Wire Act applied only to sporting events.⁸³ In reaching this determination the court looked at the legislative history of the law and also the fact that recent “legislative attempts have sought to amend the Wire Act to encompass “contest[s] of chance or a future contingent event not under the control or influence of [the bettor].”⁸⁴ The Fifth Circuit affirmed the District Court’s holding, stating “The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had failed to allege that they had engaged in internet sports gambling. We agree with the district court’s statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion.”⁸⁵ While the Department of Justice continues to maintain that the Wire Act criminalized all forms of online gambling, based on the *Mastercard* decision, it seems unlikely that its theory will prevail in court.

⁷⁴. 18 USC § 1084.

⁷⁵. 18 USC § 1952.

⁷⁶. 18 USC § 1955.

⁷⁷. The Wire Act, 18 USC § 1084.

⁷⁸. Seth Gorman & Antony Loo, *Black Jack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L. J. 667–9 (1996). “One statute that applies to Internet gambling is the Wire Act;” “This statute clearly applies to Internet casinos; however, it does not seem to apply to access providers and players.”

⁷⁹. Namely “any bet or wager”—on sports events, on roulette, on poker, on anything.

⁸⁰. Just wagers relating to “sporting events or contests.”

⁸¹. See, e.g., Jeffrey Rodefer, *Federal Wire Wager Act*, <http://www.gambling-law-us.com/Federal-Laws/wire-act.htm> and Allyn Jaffrey Shulman, *Turning Up the Heat*, CARDPLAYER ONLINE NEWSLETTER, October 29, 2003, http://www.cardplayer.com/poker_magazine/archives/?a_id=13636&m_id=74.

⁸². 132 F.Supp.2d 468 (E.D. La. 2001).

⁸³. *Id.* at 480.

⁸⁴. *Id.*

⁸⁵. *In Re MasterCard Intern. Inc.*, 313 F.3d 257, 262–3 (5th Cir. 2002).

C) THE TRAVEL ACT (18 USC §1952)

The Travel Act, in relevant part, prohibits traveling in interstate commerce or using the “mail or any facility” to “promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.”⁸⁶ This statute defines an “unlawful activity” for its purposes as “any business enterprise involving gambling . . .” and other activities normally associated with racketeering.⁸⁷ Congress passed this act around the same time as the Wire Act; both were part of President John F. Kennedy’s attempt to squelch organized crime and racketeering.⁸⁸

Essentially, the government must show two things to convict an online poker room operator of violating the Travel Act. First, the government must show that the operator violated a gambling law. Since gambling itself is regulated solely by the states, the government must demonstrate a violation of a specific state’s⁸⁹ anti-gambling laws.⁹⁰ Second, the government must prove that the operator used the “mail or any facility” in furtherance of illegal gambling. The court has held that a “facility” for the purpose of interstate commerce can include “use of the mail, telephone or telegraph, newspapers, credit cards and tickertapes.”⁹¹ The court is likely to find that the internet is a facility as well, either because the internet utilizes phone lines or simply by analogy.⁹²

It seems clear based on the plain text of this law that as long as the government can show a violation of a state anti-gambling law, then a conviction under the Travel Act should follow.

D) THE ILLEGAL GAMBLING BUSINESS ACT (18 USC §1955)

The Illegal Gambling Business Act states that “whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business” shall be fined or imprisoned.⁹³ This statute defines an “illegal gambling business” as, among other things, a gambling business which “is a violation of the law of a State.”⁹⁴ Although Congress passed this

^{86.} 18 U.S.C. § 1952.

^{87.} *Id.*

^{88.} See Jeffrey Rodefer, *Federal Travel Act Scopes and Predicates*, <http://www.gambling-law-us.com/Federal-Laws/travel-act.htm> : “As part of United States Attorney General Robert F. Kennedy's program to combat organized crime and racketeering, Congress enacted the Travel Act in 1961 as part of the same series of legislation as the Wire Act.”

^{89.} See Chuck Humphrey, *Application of Federal Anti-Gambling Laws to Internet Cardrooms*: “The question is not whether the player is violating the law, but rather whether the operation of the online cardroom violates applicable state laws that criminalize the operation of professional gambling facilities.”

^{90.} *Id.* “It is important to note that the Travel Act “refers to state law only to identify the defendant’s unlawful activity, the federal crime to be proved in § 1952 is use of the interstate facilities in furtherance of the unlawful activity, not the violation of state law; therefore § 1952 does not require that the state crime ever be completed.” Citing: *United States v. Campione*, 942 F.2d 429, 434 (7th Cir. 1991).

^{91.} See Jeffrey Rodefer, *Federal Travel Act Scopes and Predicates*, <http://www.gambling-law-us.com/Federal-Laws/travel-act.htm>.

^{92.} The court in *U.S. v. Smith*, 209 F. Supp. 907 (E.D. Ill. 1962), noted that “because telephone voices are “actually transported by wires across state lines to the same extent as materials are transported over state lines in moving vehicles,” the Travel Act encompasses acts transmitted over telephone rather than only acts of actual physical travel. The same can be said of acts committed over the internet.

^{93.} 18 USC § 1955.

^{94.} *Id.* at (b)(1)(i).

statute with organized crime in mind,⁹⁵ it seems applicable to internet gambling operators as well.⁹⁶ The government must simply show that the operator runs a business that involves gambling that is contrary to a state law.⁹⁷ As Mr. Humphrey puts it, “Gambling Web sites are subject to the same regulatory and licensing requirements as the off-line world. What is illegal off-line remains illegal online; it is illegal to offer (Internet) gambling services to consumers resident in a country where a license has not been granted by the appropriate authorities.”⁹⁸ However, again, the question of whether an internet poker room operator has violated the Illegal Gambling Business Act turns on an inquiry into the particular state law that he is accused of violating.

E) STATE LAW

Based on the previous discussion, it seems that the Wire Act would not apply to internet poker operators, but the Travel Act and the Illegal Gambling Business Act would as long as the operators violated a specific state’s anti-gambling laws. Of course, the state would also be able to prosecute these operators for violation of those same state laws.

Every state has anti-gambling laws that may do a variety of things: prohibit gambling outright, prohibit certain types of gambling, prohibit running a gambling establishment without a license, etc. Some states make exceptions and allow card rooms to operate as long as they have a state license and do not allow any other type of gambling on the premises. However, it is safe to say that operating a poker room or establishment that charges a rake violates at least one anti-gambling law in over two-thirds of the states. In fact, Mr. Humphrey writes that “the offering and conduct of online gambling activities probably violates the criminal laws of every state in the United States.”

Therefore, it is probable that internet pokerroom operators are guilty of violating not only these state laws, but also the Travel Act and Illegal Gambling Business Act. However, all internet poker sites are run completely offshore. Traditionally, the applicable law is that of the state (or the country) where the bet takes place; the “correct test is whether the gambling offered by the online casino would be legal if it were conducted in person in the place where the bettor is located.” Thus, since at least part of the crime in question takes place in the United States, the government can likely charge internet pokerroom operators with violations of state law, the Travel Act, and the Illegal Gambling Business Act. However, in order to proceed successfully with a prosecution, the government also must have jurisdiction over these operators.

^{95.} See *United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974).

^{96.} Seth Gorman & Antony Loo, *Black Jack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 *LOY. L.A. ENT. L. J.* 667–9 (1996) and Jeffrey Rodefer, *Illegal Gambling Business Act of 1970*, <http://www.gambling-law-us.com/Federal-Laws/illegal-gambling.htm>.

^{97.} An important note: I am discussing only the most important and relevant parts of these federal laws. The government must also prove other things to secure convictions under the 3 laws discussed. For example, to violate the Illegal Gambling Business Act, the business in question must involve 5 or more people and run for more than 30 days. The parts not discussed are fairly straight forward and one can assume that the government can prove the portions against internet gambling operators without much difficulty.

^{98.} See Humphrey, *supra* note 89.

IV) JURISDICTIONAL ISSUES

Civil suits by the government against a foreign/out-of-state corporation have been around for centuries. Personal jurisdiction over an out-of-state corporation is proper if it is both authorized by statute and does not violate the Due Process Clause of the Fourteenth Amendment.⁹⁹ This section shall assume that each state has enacted an appropriate long-arm statute to satisfy the first prong. For the second prong, the standard test articulated in *International Shoe* and its progeny has been used for over six decades.¹⁰⁰ Due Process requires that the defendant have “minimum contacts”¹⁰¹ with the forum state and also that the jurisdiction does not offend “traditional notions of fair play and substantial justice.”¹⁰² The court has expanded and contracted the requirements for “minimum contacts” throughout the years. A court may gain specific personal jurisdiction over a defendant if he has sufficient minimum contacts with the forum relating to the facts underlying the pending case (in this case, a civil case against a corporation for violating gambling law over the internet)¹⁰³ or if the defendant purposely directed his activities toward the forum state.¹⁰⁴

The internet has severely complicated this analysis. In the case of internet gambling companies, their actions clearly affect people in a given state, but that corporation never sets foot in that state nor does it specifically send any material to that state. The question is whether the establishment of a gambling website which is created by a foreign corporation and sent over out-of-state (or country) servers into a given state constitutes enough contact to establish jurisdiction over the corporation.

Given that this is a relatively novel question, the Circuit Courts of the United States have yet to speak on it. However, several districts Courts have adopted the standard outlined in *Zippo Mfg Co. v. Zippo Dot Com, Inc.*¹⁰⁵ *Zippo* articulates a “sliding-scale” test that evaluates “the nature and quality of activity that a defendant conducts over the Internet.”¹⁰⁶ At one end of the scale “lie businesses or persons who clearly conduct business over the Internet and have repeated contacts with the forum state.”¹⁰⁷ In such instances, jurisdiction is clearly proper. On the other side of this continuum lie passive websites. A passive website “does little more than make information available to those who are interested in it [and] is not grounds for the exercise of personal jurisdiction.”¹⁰⁸ The middle of this continuum “is occupied by interactive Web sites where a user can exchange information with the host computer,” and, there, “the exercise of

^{99.} *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 609 (1990); *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958); *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310 (1945).

^{100.} 326 U.S. 310 (1945).

^{101.} *See* *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

^{102.} *Id.*

^{103.} *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

^{104.} *Burger King*, 471 U.S. 462, 472 (1985); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

^{105.} 952 F.Supp. 1119, 1120 (W.D. Pa. 1997).

^{106.} *Id.* at 1123.

^{107.} *See* *Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.Com*, 128 F.Supp.2d 340, 349 (E.D.Va. 2001).

^{108.} *See* *Zippo*, 952 F.Supp. 1119, at 1124.

jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”¹⁰⁹

Internet poker websites fall within this middle ground. Upon examining the level of interactivity of a poker website, one would clearly conclude that it rises to a sufficient level to justify jurisdiction under the *Zippo* standard. A poker website “provides intense real-time interactivity to its members,” as members need to download a program, place money onto the site, and access the site each time they want to play.¹¹⁰ In fact, “online casino gambling is an inherently interactive activity.”¹¹¹ This was the exact conclusion of the court in *Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.Com*.¹¹² In *Alitalia*, the plaintiff, an Italian airline, sued Casinoalitalia.Com for a trademark violation. The defendant was an internet casino operator established under the laws of the Dominican Republic with its headquarters in Santo Domingo. It conducted its business solely outside the United States and has no offices or personnel within U.S. borders. Nonetheless, the court found that because a gambling website is highly interactive in nature, the company intentionally availed itself of the forum and jurisdiction was therefore proper.¹¹³ Likewise, in *Thompson v. Handa-Lopez, Inc.*, the court found personal jurisdiction over a company that runs an internet casino because of the interactive nature of the online casino.¹¹⁴ In *Thompson*, an online player sued an online casino to recover winnings that the casino allegedly did not pay out. The defendant argued that personal jurisdiction did not exist because the internet casino was a California corporation with no relevant contact in Texas. The court, applying the *Zippo* standard, found “sufficient contacts with the forum state to justify the exercise of in personam jurisdiction because (i) the defendant “continuously interacted with casino players [by] entering into contracts with them as they played with various games”; (ii) the defendant “entered into contracts with the residents of various states knowing that it would receive commercial gain at the present time”; (iii) the plaintiff “played the casino games while in Texas, as if they were physically located in Texas”; and (iv) the defendant would have sent any money won to the plaintiff’s Texas address.”¹¹⁵

The same analysis used in *Alitalia* and *Thompson* would apply if an internet poker website was sued. A poker website is interactive. A user must download the program, the program continuously interacts with the players as the poker game occurs, and more importantly, as the courts failed to comment on, when a player deposited money into his online poker account, he had to create a profile indicating what state he was in, thus telling the site operators what state their business is going into.¹¹⁶ It is clear that based on the *Zippo* standard,

^{109.} *Id.*

^{110.} *See Alitalia*, 128 F.Supp.2d, at 350.

^{111.} *Id.*

^{112.} *Id.*

^{113.} *See id.* The court avoided the problem of how, aside from establishing jurisdiction, they could proceed against a completely foreign corporation by allowing the plaintiff, as per the applicable statute, to proceed in rem against the internet casino’s domain name. This particular method would not work with an internet poker site, but this does not change the jurisdictional analysis.

¹¹⁴ *Thompson v. Handa-Lopez, Inc.*, 998 F.Supp. 738 (W.D. Tex., 1998).

^{115.} *Id.* at 744.

^{116.} ALR (59 AMJUR POF 3d 1) delineated some factors which should be examined in determining whether the defendant corporation established an “internet presence” in the forum state. Those factors include: “Location of Internet Service Provider, Accessibility of website within forum, Lack of location-sensitive gateway to website that would bar forum residents from access, Number of website hits from forum residents, Leaving “cookie” on computers within forum, Maintenance of a listserv accessible within the forum, Number of listserv participants within the forum, Administration, operation or moderation of a newsgroup accessible within the forum, Posting messages to a newsgroup accessible within the forum,

a court would find personal jurisdiction to be proper over any of the major internet poker companies.

More relevant to internet poker operators is the criminal jurisdiction which our government might be able to exercise over these corporations. A corporation can rarely be held criminally liable, and based on the laws mentioned above; severe criminal penalties are not applicable to companies that run internet poker sites. However, their officers may be held accountable, such as in the case of Jay Cohen *infra*. In general, in criminal cases “courts have no trouble finding jurisdiction over a defendant who has caused harm within their borders.”¹¹⁷ The question becomes more complicated when the action in question is legal in one state but illegal in another. For example, when the internet gambling operation is situated in Nevada where gambling is legal and it is used by a person in Utah where gambling is expressly prohibited, does Utah have jurisdiction?

Nelson Rose, in his book Internet Gaming Law,¹¹⁸ notes that there is a “strong presumption against extraterritorial application of U.S. state statutes outside the state borders.”¹¹⁹ In general, state A cannot convict a person who, while physically located in state B, affected state A through his internet actions. The one instance in which state A could convict this man is if state A was employing a statute that specifically contained a statement of legislative intent that the statute apply extraterritorially.¹²⁰ For example, Nevada enacted a law which expressly makes it a crime in Nevada for a person located anywhere to accept a wager over the Internet from a person physically located in Nevada.¹²¹ Either way, this point is generally moot, given that the most applicable laws are federal, and thus, they apply in every state. Furthermore, as mentioned above, the activity in question is not legal in any state, but only in foreign jurisdictions such as Antigua; so this is likely a doubly moot point.

A) JURISDICTION OVER PURELY FOREIGN CORPORATIONS

As previously mentioned, the only cases in which the U.S. has actually exerted jurisdiction over an internet gaming company or its officers, namely Cohen and WIGC, have occurred because the companies either stipulated to jurisdiction or actually conducted part of their business on American soil. As established in the previous section, it is likely that the U.S. government can satisfy the requirements of personal jurisdiction, either in a civil or criminal capacity, over an internet defendant. The question remains, however, whether the fact that internet poker companies have no ties to the United States changes this analysis. Can the

Number of forum residents accessing or contributing to defendant’s newsgroup, Hyperlinking a Website to other Websites active within the forum, Participating in Internet chat with forum residents, Remotely operating computers within the forum, Effecting sales via the Internet to forum residents, Transmitting products or services (such as data or programming) over the Internet to forum residents, Accepting or processing payments via the Internet, and Populating the Website with forum-related content.”

¹¹⁷ I. NELSON ROSE AND MARTIN D. OWENS, *INTERNET GAMING LAW*, (2005), at 112.

¹¹⁸ *Id.* at 113.

¹¹⁹ *Id.* Rose notes that the Supreme Court agrees in *Neilsen v. the State of Oregon*, 212 U.S. 315 (1909); The Defendant “was within the limits of the state of Washington, doing an act which that State in terms authorized and gave him license to do. Can the State of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that State had specifically authorized him to do? We are of opinion that it cannot.”

¹²⁰ *Id.* at 114.

¹²¹ *Id.* at 115 quoting S.B. 318 (1997), codified at NEV. REV. STAT. §§ 465.091 to 465.094.

United States extend its jurisdictional reach into Costa Rica, where PokerStars is incorporated, or to England, where PartyPoker is incorporated?

In one of the first articles to address the burgeoning question of the legality of online gaming, *Blackjack or Bust*, the authors comment, “it is clear that Congress has the power to pass legislation that regulates extraterritorial conduct.”¹²² They remark that the United States has enforced its laws beyond its borders since 1818.¹²³ While this may be true, it remains to be seen exactly how the United States is going to extend its reach into Costa Rica or other foreign countries to punish influential corporate officers. Furthermore, the authors remark that either the express language of the law applied or the clear congressional intent behind the law must indicate that it is meant to be applied extraterritorially.¹²⁴ A strong presumption against the extraterritorial application of federal criminal statute has been part of American law for decades.¹²⁵ The applicable anti-gambling laws discussed above lack the clear indication of extraterritorial intent necessary for them to apply to foreign operators. Even if they did, as noted by the authors of *Blackjack or Bust*, foreign countries will generally not aid in the enforcement of laws that conflict with the protection that they afford their corporations.¹²⁶ For example, if gambling is legal in Antigua, Antigua will likely not aid the U.S. in enforcing an anti-gambling statute against an Antiguan internet gambling company and its officers.

Assuming that a U.S. court did in fact rule that one of the anti-gambling laws applied to internet gambling, the court had personal jurisdiction over the company based on minimum contacts, and also that Congress had intended the law to apply extraterritorially, the U.S. would still have to find a way to either get the foreign corporation into U.S. court or to enforce a default judgment against that company. Professor Rose notes that there are three main methods by which the operator of an online gaming company may be brought under U.S. jurisdiction from a foreign country.¹²⁷

First, the operator could voluntarily submit to jurisdiction. This is unlikely to happen in the case of internet poker companies. Second, by way of international treaty, the host nation can act on behalf of the United States, allowing service of process, discovery, and eventually extradition.¹²⁸

The United States “must ensure that process is served according to applicable treaties and the enforcing country’s internal laws.”¹²⁹ This means if the defendant company’s conduct does not violate the law of the countries where the corporation operates, such as is the case with most internet gambling companies, the foreign country is unlikely to extradite. The Hague Convention, the most widely referenced extraterritorial treaty, “an international equivalent to the United States’ Full Faith and Credit Clause, binds courts of member nations to recognize one

¹²². Seth Gorman & Antony Loo, *Black Jack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L. J. 667–9 (1996).

¹²³. *Id.*

¹²⁴. *Id.*: “The first step in determining whether United States laws apply extraterritorially is to look at the express language of the law and the congressional intent.”

¹²⁵. See Professor I. Nelson Rose, *Understanding the Law of Internet Gambling*, http://www.gamblingandthelaw.com/internet_gambling.html. “This strong presumption against extraterritorial application of federal criminal statutes has been part of American law for decades.”

¹²⁶. See Gorman & Loo, *supra* note 127.

¹²⁷. I. NELSON ROSE AND MARTIN D. OWENS, *INTERNET GAMING LAW*, (2005) at 185.

¹²⁸. See generally *id.* at 186.

¹²⁹. Yvonne A. Tamayo, *Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J. LAW. & TECH. 211.

another's judicial decisions."¹³⁰ Fifty countries are members of the Hague Convention.¹³¹ However, in general, internet poker companies are not located in these countries. Furthermore, many of the Hague signatories claimed extensive reservations to the treaty.¹³² Additionally, "much depends on the host country's willingness to cooperate."¹³³ The combination of these factors makes it unlikely that the U.S. can gain jurisdiction over an internet poker company located in Europe, and even more unlikely that they could gain jurisdiction over a company located in Central American or the Caribbean, where most internet poker corporations are located. Moreover, these treaties usually exist with respect to civil law; it would be near impossible for the United States to get a foreign country to agree to extradite the officers of a corporation who are operating a legal gambling business under the laws of the other country to the U.S. to face criminal charges.

The third method Professor Rose indicates may be used by the U.S. to bring a gambling site into court is to simply assert unilateral jurisdiction.¹³⁴ He notes that this is an "extraordinary and unusual process" only justified "when no lesser recourse is available."¹³⁵ In *Graduate Management Admission Council (GMAC) v. Raju*, the court found jurisdiction over a foreign website operator and citizen of India.¹³⁶ Using the *Zippo* analysis, the court found personal jurisdiction over the defendant noting that "to find otherwise would not only frustrate GMAC's attempts in this case to vindicate its rights under United States law, by requiring GMAC to turn to foreign courts to vindicate those rights against a likely elusive defendant, it would also provide a blueprint whereby other individuals bent on violating United States trademark and copyright laws could do so without risking suit in a United States court."¹³⁷ While in this case the court chose to exercise jurisdiction unilaterally, it is a rare event. The judge also entered a default judgment against Raju as he did not show up in the country for the hearing. Even in the unlikely event that the U.S. took similarly drastic action against an internet gambling site, it would be near impossible to enforce a default judgment given the location of the companies. Moreover, this sort of jurisdiction would not be utilized in a criminal case.

Foreign countries' animosity toward U.S. policy on internet gambling is further highlighted by the fact that the Caribbean nations of Antigua and Barbuda brought a case against the United States in front of the World Trade Organization claiming that U.S. laws prohibiting internet gambling violate international trade treaties signed between the countries.¹³⁸ The WTO court found that the United States violated the General Agreement of Trade in Services (GATS). The GATS requires that a country "extend the same treatment to the

^{130.} *Id.*

^{131.} *Id.* "Signatories to the Hague Convention are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belarus, Belgium, Botswana, Bulgaria, Canada, China, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Malawi, Mexico, Netherlands, Norway, Pakistan, Poland, Portugal, Russian Federation, San Marino, Seychelles, Slovak Republic, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, and Venezuela. MARTINDALE-HUBBELL, Selected International Conventions, in MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST 2003 IC-2."

^{132.} I. NELSON ROSE AND MARTIN D. OWENS, INTERNET GAMING LAW, (2005) at 187.

^{133.} *Id.*

^{134.} *Id.* at 189.

^{135.} *Id.*

^{136.} 241 F. Supp.2d 589 (E.D. Va., 2003).

^{137.} *Id.* at 600.

^{138.} World Trade Organization, Report of the Appellate Body: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services; WT/DS285/AB/R, April 7, 2005. [hereinafter WTOR]

services and suppliers of any other Member that it would give its own native suppliers.”¹³⁹ More important than the fact that the WTO court held that the U.S. anti-gambling laws as applied to the internet violated the GATS, is the fact that this case illustrates the fact that foreign nations are hostile toward U.S. policy on internet gambling and therefore are not to be expected to help with extradition or jurisdiction.

Simply put, the U.S. government will not be able to obtain jurisdiction over internet poker companies based offshore. One proposed alternative to prosecution of these companies is to hold the Internet Services Providers (“ISPs”) accountable.¹⁴⁰ Access providers have a physical presence in the U.S. and also advertise within the countries borders, thus satisfying the requirements for personal jurisdiction.¹⁴¹ Access providers may fold under the pressure of a threatened prosecution and simply block access to gambling websites in the U.S. This may well be why the recently proposed legislation has targeted ISPs and/or credit card companies rather than the corporations that run the internet gambling websites.

V) LEGISLATION

Before examining the Safe Port Act in detail, it is important to review the history of Congress’s previous attempts to ban online gambling and to track the evolution of both the legislation itself, and the thinking behind it.

A) 105TH CONGRESS

The regulation of non-sports betting has generally been left to the states,¹⁴² each of which has approached the issue in differing ways, from the permissive laws of Nevada¹⁴³ and New Jersey,¹⁴⁴ to the prohibitions in Utah¹⁴⁵ and Hawaii.¹⁴⁶ However, when the spectacle of internet gambling¹⁴⁷ began to make headlines in the news in late 1996 right before the start of the 105th Congress, Senator Jon Kyl, a Republican from Arizona, introduced one of the first Internet gambling prohibition bills in March 1997¹⁴⁸. The bill was simplistic in nature and its main thrust

¹³⁹ I. NELSON ROSE AND MARTIN D. OWENS, *INTERNET GAMING LAW*, (2005) at 192.

¹⁴⁰ Seth Gorman & Anthony Loo, *Black Jack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 *LOY. L.A. ENT. L. J.* 667–9 (1996).

¹⁴¹ *Id.*

¹⁴² CHARLES DOYLE, *INTERNET GAMBLING* 52 (Novinka Books, 2003): “The legality and regulation of gambling is first and foremost a matter of state law that varies considerably from state to state.”

¹⁴³ See *NEV. REV. STATS.* 171.015, 194.020, 195.020, 463.0129, 463.01365, 463.01463, 463.01473, 463.0152, 463.0153, 463.016425, 463.160, 463.360, 465.092, *NEV. REV. STATS.* 465.093, and 465.094.

¹⁴⁴ See *N.J. CRIM. LAW* 2A 40-1,2,5,6; 2C 37-2; and *N.J. CONST.*

¹⁴⁵ See *UTAH CODE* 76-2-202, and 76-10-1101 through 76-10-1108.

¹⁴⁶ See *HAW. STATS.* § 712–1220 through § 712–1231.

¹⁴⁷ Note: This section refers to legislation regarding internet gambling in general rather than internet poker specifically. Generally speaking, any of the bills discussed shall not only encompass internet “table” games such as blackjack and roulette, but also internet poker. Within federal law, there is never any great distinction between the two. However, among state law, factors such as “skill” may differentiate the games. Please see the introduction to the section “Existing Law” for a more complete discussion of this topic.

¹⁴⁸ S. 474: “Internet Gambling Prohibition Act of 1997”

was to prohibit the acceptance of internet wagers.¹⁴⁹ As most internet sites operated offshore, this bill would have had very little impact. Therefore, later redrafts of the bill subjected U.S.-based Internet Service Providers (ISPs)¹⁵⁰ that allowed access to internet gambling websites to “notice and takedown procedures,” and also forbade these ISPs from allowing their customers to access websites which U.S. law enforcement determined to contain internet gambling material.¹⁵¹ Senator Kyl added one of these later redrafts to an appropriations bill, but it was subsequently removed during a House-Senate conference on the bill.

B) 106TH CONGRESS

In 1999, during the 106th Congress, and shortly after the release of the report by the National Gambling Impact Study Commission (“NGISC”), which recommended a ban on internet gambling,¹⁵² Senator Kyl again introduced a bill that focused on ISPs.¹⁵³ However, this time there was initial opposition to the bill from various land based gaming interests that wanted exemptions from the bill’s application. The horse racing industry had what they thought was an exemption from the Wire Act¹⁵⁴ which had allowed states to compact to allow interstate wagers on horse races from off-track betting facilities, and pursuant to that began to accept internet wagers as well.¹⁵⁵ To accommodate them, Senator Kyl put an exemption in his new bill for horse racing. The bill also contained a similar exemption for pari-mutual gaming (jai alai, dog-racing, etc.). The bill was held up for an extended period of time because Native American tribes wanted their own exemption; in the end, the bill granted a small exemption to the tribes that allowed them to run internet pool wagering and progressive slots. On the last day of the 1999 Congressional session, the Senate passed S.692 by a voice vote.

In 2000, Representative Bob Goodlatte, a Republican from Virginia, introduced the companion bill in the House of Representatives.¹⁵⁶ H.R.3125 received even more scrutiny from land based gambling interests, as state run lotteries lobbied for exemptions as well. However, convenience stores (which wanted to prevent states from selling tickets directly to consumers through the internet) ardently opposed any exemption for state lotteries. Additionally, the Native American gaming interests sought more far-reaching exemption language than they received in the Senate bill. Given the large number of carve-outs the various gaming interests created, the bill seemed to authorize more gambling than it prohibited and thus was defeated in the House.

¹⁴⁹. Technically, it also prohibits the making of interstate internet wagers as well, *see Doyle, supra* 142 at 44.

¹⁵⁰. “An Internet service provider (ISP, also called Internet access provider) is a business or organization that offers users access to the Internet and related services.” Many but not all ISPs are telephone companies. “They provide services such as Internet transit, domain name registration and hosting, dial-up or DSL access, leased line access and colocation.” *See* http://en.wikipedia.org/wiki/Internet_service_provider

¹⁵¹. *See* S.AMDT. 3266 to S.2260. For text that closely mirrors the text of Senator Kyl’s original bill, *see* H.R. 2380 introduced by Representative Goodlatte.

¹⁵². *See Doyle, supra* note 142 at 52.

¹⁵³. S. 692.

¹⁵⁴. The Wire Act prohibits receiving certain bets on sporting events through telephones/internet across state lines where it is illegal at the point of origin. *See* “Existing Law” Section page 28 *infra*.

¹⁵⁵. Senate Hearing II, at 4 (prepared statement of Senator McConnell); House Hearing (testimony of Douglas Donn, Gulfstream Park Racing Association). *See also* http://www.house.gov/list/press/va06_goodlatte/061106.html

¹⁵⁶. H.R. 3125.

At the end of the year, Representative Jim Leach, a Republican from Iowa, decided to try a different approach. Leach, the Chairman of the House Banking Committee, proposed a bill¹⁵⁷ which would essentially prohibit credit card companies from processing payment for any illegal internet wager; however it did not define what an “illegal wager” was.¹⁵⁸ The U.S. banking and financial services industries opposed the bill, and the 106th Congress adjourned before any further action could be taken on it.

C) 107TH CONGRESS

During 2001, the beginning of the 107th Congress, neither the House nor the Senate gave the internet gambling issue much attention. Then, after the terrorist attacks of September 11, 2001, the landscape changed dramatically. Members of the House Financial Services Committee¹⁵⁹ became wary that terrorists might use internet gambling accounts as a money laundering device.¹⁶⁰ In response to the attacks, Congress passed the Patriot Act,¹⁶¹ which dealt with many domestic security needs including the terrorist money laundering issue. The process of creating the Patriot Act was an iterative one and Representative Oxley, a Republican from Ohio, attached the Leach legislation to several iterations of the Patriot Act. However, the House removed the Leach credit card based internet gambling prohibition from the final version of the Patriot Act after vehement lobbying by banking, Native American, and Internet gaming interests.¹⁶²

Shortly after the passage of the Patriot Act absent an internet gambling prohibition, the House Financial Services Committee reported a free-standing version of the Leach bill¹⁶³, and sought immediate consideration by the full House.¹⁶⁴ However, this time, the American Gaming Association (“AGA”) lobbied for a carve-out to exclude the bill’s application to the payment processing of “any lawful transaction with a state-licensed entity.”¹⁶⁵ This exemption was granted, and immediately it drew scrutiny from the National Native American Gaming Association (NIGA) which wanted its own carve-out.

Because the Leach legislation provided for civil and criminal penalties, it was referred to the House Judiciary Committee. The Judiciary Committee struck all carve-outs in the bill and reported it to the House floor¹⁶⁶. However, in late 2002, after the banking industry¹⁶⁷ removed

¹⁵⁷ H.R. 4419: “To prevent the use of certain bank instruments for Internet gambling, and for other purposes.”

¹⁵⁸ The bill did define what a wager is, just not what an “illegal” wager is. However, it is unclear based on the text of this bill whether a “wager” is made by transferring money to an internet poker site. On an internet poker site, you are simply transferring money from the credit card/bank account to a virtual account on the poker site. Is this a wager? In this instance, money is never directly bet on any event directly from the credit card.

¹⁵⁹ At the start of the 107th Congress the House Banking Committee was renamed the House Financial Services Committee.

¹⁶⁰ See House Committee on Financial Services Report (<http://financialservices.house.gov/News.asp?FormMode=release&ID=879>) (last visited January 9, 2006) and USA Patriot Act: A review for the Purpose of Reauthorization: House Judiciary Committee, 109th Congress 128–9, April 6, 2005. [hereinafter Patriot].

¹⁶¹ H.R. 3162.

¹⁶² See Patriot *supra* note 160 at 137.

¹⁶³ H.R. 556 (Reps. Leach and LaFace), 148 Cong. Rec. H6848

¹⁶⁴ See H.R. 556.

¹⁶⁵ See *id.*

¹⁶⁶ H.R. 3125.

its strong objections to the bill, the House Republican leadership put forth the original version of the bill, complete with carve-outs, which passed by a voice vote shortly before the Congressional session ended, such that it was too late for the Senate to act on the bill.

D) 108TH CONGRESS

Given the modicum of success the Leach bill had in 2002, at the start of the 108th Congress, Representative Leach introduced H.R.21¹⁶⁸, which was identical to the bill that passed the House in the previous session. The bill was quickly reported by the House Financial Services Committee, but when it was received by the Judiciary Committee, Representative Chris Cannon, a Republican from Utah, offered an amendment, backed by Native American and e-gaming interests to remove the state carve-outs, which the Committee narrowly adopted.¹⁶⁹

In response, Representative Spencer Bachus, a Republican from Alabama, introduced H.R.2143¹⁷⁰ which was identical to H.R.21 except for the fact that it omitted the clauses which gave the Judiciary Committee jurisdiction. Eventually, in June 2003, H.R.2143 was passed by the full House of Representatives.¹⁷¹

Shortly after the House passage, Senate Banking Committee Chairman Richard Shelby, a Republican from Alabama, held a hearing on the internet gambling issue. For the next month, the Committee held meetings with the various stakeholders in an attempt to reach a consensus on language for the bill, which would be agreeable to all parties, especially the AGA and NIGA.¹⁷² It became clear that the AGA and NIGA's interests were directly opposed, so Senator Shelby reported a bill with no-carve outs (S.627).¹⁷³ Once the bill reported, the Nevada Senators, being aligned with the AGA, placed "holds" on the bill, thereby expressing their opposition.

In mid-2004, after a WTO ruling that the U.S.'s anti-internet gaming stance violated international law,¹⁷⁴ the United States Chamber of Commerce (USCC), the largest business lobby in the U.S., sent a letter to the Senate voicing its opposition to the internet gambling prohibition bill. Due to the stringent opposition of the AGA, NIGA, and USCC, the Senate never took a vote on the bill.¹⁷⁵

¹⁶⁷. House Report 107-339-Part 1-Unlawful Internet Gambling Funding Prohibition Act, 107th Congress, Judiciary Committee, 1st Session.

¹⁶⁸. H.R. 21.

¹⁶⁹. *See generally, id.* ; House Report 108-051-Part 2-Unlawful Internet Gambling Funding Prohibition Act, 108th Congress, Judiciary Committee, 2nd Session.

¹⁷⁰. H.R. 2143.

¹⁷¹ *Id.*

¹⁷². *See generally* Senate Report 108-173-Internet Gambling Funding Prohibition Act.

¹⁷³. S. 627

¹⁷⁴. Please see the following section "Existing Law" for a more complete description of the WTO's ruling.

¹⁷⁵. Many, many thanks to Mr. Dan Walsh of Greenberg, Traurig LLP for providing me with the background for this legislation section, as well as much of the language for this section, which I used, with permission.

E) 109TH CONGRESS

Many commentators initially believed that the chance for a ban of internet gambling died after the Senate failed to pass S.627.¹⁷⁶ However, due to the recent Jack Abramoff scandal, the campaign against internet gambling not only has new life but seems to be thriving. Jack Abramoff, a formerly powerful Washington lobbyist, pled guilty to fraud and conspiracy counts in early 2006 in connection with, among other things, a \$50,000 bribe he gave to “the wife of an unnamed congressional staffer in return for the staffer’s help in killing an Internet gambling measure.”¹⁷⁷

Mr. Abramoff worked at the firms of Preston Gates & Ellis LLP and subsequently Greenberg, Traurig, LLP. His primary client was eLottery, Inc. that generated its profits by helping states and other organizations put their lotteries online. After Senator Kyl’s Bill, S.692 passed the Senate in late 1999, eLottery was in a panic. eLottery hired Mr. Abramoff to defeat the companion bill introduced by Representative Goodlatte, H.R.3125.¹⁷⁸

The Goodlatte bill appeared to be “on its way to passage by an overwhelming margin in the House of Representatives.”¹⁷⁹ However, Tony Rudy, a senior aide to then-Majority Whip Tom DeLay, a Republican from Texas, helped dash the bill in the House. According to the Washington Post, Mr. Rudy e-mailed Abramoff internal congressional communications. In return, Mr. Abramoff gave him expensive trips and other luxury items. Abramoff successfully used Rudy to convince anti-gambling conservative representatives that the carve-outs defeated the central purpose of the bill. Additionally, “Abramoff quietly arranged for eLottery to pay conservative, anti-gambling activists to help in the firm’s \$2 million pro-gambling campaign, including Ralph Reed, former head of the Christian Coalition, and the Rev. Louis P. Sheldon of the Traditional Values Coalition.”¹⁸⁰ He even went so far as to circulate a fake letter by Florida Governor Jeb Bush that purportedly said that Governor Bush opposed the bill because it infringed on states’ rights.¹⁸¹

Even though Representative Goodlatte “had more than enough votes” for his bill to pass, he was worried that all the commotion surrounding the bill would cause unwanted amendments to be proposed. Therefore, in order to avoid a floor fight on the bill, he placed it on the suspension calendar, which banned amendments, but at the same time required a two-thirds vote for the bill to pass. Abramoff exploited this opportunity and managed to scurry up enough votes to defeat the bill.¹⁸²

In the recent wake of the discovery of Abramoff’s illegal activities, Representative Goodlatte and others appear to feel cheated out of a legislative victory. Those Republicans who previously voted against the bill likely feel duped and are possibly more inclined to vote for a

^{176.} See, e.g., Allyn Jaffrey Shulman, 2003 Legal Overview 1995-Present, CARDPLAYER MAGAZINE ONLINE, October 1, 2003, http://www.cardplayer.com/poker_magazine/archives/?a_id=13571.

^{177.} Susan Schmidt and James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts: Lobbyist to Testify About Lawmakers in Corruption Probe*, WASHINGTON POST, January 4, 2006 at A01.

(<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/03/AR2006010300474.html>)

^{178.} Susan Schmidt and James V. Grimaldi, *How a Lobbyist Stacked the Deck: Abramoff Used DeLay Aide, Attacks on Allies to Defeat Anti-Gambling Bill*, WASHINGTON POST, October 16, 2005 at Page A01.

(<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/15/AR2005101501539.html>).

^{179.} *Id.*

^{180.} *Id.*

^{181.} *Id.*

^{182.} *Id.*

new version of it. Furthermore, given that illegal means were used to defeat the original bill, those who proposed it feel even more morally justified in their anti-internet gambling stance. Therefore, the political climate was ripe for the passage of an internet gambling prohibition.

Two bills were introduced in the House at the start of the next Congressional session. Representative Goodlatte introduced H.R.4777 in February 2006.¹⁸³ Representative Leach introduced H.R.4411 during the first 109th Congressional session.¹⁸⁴ Goodlatte's bill is a throwback to the Kyl legislation and focuses on ISPs. It is generally cleaner legislation and includes a prohibition on hyperlinking.¹⁸⁵ It also allocates \$10 million per year for the investigation of internet gambling by the DOJ. Leach's bill is similar to his previous legislation in that it targets the payment processing mechanism for illegal internet wagers. This version contains carve-outs for horse racing and fantasy sports. The Leach Bill, H.R. 4411 passed the House of Representatives by a vote of 317-93 in July, 2006.¹⁸⁶ Given the legislative climate, many commentators believed that H.R. 4411 would have been passed by the Senate and the U.S. would finally have taken direct action against internet gambling.¹⁸⁷ However, 4411 was sent back to committees and not put up for a vote in the final week that the 109th Congress was in session. For all intents and purposes, this bill was dead.

Then, out of the blue, three days before Congress's session was set to close, Republican leadership in Congress debated adding "last-minute provisions to a major maritime security bill, including the court security and online gambling legislation that Republican leaders sought unsuccessfully" to add the 2007 fiscal year defense authorization bill.¹⁸⁸ Republican leadership did in fact add an "unlawful internet gambling enforcement" provision to the Safe Port Act.¹⁸⁹ They did so without sending the bill back to committee, thus "preventing Democrats adding amendments to the final conference agreement on the bill," prompting outrage among Democrats.¹⁹⁰ Congress passed the Safe Port Security Act, and President Bush signed into law on October 13, 2006.¹⁹¹

The Port Security Bill was the last bill to pass the 109th Congress. While this bill passed by a vote of 98-0, several Democrats were enraged. Some Democrats claim that the Senators were not even allowed to see the final language of the bill before it was put to a vote.¹⁹² They

¹⁸³ H.R. 4777.

¹⁸⁴ H.R. 4411.

¹⁸⁵ Hyperlinking means having a link on a website which a user can click on to get to another website, in this case one that contains gambling. This is especially important in the internet poker industry because, as mentioned above, poker sites run both real money sites and play money sites. The play money sites often have different internet addresses and the play money webpages contain hyperlinking to the real money pages. For more on this see the "Advertising" section.

¹⁸⁶ *House Approves Goodlatte Legislation to Combat Illegal Gambling*, http://www.house.gov/list/press/va06_goodlatte/061106.html

¹⁸⁷ *Id.*

¹⁸⁸ *Internet Gambling Bill may be added to Port Security Bill*, EYE ON GAMBLING, (<http://www.eog.com/news/industry.aspx?id=9184>) (hereinafter EYE)

¹⁸⁹ H.R. 4954

¹⁹⁰ EYE, *supra* note 188.

¹⁹¹ H.R. 4954 and *Congress Approves Internet Gambling Bill* (http://today.reuters.com/news/articlenews.aspx?type=internetNews&storyID=2006-09-30T045429Z_01_N29415181_RTRUKOC_o_US-CONGRESS-TECH-GAMBLING.xml&WTmodLoc=InternetNewsHome_C1_%5BFeed%5D-2)

¹⁹² See I. Nelson Rose, *The New Law Broken Down* (<http://www.pocketfives.com/68CBB9B1-C383-45BF-8308-13BBFE1C37BC.aspx>) (hereinafter *New Law*)

accused the Republicans of clandestinely attaching the internet gambling bill to a national security bill that absolutely had to pass.¹⁹³

VI) THE SAFE PORT ACT OF 2006

The “unlawful internet gambling enforcement” provision of the Safe Port Act is the weakest form of anti-internet gambling legislation proposed to date. In summary, this entire bill does make it illegal to own or operate an internet gambling site; something that the US government has claimed has been illegal since its inception. More specifically, §5363 of this act states that “No person engaged in the business of betting or wagering may knowingly accept” any form of payment, credit cards, money orders, checks, for the purpose of pursuing illegal gambling. Section 5364 of the act gives the Fed 270 days to establish a system of regulations to identify illegal gambling websites and promulgate rules to prevent them from receiving funds. “The regulations will require everyone connected with a ‘designated payment system’ to identify and block all restricted transactions.”¹⁹⁴

While the bill makes operating an internet poker site illegal, unlike previous iterations of anti-online gambling legislation, it does not contain a specific enforcement mechanism such as making it illegal for credit card companies to transfer funds to restricted sites¹⁹⁵ or making it illegal for ISPs to allow the American populace access to these sites. Rather, it instructs the Federal Reserve (the ‘Fed’) to make rules needed to enforce the law. Presumably, the Fed will populate a list of restricted gambling websites and pass regulations forbidding US credit card companies and banks from processing payments to these sites.

The most important question to ask regarding this new law is how does the jurisdictional analysis discussed above apply. The answer is the same. Our government does not have the authority to enforce this law outside the boundaries of the United States. This law allows the government to prevent credit card companies and other financial institutions from sending money from customers’ accounts to PartyPoker, PokerStars, and other online gaming companies. However, the question remains, is this enough to shut down internet poker in the United States?

The short answer is no. Two large loopholes remain which allow Americans continued access to online gaming. First, one could set up a bank account offshore, such as in Canada, and then transfer funds from this account to the poker website of his choice. Second, and perhaps more importantly, this law is not crafted narrowly enough to stop “business as usual” in the online poker world. This bill only gives the government the power to make rules preventing U.S. financial institutions from transferring money to persons or business engaged in the business of betting or wagering online, i.e. internet gambling sites. It does not give the U.S. government the power to prevent the money from being sent from U.S. citizens to non-gambling related institutions. As explained above, one of the most common ways a player gets money from his account to a poker site is to first transfer it to a middleman such as Neteller and then transfer it

¹⁹³ All the Democrats’ objections can best be captured by listening to Rep. Shelly Bakus speech on the house floor at <http://www.youtube.com/watch?v=nb1pzayqPaI>

¹⁹⁴ See *New Law*, *supra* note 192.

¹⁹⁵ See Earl Burton, *Noted Legal Expert I. Nelson Rose's Views On Recent Legislation: "Payment processors are not covered, unless prosecutors want to use theories of aiding and abetting. Treasury will make new regulations to require money transferors to identify and block funds from gambling sites. Banks will thus not be required to read paper checks."* (<http://www.pokernews.com/news/2006/10/nelson-rose-views-legislation.htm>)

from Neteller to the overseas site. Neteller is a legitimate financial company and does not engage in the business of gambling. Therefore, the Safe Port Act does not and cannot prohibit a credit card company or bank from allowing a U.S. citizen to transfer his funds to Neteller. Moreover, since Neteller is not a U.S. company, this act then does not prohibit Neteller from transferring these funds to an online gambling site. Furthermore, since this law does not apply to players, players are not prohibited from sending money to Neteller or to the internet sites themselves.¹⁹⁶ Thus, legally, given the manner in which this law is written and its jurisdictional reach, the Safe Port Act should have little impact on internet gambling.

However, what is true legally is not always what happens in reality. Several internet poker vendors, particularly those that are publicly traded, have decided to close their doors to American consumers. PartyGaming, in an effort to “comply with the spirit of American law,” was one of the first companies to announce that it no longer would process wagers from American citizens.¹⁹⁷ Upon announcing this decision, Party Gaming’s value dropped from \$12 billion to \$7 billion, and its stock plummeted an amazing 58 percent.¹⁹⁸ The future of Party Gaming is in jeopardy as well, largely due to the fact that prior to its decision to pull out of the U.S. market, 80 percent of its revenue was generated from the United States.¹⁹⁹ Other sites have followed Party Poker’s lead and bowed out of the U.S. market including Paradise Poker, Pacific Poker, and the financial intermediary Firepay.²⁰⁰ Other industry giants, however, such as FullTilt Poker and PokerStars have chosen to continue business as usual.²⁰¹ Given that these companies are located offshore and can legally receive funds from U.S. players transferred through Neteller and similar intermediaries, it is not likely that the internet poker landscape will change extensively in the near future. Thus, the Safe Port Act, aside from scaring some players out of the market, has had, and will likely have, little effect on internet gambling.

Now that this paper has established the current status of the legality of online poker, namely that it isn’t legal for operators but that there is little or nothing the government can do about it do to jurisdictional issues, it will analyze the reasons behind the US government’s opposition to online gambling, consider the pros and cons of legalizing and regulating online poker, and finally make recommendations as to how the government should proceed with respect to the online poker industry in the future.

VII) THE PUBLIC POLICY REASONS BEHIND THE U.S. GOVERNMENT’S DISLIKE OF ONLINE GAMING

On Wednesday, December 15, 2005 a man walked into a Wachovia bank branch in Lehigh, Pennsylvania and handed the bank teller a note claiming he was carrying a gun and demanding all the money in the teller’s drawer. A few minutes later he walked out with almost \$3000 of the bank’s money and a few days later the police arrested and charged him with bank

¹⁹⁶ See, e.g., Allyn Shulman, What’s NOT included in Anti-Gambling Legislation: A Legal Perspective (http://www.cardplayer.com/poker_news/article/1446) (last visited February 18, 2006)

¹⁹⁷ See Jonathan Laing, *Last Woman Standing*, BARRON’S ONLINE (http://online.barrons.com/public/article/SB116018480631785723-E7nqJqKei44PIzfxJ_qCG7gnerk_20061106.html?mod=mktw) (hereinafter *Woman*) and *Online Poker Industry responds to Law Change* (http://www.cardplayer.com/poker_news/article/3261).

¹⁹⁸ See *Woman*, *supra* note 202.

¹⁹⁹ *Id.*

²⁰⁰ See <http://www.neverwinpoker.com/phpnuke/html/ftopic-27922.html>

²⁰¹ *Id.*

robbery. The identity of this master criminal shocked the community. Police identified Greg Hogan, 19 year-old son of a Baptist minister and president of the 2008 undergraduate class of Lehigh University, as the perpetrator. Mr. Hogan claimed his gambling addiction drove him to rob the bank²⁰² after he lost over \$5,000 in the previous few months playing online poker.²⁰³

This is just one example that internet poker opponents use as an illustration of the negative effects that the game, and internet gambling in general, have on our society. For the last several hundred years, “Americans have vacillated between their desires to permit and control gambling, creating an erratic record of legalized gaming initiatives and a distasteful legacy of illegal gaming and corruption.”²⁰⁴ For example, gambling is fully legal in Nevada, unlawful in Tennessee, and legal only if licensed and on water in Illinois.²⁰⁵ Sometimes our government’s and our society’s opinion on the ill effects of gambling seems to have no rhyme or reason. While society’s opinion of the pros and cons of internet poker are substantially similar to its opinion of gambling in the real world, online gaming does raise a few new objections.²⁰⁶

Some of the most common critiques of online gaming, which are not used against land based gaming, include: 1) increased operating hours—internet gaming can occur 24 hours a day, 7 days a week; 2) frequency and speed of gaming—many more hands per hour in the case of poker and bets per hour in the case of table games and slots occur online as compared to in brick and mortar casinos;²⁰⁷ 3) variety of games—by allowing free trials of games, the internet facilitates learning new games and thus more gambling; 4) amount of money players—in general, the bet size can be less on the internet, thus attracting people with lower income;²⁰⁸ and 5) greater social accessibility—because no social interaction is necessary on the internet, socially awkward people are more likely to begin gambling.²⁰⁹ Aside from these concerns, online gambling critics cite deeper problems.

One of the most prevalent complaints anti-gambling authorities have is that the availability of gambling leads to addiction in many people which in turn leads to negative externalities on society.²¹⁰ In fact, the only reason cited in the Safe Port Act for banning online

^{202.} *Gambling Blamed in Bank Rob Case*, CBS NEWS ONLINE. Hogan’s lawyer says “His gambling addiction led him to make a terrible, terrible mistake.” (<http://www.cbsnews.com/stories/2005/12/14/national/main1127469.shtml>)

^{203.} *See generally, Gambling Blamed in Bank Rob Case*, CBS NEWS ONLINE, <http://www.cbsnews.com/stories/2005/12/14/national/main1127469.shtml>; Alan Roarty, *Class of 2008 President Arrested in Bank Robbery*, THE BROWN AND WHITE, LEHIGH UNIVERSITY STUDENT NEWSPAPER, Dec. 15, 2005 <http://bw.lehigh.edu/story.asp?ID=19305>; and <http://www.neverwinpoker.com/phpnuke/html/modules.php?name=Forums&file=viewtopic&t=11181>.

^{204.} *See* DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET* (Univ. Nevada Press, 2005) at 12.

^{205.} *Id.* at 12.

^{206.} *See* Mark G. Tratos, *Gaming on the Internet III: The Politics of Internet Gaming and the Genesis of Legal Bans or Licensing*, 610 PLI/PAT 711, June 2000 at 752-3: “At the heart of the opposition to Internet gaming is the general opposition to gambling per se. Until the second half of the 20th Century, gambling in America was considered immoral by much of the population. Whether this moral stigma was the result of religious condemnation or *753 prevailing social attitudes is unclear.”

²⁰⁷ In online poker players can “multi-table”- which means they can play at several, occasional upwards of 6, tables at the same time.

²⁰⁸ At a casino, the smallest stakes one normally can find is \$1-\$2. Online, poker sites often offer games as small at \$.05 -\$1.

^{209.} *Id.*

^{210.} *See* National Gambling Impact Study Commission, Final Report, at 1-1 and 5-4,5 <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html> [hereinafter NGIS].

gaming is that it leads to “debt collection problems” for U.S. financial institutions.²¹¹ The sad story of Greg Hogan is an example of another type of externality. Internet gambling opponents say that along with the increased access to gambling which the internet now provides will come a dramatic increase in the number of problem gamblers our society must support and deal with. Problem gambling results in negative spillovers onto the rest of society. An increase in crime is a notable example.²¹² Lost work and school hours, which result in lower societal efficiency, are another. An increase in personal debt and therefore the need for state public assistance is a third.²¹³

Another common complaint that anti-gambling advocates lodge against casinos is that they allow access to minors too easily.²¹⁴ This complaint translates to online gambling as well. In a casino, a minor may enter with fake identification. Online, it is even easier for underage gamblers to play. First, the “legal” or rather, “allowed,” gambling age by most internet card rooms is 18, while it is 21 in most brick-and-mortar casinos.²¹⁵ Second, online casinos do very little to verify the age of the players on their websites. Most casinos simply ask the player to input his or her birthday when signing up for an account. Then all a player needs to do is transfer money onto the site using a credit card or wire transfer. Underage gamblers who lie about their age and have access to their own funds, or their parent’s credit cards, can easily play online poker without anyone being the wiser.²¹⁶ State governments make a similar complaint, namely that online gambling restricts the State’s ability to set social policy. When online casinos offer a certain type of game or permit people of a certain age to gamble, they thereby cut off the State’s ability to set that policy.

Aside from the social evils associated with all gambling, critics of online gambling believe that internet gaming has even more negative elements than traditional gambling. First, the government cites the argument that because online gaming is done offshore, it cannot ensure that these sites are run fairly. The government cannot intercede to audit these gaming sites, there is no government protection against these sites using their software to cheat players, and there is no gaming board to resolve customer disputes.²¹⁷ For example, the designer of a blackjack software program could have his card generator give the dealer blackjack every time a player doubles down²¹⁸, thus reaping a huge profit for the casino. If a player has a dispute against any of these offshore internet casinos, the best he can do is bring suit in the nation the site is incorporated in. If this is in England, he may have a fair shot, but if it is in a country with

²¹¹ Safe Port Act H.R. 4954

²¹² *NGIS*, *supra* note 215 at 5-5.

²¹³ See I. Nelson Rose, *The Law of Internet Gambling*, GAMBLING AND THE LAW, <http://www.gamblingandthelaw.com/internet.html>.

²¹⁴ See *NGIS*, *supra* note 210, at 5-4.

²¹⁵ See generally <http://www.gambling-law-us.com/State-Laws/> for state laws, and www.pokerstars.com, or other sites for online ages (The way [pokerstars.com](http://www.pokerstars.com) and [party poker.com](http://www.party poker.com) work in terms of age restrictions is that once you download their software you are required to register for an account- name, location, etc. They also ask for your birth date. All you need do is enter a birth date that shows that you are at least 18 years of age. This age limit corresponds with the age limit in the country where the site is located- England, Costa Rica, etc).

²¹⁶ See *Underage Internet Gambling Study: Children as Young as 11 Can Set Up Gambling Accounts at the Click of a Button*, July 27, 2004, <http://www.gamcare.org.uk/shownews.php/000095.html>.

²¹⁷ See, generally, *NGIS*, *supra* note 210.

²¹⁸ “Double down: Double the wager, take exactly one more card, and then stand.” See <http://en.wikipedia.org/wiki/Blackjack>.

an antiquated legal system, hope is all but lost.²¹⁹ Even if the player did manage to get the corporation into court, given that there is no oversight of the online casino to begin with, it would be very hard to gather enough proof against the company to win the case.

There have been two recent examples of how a lack of governmental or other oversight has caused poker players to lose substantial sums of money. PokerSpot.com, one of the first online cardrooms, designed by poker pro Dutch Boyd, went defunct shortly after it opened.²²⁰ There are two stories circulating surrounding the demise of this corporation. The story put forth by Mr. Boyd is that the credit card processing service it used to process customer deposits, Net Pro,²²¹ either didn't process the transactions quickly enough for the company to have adequate funds or it kept some of the money for itself when it should not have.²²² The other story is that because PokerSpot did not have adequate working capital, the company used the players' deposits, meant for their personal poker gambling, to run the day to day operations of the business.²²³ Either way, it is agreed that at some point in time shortly after the launch of the PokerSpot.com, it went defunct and did not have enough cash to refund to the players all of their deposits.²²⁴ Given the lack of regulation in the industry, and the fact that the U.S. government had no jurisdiction or standing to intervene, the players were left high and dry.²²⁵

The second example involves a twenty-one year old professional internet poker player named Justin Bonomo who goes by the internet poker screen name "zeejustin".²²⁶ PokerStars and PartyPoker accused Justin, along with several other high profile internet poker players, of "multi-tabling" big buy-in tournament events. "Multi-tabling," in this instance, means that Justin entered an online poker tournament using two (or more) different poker screen names.²²⁷ That is the real world equivalent of entering the same poker tournament as two different people, which, of course, is physically impossible. "Multi-tabling" is cheating according to online poker room rules. PokerStars searched its records and itemized the money Justin won as a result of multi-tabling (\$3,445.75) and redistributed it to other players in the tournament. PartyPoker, on the other hand, froze Justin's entire account and kept over \$100,000, which they could not prove was earned as a result of multi-tabling, for themselves (no redistribution).²²⁸ Again, Justin has little or no recourse because the site is not governed by U.S. policy.

^{219.} See I. Nelson Rose, *The Law of Internet Gambling*, GAMBLING AND THE LAW, <http://www.gamblingandthelaw.com/internet.html>. Professor Rose notes "Government oversight of these gaming operations are also often spotty or non-existent. Players have little guarantee that the games are run honestly, they will be paid if they win, or even that they can get their front money returned."

^{220.} www.pokerspot.com.

^{221.} The equivalent of Neteller or Firepay.

^{222.} See <http://www.dutchboyd.com/blog/2004/12/pokerspot.html> and <http://www.rakefree.com/faq10.htm#faq> [hereinafter Boyd].

^{223.} See <http://extempore.livejournal.com/76520.html> and <http://archiveserver.twoplustwo.com/showthreaded.php?Cat=0&Board=&Number=567339&page=2&view=&sb=5&o=0&fpart> (last visited April 19, 2006)

^{224.} See Boyd, *supra* note 222.

^{225.} Antigua, where pokerspot.com was allegedly incorporated, disclaims licensing the organization. See http://www.antiguagaming.gov.ag/press/Press_Release_pkspot.asp.

^{226.} www.zeejustin.com

^{227.} See footnote 212 for other definition.

^{228.} See http://www.zeejustin.com/journal.php?journal_id=81; <http://www.neverwinpoker.com/phpnuke/html/modules.php?name=Forums&file=viewtopic&t=17789>; and <http://www.neverwinpoker.com/phpnuke/html/modules.php?name=News&file=article&sid=438&mode>

Another reason that States dislike online gaming is that online gambling takes away from their annual revenues. States that allow land based gambling usually collect a fairly high tax on wagers placed at these casinos through either a privately negotiated contract with the casino or through a statute that mandates a wager tax.²²⁹ States also collect revenue from gambling programs they run themselves such as a statewide lottery drawing or scratch off lottery tickets. Before online gambling, the state run lotteries might have been the only game in town.

Another reason the government dislikes online gambling more than land based gambling is because of tax reporting requirements, or in this case, the lack of tax reporting requirements. For a land based casino, IRS regulations require that for poker tournament cashes, the casino file a report with the IRS and withhold taxes from a player if he wins greater than \$600 or more than 300 times his initial wager.²³⁰ There are other reporting requirements as well.²³¹ Online casinos are not subject to any such reporting requirements. They are not required to provide the U.S. government with information about the monies U.S. citizens win or lose on their poker sites. Thus, assuming players do not completely follow the honor system, the government loses the tax revenue that players earn online and fail to report.

Last, States claim that online poker interferes with their autonomy.²³² As it stands now, each state is allowed to determine whether to allow gambling within its borders, and if so, what types of gambling to allow. As stated above, states such as Utah and Tennessee completely outlaw gambling, while it is nearly 100 percent permissible in Nevada. States such as Connecticut allow it, but only on tribal land. Each state is different. Internet gambling threatens this. By breaking down the boundaries between space and elevating each player into the realm of cyberspace, a player from New York can “sit” with a player from Guam and a player from Utah at the same virtual poker table. Internet gambling has essentially “nationalized” the gambling industry, removing almost all individual state nuances. For all intents and purposes, unless States are going to crackdown and begin arresting their own citizens for placing bets on the internet, States no longer have any say about what is legal in terms of gambling within their borders. If internet gambling is going to be stopped, the government needs to target either ISPs or credit card companies. Further, targeting these middlemen almost has to be done on a national level. Congress will have to wield the mighty axe of the Commerce Clause to pass legislation prohibiting, or regulating internet gambling. Thus, internet gambling will have to have a standardized national policy, stripping the states of their autonomy in deciding which facets to allow and which to proscribe.²³³

=&order=0&thold=0 for description of how JJProdigy, another online poker pro, whom online poker sites also caught multi-tabling.

²²⁹. See, generally, David H. Lantzer, *Internet Gaming Tax Regulation: Can Old Laws Learn New Tricks?*, CHAPMAN LAW REVIEW, Spring 2002. For example of statute, see Federal Wager Tax; I.R.C. § 4401. The Federal Excise Wagering Tax allows the federal government to collect a tax equal to 0.25 percent of the amount of any state authorized wager.

²³⁰. See, e.g., Russ Fox, *Tax Aspects of Online Gambling*, (<http://www.gambling-law-us.com/Articles-Notes/online-gambling-tax.htm>),.

²³¹. *Id.*

²³². See, e.g., Earl Burton, *Washington State Passes Online Poker and Gaming Legislation*, POKER NEWS, May 2, 2006, <http://www.pokernews.com/news/2006/5/washington-state-online-poker-legislation.htm>: discussing how states are taking measures against online gaming because it interferes with already existing prohibitions on gambling.

²³³. See NGIS, *supra* note 210, at 5-9: “several states have concluded that only the federal government has the potential to regulate or prohibit Internet gambling.”

While internet poker has its detractors, it also has a huge number of proponents. These proponents admonish the states for speaking out against internet gambling while at the same time permitting land based gambling and lotteries within the state.²³⁴ These players enjoy playing poker in the comfort of their own homes without having to drive out of state to find a casino. Furthermore, it is often more economical to play online because the casinos charge a smaller rake, spread smaller stakes games, and offer rakeback.²³⁵ Moreover, many players actually contend that online poker reduces crime, specifically organized crime and bookmaking.²³⁶ In states where casinos do not exist, many players play at underground card clubs, which are illegal to own and operate. For example, ARod was caught in a New York City cardclub that allegedly had mafia ties.²³⁷ Online sites present players with a safer way to play poker and thus cut down on organized crime's business. The last, and most substantial, argument made in support of online gaming is simply that reasonable people should be allowed to make up their own minds about whether they wish to gamble. Players feel that Big Brother should stop looking over their shoulder and telling them that gambling is morally, fiscally, or otherwise wrong.²³⁸ They want to be allowed to make up their own minds.

VIII) THE PROS AND CONS OF LEGALIZING AND REGULATING ONLINE POKER

The 104th United States Congress charged the National Gambling Impact Study Commission with, among other things, investigating the causes of a large growth in gambling in the past several decades.²³⁹ Congress specifically asked the Commission to assess the impact of internet gambling on the United States and to recommend steps that Congress should take to combat it.²⁴⁰ The Commission found that the three biggest reasons that Congress should consider prohibiting internet gambling are because internet gambling is abused by underage gamblers, facilitates addiction for pathological gamblers due to its high speed and instant gratification, and raises the potential for criminal activities (such as stealing credit card numbers or money laundering).²⁴¹ Without discussing at any significant length other

²³⁴ See, e.g., THE POKER PLAYERS ALLIANCE, <http://www.pokerplayersalliance.org/> [hereinafter PPA].

²³⁵ See <http://en.wikipedia.org/wiki/Rakeback#R>. A program through which a player gets back a certain percentage of the rake he paid to the house. "Rebate/repayment to a player of a portion the rake paid by the player, normally from a non-cardroom, third-party source such as an affiliate."

²³⁶ See Clive Small, *Gambling and the Harms We Choose to Have*, NATIONAL GAMBLING REGULATION CONFERENCE, May 1999, <http://www.aic.gov.au/conferences/gambling99/small.pdf>." Arguably internet gambling reduces organized crime."

²³⁷ See AROD, *supra* note 1.

²³⁸ See PPA, *supra* note 234.

²³⁹ See NGIS, *supra* note 210.

²⁴⁰ *Id.* at 5-1: "A key mandate of the National Gambling Impact Study Commission was to assess the impact of technology on gambling in the United States."

²⁴¹ *Id.* at 5-5.

alternatives,²⁴² the Commission recommended that Congress take immediate action to prohibit internet gambling²⁴³

Several commentators suggest that it is a better idea for the U.S. to legalize and regulate internet gambling rather than to forbid it completely.²⁴⁴ Some even suggest that the ills enumerated by gambling opponents can be better alleviated through regulation than outright prohibition.²⁴⁵ In April 2000, the Gaming Board for Great Britain recommended that the British government legalize internet poker under a system of permits and regulations and subject the companies to a tax on their gross profits (15 percent was recommended).²⁴⁶ Great Britain's legalization of internet gaming has caused several leading internet poker sites to go public on the British stock exchange, the most recent of which PokerStars, which is estimated to receive \$2

^{242.} *Id.* at 5-12,13: "The Commission recommends to the President, Congress, and the Department of Justice (DOJ) that the federal government should prohibit, without allowing new exemptions or the expansion of existing federal exemptions to other jurisdictions, Internet gambling not already authorized within the United States or among parties in the United States and any foreign jurisdiction. Further, the Commission recommends that the President and Congress direct DOJ to develop enforcement strategies . . ."

^{243.} In its final report, in the internet gaming section, the commission has a 3-page part entitled "Regulation or Prohibition?" However, little, if any regulation is discussed in the part. The part is essentially devoted to a brief commentary on steps already taken to prohibit, rather than regulate internet gambling. This prohibit includes prosecutions undertaken by the NY AG as well as state legislation designed to eliminate internet gaming.

^{244.} See, Lantzer, *supra* note 234 at 3: "The lure of increased revenue and consumer preference will likely result in federal and state governments enacting legislation to legalize and regulate Internet gaming." "A relatively clean slate encourages governments and businesses to negotiate regulatory solutions that will benefit all parties;" See also <http://www.neverwinpoker.com/phpnuke/html/article-451-thread-1-0.html> Referring to <http://business.timesonline.co.uk/article/0,,9070-2136074,00.html> Bryan Micon posting, in response to newspaper reports the PokerStars.com is going to make an IPO on the British stock market for an estimated \$2 billion: "Lesson to the USA—look at all these billion dollar companies setting up shop overseas with our money! Fucking regulate online poker and bring these very wealthy companies (with their K's of jobs & M's of taxable revenue) to our country!" [hereinafter Micon]; and Seth Gorman & Antony Loo, *Black Jack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 *LOY. L.A. ENT. L. J.* 667–9 (1996).: "Moreover, conditional legalization of gambling is consistent with most states' policies that favor gambling. Most states permit gambling in some form or another."

^{245.} See Micon, *id.*

^{246.} See Professor I. Nelson Rose, *Understanding the Law of Internet Gambling*, http://www.gamblingandthelaw.com/internet_gambling.html "The Review Body has already had submitted to it a separate paper prepared by the Gaming Board on this issue [Internet Gambling], following a study carried out by the Board during late 1999/early 2000. The key conclusions of that paper are as follows. There are a growing number of sites on the Internet which offer opportunities to gamble and in particular on-line casino gaming, and legislation in this country bears on Internet gambling in unintended and erratic ways. For instance, no on-line casino gaming site can lawfully be established here, but residents are free to play on overseas sites and those sites can accept bets from here without breaking any British laws. The Board concludes that legislative change is needed to remedy this unsatisfactory situation. It does not believe that measures which attempt to prohibit on-line gambling in Britain would be either sensible or likely to be successful. Thus, whilst acknowledging that legislative change is unlikely to be simple or straightforward, the Board recommends that a coherent legislative system should be established which permits controlled and regulated Internet gambling sites in Britain. It believes that this is a matter to which the Review Body should give particular attention . . ."

billion for its IPO.²⁴⁷ Additionally, North Dakota proposed a bill to legalize a “licensed internet live poker establishment” and then tax the internet corporations according to a graduated tax schedule; the bill narrowly missed becoming law.²⁴⁸

Regulation is capable of both assuaging the social problems surrounding internet gambling mentioned in the previous section and bringing economic and other benefits to the U.S. First, through proper regulation, the U.S. government can prevent the use of internet gambling facilities by unwanted players, namely underage persons and problem gamblers. There are several regulatory models through which the government can do this. The U.S. can mandate that all monetary transfers to internet poker sites come from U.S. bank accounts or U.S. based credit cards. These institutions will be able to properly verify the age of the player well before he deposits money on a poker site—namely when he signs up for a bank account or credit card—by examining his social security number and other government issued identification. Additionally, the U.S. could also set up a protocol, much like the currency transaction reports banks must issue for transactions over \$10,000, such that banks or other financial institutions must monitor deposits onto these sites and report habitual or problem gamblers to the proper authorities. The government could also regulate what type of gaming is offered, i.e. slots and poker only, or table games and sports betting only. Moreover, it could empower families to monitor minors or problem gambler encouraging the installation of monitoring chips in computers.²⁴⁹ Currently, the only safeguards against problem gamblers and minors accessing sites are the ones instituted by the sites themselves, which are, as previously discussed, minimal at best. This type of regulation will work better than the Safe Port Act’s prohibition given its jurisdictional problems.²⁵⁰

Second, regulation will allow the U.S. government to monitor the integrity of the sites to prevent cheating. It will also allow players and others associated with the internet sites a reputable forum to adjudicate grievances, namely a U.S. federal court. Additionally, the government can mandate each site be audited by an independent authority (PriceWaterHouse, etc.) annually. Private citizens would, of course, have the right to bring civil actions against internet gambling operators in a U.S. court of appropriate U.S. jurisdiction. The U.S. legislature

²⁴⁷. See Matthew Goodman, *Pokerstars Reveals Hand with Plans for \$1 Billion Pound Float*, THE LONDON TIMES ONLINE, April 16, 2006, <http://business.timesonline.co.uk/article/0,,8209-2136074,00.html>.

²⁴⁸. See NDHB150 for the 59th Legislative Assembly of North Dakota.

²⁴⁹. See Gorman & Loo, *supra* note 78: “An anti-gambling chip, the “G-chip,” for computers, would allow parents to block out Internet services that offer gambling, and thus, prevent minors from gaining access to the virtual casinos. A blocking mechanism would also allow the Internet to develop without governmental interference. The issues of jurisdiction and law enforcement are not raised by this solution because it does not require the application of any law. This solution allows parents to dictate what activities are appropriate for their children to access.”

²⁵⁰. See NGIS, *supra* note 210, at 5-10,11: “To effectively prohibit Internet gambling, the U.S. government would have to ensure that these licensed operators do not offer their services within U.S. borders, a proposition that poses a range of unanswered questions regarding feasibility. Efforts to prevent customers in the United States from accessing and using these sites may be easily circumvented. For example, the on-line registration process makes possible an initial screening of customers when they disclose the locations of bank accounts or credit card companies. Yet potential customers can take a number of steps to conceal their location within the United States. For example, patrons can establish offshore bank accounts and wire the money from those accounts to the Internet gambling site. In addition, patrons can mask their origins by first dialing an offshore ISP before logging onto a particular site, thereby creating the appearance of operating in a legal Internet gambling jurisdiction.”

can establish whatever penalties it sees fit, from monetary fines to shutdown of the violating website, for violations of these monitoring provisions.

Third, as the NGISC's report fails to mention, the U.S. would receive a massive windfall from tax revenue if it chooses to legalize and tax internet gambling.²⁵¹ At a flat tax rate of 6.25%, internet gambling could generate an upwards of \$750 million dollars annually. Several other countries have recognized the tax benefits of legalizing and regulating online gaming---Australia, Costa Rica, Great Britain, Aruba, and Antigua just to name a few.²⁵² Legalized gambling has already proven its effectiveness in raising revenue; for example, in Nevada legalized gambling has led to "one of the longest economic booms any state has experienced," and Las Vegas is currently the country's fastest growing city.²⁵³ In addition to generating millions in revenue for the state, gambling also boosts the economy by creating thousands of jobs. In discussing brick-and-mortar casinos creating economic growth, the Practicing Law Institute comments that "once opened, the new casinos provide tens of thousands of jobs in the service industries, leading to sustained community economic growth. The economics of the gaming industry are such that as in many cash-based businesses, even a largely uneducated work force can enjoy economic prosperity. Thus, the brick and mortar casinos provide a sustaining economic benefit from the moment of their construction and licensing that continues through their long 24-hour a day operations."²⁵⁴ Granted, internet gaming will not create jobs in the same magnitude as a brick and mortar casino because internet sites have computers performing a lot of work, but it will establish a significant number of customer service, management, and technology jobs. Of course, assuming the Federal Government is licensing the online sites and collecting the revenue,²⁵⁵ it must find a way to distribute a portion of the proceeds to the states.²⁵⁶

Proper federal government regulation might be able to alleviate the state autonomy concerns. Throughout history, states have traditionally regulated gambling within their borders and the federal government has passed statutes only to assist the states in enforcing their gambling regulations.²⁵⁷ The Wire Act is a great example of this; the Wire Act does not

²⁵¹. See Jeff Simpson, *Experts Promote Legalization of Internet Gambling*, LAS VEGAS REV.J., May 16, 2001, at 3D, available at [2001 WL 9534745](#).

²⁵². See generally Tratos, *supra* note 44, at 721; Rose & Owens, *supra* note 103; and Lantzer, *supra* note 234: "Not only has Internet gaming in countries with lax regulation grown, but officials in countries such as Australia and Great Britain have legalized Internet gaming establishments in an effort to internalize gaming revenue." The Caribbean islands decided to legalize internet gaming to replace the revenue they have lost as a result of decreased tourism.

²⁵³. See Tratos, *supra* note 44, at 754.

²⁵⁴. *Id.*

²⁵⁵. See Lantzer, *supra* note 234. Lantzer proposes several regulatory schemes including, but not limited to, revising the Federal Wager Tax to distribute tax proceeds to the states on a pro rate basis.

²⁵⁶. See NGIS, *supra* note 210, at 5 and Lantzer, *supra* note 234: "Congress's Power to Regulate Internet Gaming Under the Commerce Clause Congress can clearly regulate Internet gaming under the Commerce Clause. The Commerce Clause allows Congress to regulate commerce with foreign nations or among the several states. Placing bets across state or international lines falls into the category of commerce among the several states or with foreign nations for several reasons."

²⁵⁷. See Lantzer, *supra* note 234: "States traditionally regulate gambling under their police powers. The police power allows states to regulate in the interest of the health, safety, morals, and welfare of citizens. Gambling has historically been regulated by the states under the police power because gambling is considered a vice activity that affects the morality of citizens. The police power gives states the authority to regulate gaming to the point of completely banning all gaming activity within the borders of the state. Federal gaming regulation has been designed and used to assist states in enforcing gambling

determine the legality of the gambling in question; state law does. The Wire Act only provides a federal cause of action for certain violations of state law to make enforcement easier.²⁵⁸ The federal government can craft its internet gaming regulations in much the same fashion.

In the Safe Port Act, the government did the exact opposite. It made operating an internet gambling site illegal, but left each state the option of legalizing it within the state.²⁵⁹ It takes far more effort to mobilize a campaign to make something legal than it does to make something illegal. Furthermore, even if a state wanted to make it legal to operate a site in the state, it is unclear if internet poker site operating in state A could accept customers from state B. That, combined with the fact that the government asserts that the Wire and Travel Acts prohibit running a gambling website make it very unlikely that a state will legalize online poker anytime soon.

On the other hand, if the federal government were to legalize internet gaming subject to regulations, each state could decide whether it wants to “opt into” the government regulation scheme.²⁶⁰ If the state chooses to opt in, the federal government will perform the regulations and share the tax revenue with the state, keeping a portion of the tax itself to cover the costs of the regulations. If the state chooses to opt out, the federal government can either block internet access to gambling websites in specific states or come up with an alternative means of preventing a certain state’s citizens from accessing gambling websites.²⁶¹

One might see a contradiction in some of the above statements, namely, a rift between the contentions that under a regulatory scheme if a state opts out it can have the gambling websites blocked, but if a state tries to prohibit internet gaming it will be too hard for the ISP to block a website to just a handful of states. What differentiates these contentions is that under a regulatory scheme, it will not be an ISP that is blocking the website, it will be the website itself that is hindering a player from a forbidden state to gamble on the site. The regulatory schemes are assuming that part and parcel of legalizing internet gaming is mandating that internet gaming operators submit to U.S. jurisdiction.

Moreover, once web gambling is conditionally legalized, internet gambling companies will incorporate in the U.S. either as one of the conditions of their legalization or based on the sheer entrepreneurial spirit of the American people. Many experts agree that “the advantages of setting up Internet gaming sites offshore are outweighed by the opportunity to profit from legalized Internet gaming in the United States and other first-world countries.”²⁶² Other corporations inherently linked to internet gambling, such as e-banks modeled after Neteller and Firepay, will likely follow as well.

Regulation does have its disadvantages, however. It is exceedingly more complicated (excepting the fact that the current prohibition has jurisdictional problems) and requires exceedingly more upfront costs than outright prohibition. Once a prohibition bill is passed, the

regulations. The federal government yields to the wishes of the states in determining gambling policy because states are better able to determine the will of the people.”

^{258.} *Id.* “States determine the legality of placing wagers while the Wire Act assists “prohibitionist states in keeping their citizens free from operators based in foreign jurisdictions.” The Wire Act and other federal statutes do not determine the legality of gambling in any particular state or for the nation as a whole. Rather, federal statutes assist states in effectively enforcing their own laws by providing a federal cause of action against violators whom states would otherwise have difficulty prosecuting.”

²⁵⁹ Safe Port Act H.R. 4954

^{260.} *Id.*

^{261.} For a discussion of different possible regulatory models see Lantzer, *supra* note 234.

^{262.} *Id.*

DOJ can immediately begin mandating the compliance ISPs and credit card companies, shutting down the threat with little expenditure of time. Enforcement of a prohibition bill and continued compliance checks is likely to cost the government \$10 million annually.²⁶³ Regulation, on the other hand, will require more complicated legislation.²⁶⁴ It will also require far more governmental monitoring and possibly the creation of a separate sub-regulatory agency.²⁶⁵ It will also necessitate a tax revenue dispersal scheme which will take time to create. All of this will require much more than \$10 million per year.²⁶⁶ However, legalizing and taxing internet gambling will bring in many millions of dollars more than is needed to regulate it, thus making it a profitable venture for both the federal and state governments.

While prohibition appears to offer a quick fix, regulation can provide revenue to states and help further state sovereignty. It will also help further a long standing American principle—self determination. Most gamblers are not problem gamblers. Most players gamble infrequently for the enjoyment of the experience.²⁶⁷ Proponents of gambling continue to harp on the idea that these people should not have the government forcing its moral values or social norms upon them.²⁶⁸ Moreover, as will be discussed in the subsequent section, poker is played for reasons beyond the mere “gamble” of it: the sense of skill involved, the feeling of victory over a group of peers (not the casino), and to make money. The government has recognized being a professional gambler is a lawful profession for tax purposes, yet at the same time this “lawful” profession cannot occur in some states.²⁶⁹ In the words of gambling author Barry Shulman, people should be able to make “adult personal choices with what to do with their own time and money.”²⁷⁰

IX) CONCLUSION

With the passage of the internet gambling ban incorporated in the Safe Port Act it seems that the debate raging around prohibiting online gambling versus regulating it has come to a close. However, upon closer examination of the ban, based on the jurisdictional factors discussed above, one can see that the so called “ban” on online gaming is not effective. As long as non-gambling related financial intermediaries remain operational in other countries, this ban will not prohibit online gaming in this country.

^{263.} See H.R.4777 109th Cong. (Representative Goodlatte).

^{264.} See *generally*, DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET at 193–8, (Univ. Nev. Press, 2005).

^{265.} *Id.*

^{266.} *Id.*

^{267.} For the general proposition, see, *generally*, Roy Cooke, *Stepping Up From Home Poker*, CARDPLAYER MAGAZINE VOL. 19 NO. 8, http://www.cardplayer.com/poker_magazine/archives/showarticle.php?a_id=15412. (last visited May 16, 2006)

^{268.} See PPA, *supra* note 234.

^{269.} See, e.g., CIT. v. Graettinger, 480 U.S. 23,35–6 (1987): “. . . [W]e conclude that if one’s gambling activity is pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and is not a mere hobby, it is a trade or business within the meaning of the statutes with which we are here concerned. Respondent Graettinger satisfied that test in 1978. Constant and large scale effort on his part was made. Skill was required and was applied. He did what he did for a livelihood, though with a less-than-successful result. This was not a hobby or a passing fancy or an occasional bet for amusement.”

^{270.} See Barry Shulman, *Congress Scares Me*, THE INSIDE SCOOP, April 16, 2006, http://www.cardplayer.com/poker_news/blog_author/1?page=5

Given the impotence of this ban, the government should not be quick to table the idea of regulating and taxing online gaming especially in light of the fact that there are millions of Americans who enjoy playing the game responsibly. In 1996, the Loyola of Los Angeles Entertainment Law Journal published one of the first articles addressing the legality of the hundreds of casinos that suddenly appeared on the internet. In that article, Seth Gorman and Anthony Loo both recommended and predicted that the U.S. legalize and regulate the internet gambling industry.²⁷¹ The authors relied on the fact that 48 out of the 50 states already have some form of legalized gambling and that the tax revenue from these sites could total in the hundreds of millions of dollars each year.²⁷² In 2002, the Chapman Law review published an article which stated that “the lure of consumer preference and tax revenue” made the legalization of internet gaming inevitable.²⁷³ So far, the U.S. Congress has made no attempts to legalize internet gambling; despite this, the NGISC reports that legalized gambling in the United States has increased exponentially in the past few years.²⁷⁴

Even if the government chooses not to revisit its decision to ban online gaming, a strong argument can be made that poker should be differentiated from other forms of gambling. Poker is a game of skill and the law should treat it accordingly.

Most state laws permit wagers to be placed on games of skill without penalty.²⁷⁵ However, what determines a “game of skill” varies from state to state and often depends on the court’s statutory interpretation. An example of a pure game of skill is chess. It is a game of perfect information in which the player with the greater skill at the time of the game will always win.

“The best known games of skill played for money, which are also available online in the United States, are fantasy sports leagues.”²⁷⁶ Proponents of these leagues cite the skills involved in researching, drafting, and trading players; nonetheless, the game involves a “significant element of chance”.²⁷⁷ However, the court has yet to specifically hold that skill predominates chance in fantasy sports leagues so the question of their legality is still up in the air.²⁷⁸ The most telling point that illustrates that many Americans believe that fantasy sports leagues require skill is that the Safe Port Act contains a specific carve-out for fantasy sports leagues, which exempts them from this law.

No court has specifically stated that poker is a game of skill.²⁷⁹ No court has specifically stated that poker is a game predominated by chance. However, some dicta sheds light on the issue, indicating that poker is a game that involves elements of both chance and skill. In the Oregon case of *State v. Coats*, the court commented that “poker, when played for money, is a gambling game, but, since it involves a substantial element of skill judgment, it cannot

²⁷¹. See Gorman and Loo, *supra* note 78.

²⁷². *Id.*

²⁷³. See Lantzer, *supra* note 234.

²⁷⁴. See NGIS, *supra* 210 at 1-1,2.

²⁷⁵. See, *generally*, the individual state laws available at <http://www.gambling-law-us.com/State-Laws/>

²⁷⁶. See Chuck Humphrey, *Is Poker in the U.S. a Game of Skill?*, <http://www.gambling-law-us.com/Articles-Notes/online-poker-skill.htm>.

²⁷⁷. *Id.*

²⁷⁸. *Id.* citing *State v. Hahn*, 586 N.W.2d 5 (Wis. 1998): “Whether Fantasy Sports contests are considered gambling is a matter of debate, which revolves around whether skill or chance predominates the contest;” and Davidson, *COMMENT: Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201.

²⁷⁹. *Id.*

reasonably be contended that it is a lottery.”²⁸⁰ Along the same lines, in the Colorado case of *Ginsberg v. Centennial Turf Club*, the court noted that “no one would contend that a game of poker in which money is bet upon the relative value of the cards held by the participants, constitutes a lottery, but it most certainly is a form of gambling.”²⁸¹

However, individual state courts have specifically defined what a game of skill is in general. The consensus seems to be that a “game of skill” is a game in which “skill predominates chance” in determining the winner. For example, in *In Re Allen*, the California court defined a game of skill as follows: “It is the character of the game rather than a particular player’s skill or lack of it that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.”²⁸² As another example, ²⁸³ a Wisconsin statute defines skill in gaming by stating the following: “In this subdivision, ‘skill’ means, within an opportunity provided for all players fairly to obtain prizes or rewards of merchandise, a player’s precision, dexterity or ability to use his or her knowledge which enables him or her to obtain more frequent rewards or prizes than does another less precise, dexterous or knowledgeable player.”²⁸⁴

Mr. Humphrey contends that poker does not fit the definition of a skill game because for each individual session or over a short period of time (months to a year) skill does not predominate over luck.²⁸⁵ He does add that in the long-run, skill might predominate over luck.²⁸⁶ He fails, however, to grasp the complete issue. If a skilled player knows his poker-hand has an 85% chance of beating his opponent’s hand, he would like to bet as much as possible. This is an extremely favorable situation for that player. Nonetheless, 15% of the time, this player will lose the hand and his money. Several of these unlucky hands for the skilled player could happen in succession, making him a loser in the game for a day, a month, possibly even up to a year. But, if the skilled player continues to put his money in the pot as an 85% favorite, or just a favorite in general, over time, mathematics dictates that he cannot walk away from the game a loser.²⁸⁷ There is an abundance of literature discussing how, in the long-run, skill dominates luck at the poker table.²⁸⁸ In fact, California has already recognized poker as a game of skill, allowing casinos devoted solely to poker while games of chance remain illegal.²⁸⁹

To illustrate his point, Mr. Humphrey mentions that few players repeat as “tournament player of the year.” However, great tournament players often have consistent results. Looking at the Card Player Magazine player of the year awards, Michael Mizrachi finished in the top 10

^{280.} 74 P.2D 1102,1106 (1938).

^{281.} 251 P.2D 926, 929 (1952).

^{282.} 377 P.2D 280 (1961).

^{283.} WIS. STATS. § 945.01 (3)(b)(3).

^{284.} These examples, and others from this section, have been taken from an online piece by Humphrey, *supra* note 276.

^{285.} *See* Humphrey, *supra* note 276.

^{286.} *Id.*

^{287.} *See, generally*, DAVID SKYLANSKY, THE THEORY OF POKER, (Two Plus Two Publishing, 1987).

^{288.} *See* any of the hundreds of poker books or articles, e.g. DOYLE BRUNSON, SUPER SYSTEM, PPA, *supra* note 234, or Smith, *infra* note 294.

^{289.} Tie Smith, Poker 101: Its Not Just a Game of Chance, THE DAILY UTAH CHRONICLE, September 1, 2005, <http://www.pokerplayersalliance.org/commentary/c090105-2.html>: “In fact, many states in this country do not even classify poker as a gambling game; it is classified as a game of skill, like bowling or golf. California, for example, has casinos devoted entirely to the game of poker while casino gambling games classified as games of chance remain illegal.”

in his first two years he competed, Men Nguyen finished in the top 15 in 3 of the last 4 years, and Scotty Nguyen finished in the top 20 in each of the last 4 years.²⁹⁰ Additionally, only 8 players have 8 or more tournament victories at the WSOP.²⁹¹ This shows that it takes an elite type of skill to win consistently over time. Furthermore, the point system involved in player of the year awards weighs first place finishes highly and fail to reward a player who consistently finishes in the top 20 in tournament play. In addition, these records do not accurately reflect the tremendous increases in tournament fields in recent years. Moreover, these records do not accurately reflect the best or most consistent players because lots of the world's best player stick strictly to cash games or play only the biggest tournaments each year. Also, because of escalating blind structures, tournament poker has a higher variance than cash games and therefore more luck is involved. No definitive records exist which chronicle the winnings of the world's best cash game players, but there is little doubt that these players exist.²⁹² Nonetheless, several of the top poker players are consistent winners on the tournament circuit: Victor Ramdin, Daniel Negreanu, Phil Ivey, Doyle Brunson, Barry Greenstein, Scotty Nguyen, and Freddy Deed just to name a handful.²⁹³ Their performances can be likened to the top professionals in tennis or golf tournaments.

Currently, the courts and states are divided as to whether poker should be considered a game of skill; a legal grey area exists here.²⁹⁴ Poker involves a high amount of skill. Mathematical precision is required to effectively know when to call, bet, and raise. Knowledge of statistics is necessary to know the percentage chance one hand has to beat another. Experience is necessary to help know what to do in given situations and to help determine what an opponent might be holding. Knowledge of psychology is paramount in evaluating the strength of an opponent's hand. Patience and concentration are required to study opponent's betting patterns and tells. Gaming that involves skill is much less likely to cause the negative social spillovers consistently mentioned by anti-gambling activists.²⁹⁵ As the money in poker is redistributed among players and not given to the house, there is no net loss in wealth to society (except the rake.) A losing poker player is much more likely to either become better or quit playing; this is not the case with the more addictive casino games and slots.²⁹⁶ The average losing player loses less in poker as compared to table games. (Technically, given that the money

²⁹⁰. See www.cardplayer.com.

²⁹¹. See <http://www.pokerpages.com/pokerinfo/tournamentgallery/wsop/bracelet-winners01.htm>.

²⁹² Brunson *supra* note 293, www.fullcontactpoker.com, neverwinpoker.com

²⁹³. See *id.*, www.worldpokerotur.com, and <http://pokerdb.thehendomb.com/player.php?a=1>. (This database enables anyone to look up a professional player's name and see their tournament winnings for the last few decades. You can look up all the players I referred to by going to that link, clicking on "players" and then typing in their respective names. In the poker community, this is the be-all, end-all of player databases.)

²⁹⁴. See Charles Humphrey, Esq., *Is Poker in the U.S. a Game of Skill?*, <http://www.gambling-law-us.com/Articles-Notes/online-poker-skill.htm>. In a footnote concerning the assertion that poker is in a grey area and has been held to be predominately skill-based by "some courts" the author states: "See, e.g., *Charnels v. Cent. City Opera House Sass's.*, 773 P.2d 546, 551 (Colo. 1989) (holding that, in Colorado, poker is an illegal gambling game of chance); see also *United States v. Murder*, 48 F.3d 564, 569 (1st Cir. 1995) (holding that, in Massachusetts, video poker is a lottery in which chance predominates); but see *Commonwealth v. Club Caravan, Inc.*, 571 N.E.2d 405 (Mass. App. Ct. 1991) (holding that, in Massachusetts, video poker games are games of skill); cf. 1993 Colo. Op. AT&T's Gen. No. 93-5 (April 21, 1993) (opining that, in Colorado, poker is a game of skill, but nevertheless illegal under specific statutory language)." *Id.* at n.41.

²⁹⁵. See, generally, *PPA*, *supra* 234. Less addictive. Less likely to be played by minors. Less crime associated with it, etc. As money is redistributed amongst players there is no net loss wealth to society.

²⁹⁶. *Id.*

is redistributed amongst the players, the average player is break-even and neither wins nor loses money—but the average loser himself loses less money on average.)²⁹⁷ Poker is a game of skill and any internet law should reflect that. It is not necessary for the law to legalize poker purely because it is a skill game. But, if skill games are exempt from a gambling prohibition, poker should definitely be included.

Poker is red hot. Tournament poker fields have doubled and tripled over the past few years due to televised poker on ESPN and the Travel channel. Thousands of players have flocked to the newest medium on which to compete, internet poker sites.²⁹⁸ This paper began its survey of the burgeoning world of internet poker by tracking the history of its legality. After concluding that the government was indeed correct in its assertion that internet poker was prohibited by the Travel and Illegal Gambling Business Acts, it analyzed the recent ban on online gambling passed attached to the Safe Port Act of 2006. However, the U.S. will be unable to enforce these laws against poker operators, who are located in foreign countries unlikely to cooperate with the U.S. in enforcing judgments against them. U.S. players will be able to avoid the intent of this law by sending their money to these sites through Neteller, a financial intermediary incorporated in Canada.

Therefore, the U.S. government should reconsider regulating online poker. Most states already allow some form of card-based gambling. By foregoing regulation, the government is ignoring state sovereignty issues and declining millions of dollars in tax revenue. Moreover, regulation will give the government the ability to monitor online gambling operators and protect social policy by setting age limits. Lastly, legalizing online poker will renew America's longstanding belief in allowing its citizens self-determination.

²⁹⁷. See, generally Skylansky, *supra* note 292.

²⁹⁸. See, generally, WO, *supra* note 31.