

FOLDED INDUSTRY? BLACK FRIDAY’S EFFECT ON THE FUTURE OF ONLINE POKER IN THE UNITED STATES

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I. INTRODUCTION

With one swift action by the Department of Justice (DOJ), an industry that affects ten million Americans¹ and attracts \$6 million worth of their money every year was seriously crippled.² On April 15, 2011, a date dubbed “Black Friday” by poker enthusiasts, the DOJ issued an indictment against three of the largest online poker websites, effectively prohibiting Americans from participating in online poker games.³ The three poker sites that were affected, PokerStars, Full Tilt, and Absolute Poker, accounted for the majority of online poker played by customers in the United States at the time that the indictment was issued.⁴

In the indictment, the DOJ depended on the Illegal Gambling Business Act (IGBA) and the Unlawful Internet Gaming Enforcement Act (UIGEA) to provide the basis for the charges against the poker websites.⁵ The UIGEA was passed in 2006 in an effort to curtail the business of the online gambling industry within the United States.⁶ However, the unclear wording in the statute left open to debate whether it applied to online poker.⁷ Therefore, many sites continued to operate, despite the new law, under the assumption that it applied to other forms of online gambling, but did not prohibit online poker.⁸

Further, the DOJ injunction had broad economic consequences. The online poker industry contributed millions of dollars in advertising revenue to poker-related television shows.⁹ This income stream has stopped for many television networks and has caused the cancellation of shows that depended on

1. Al D’Amato, *Make Online Poker Legal? It Already Is*, WASH. POST (Apr. 22, 2011), http://www.washingtonpost.com/opinions/former-senator-alfonse-damato-make-online-poker-legal-it-already-is/2011/04/20/AFAWPwOE_story.html.

2. Oskar Garcia, *Prosecutions Turn Online Poker Into a Shaky Bet*, ABC NEWS (Apr. 21, 2011), <http://abcnews.go.com/Technology/wireStory?id=13420976>.

3. Press Release, Preet Bharara, U.S. Attorney S. District of N.Y., Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds (Apr. 15, 2011), available at <http://www.justice.gov/usao/nys/pressreleases/April11/scheinbergetalindictmentpr.pdf>.

4. *Id.*

5. *Id.* at 5–6.

6. See 31 U.S.C. § 5361(a) (2006) (discussing the Congressional purpose of passing the UIGEA).

7. *Id.*

8. See Gregory Karp, *Online Poker Industry Ponders Next Move*, CHI. TRIB. (Apr. 18, 2011, 7:31 PM), http://law.uark.edu/faculty/gallini/Gallini-4-18-11_-_Online_poker_industry_ponders_next_move_-_chicagotribune.com.pdf (“[There] is no federal law that specifically prohibits Internet poker.”).

9. Sam Schechner & Alexandra Berzon, *Inside the TV Poker Machine*, WALL ST. J. (July 26, 2011), <http://online.wsj.com/article/SB10001424053111904772304576466343325102336.html>.

the advertising from the online poker industry.¹⁰ The indictment also had economic effects on individual players who had money stored in their personal accounts on the poker websites at the time that they were shut down.¹¹ The massive withdrawal of money by the American players from the indicted websites has created doubts about whether everyone will be fully reimbursed.¹²

Part II of this Note will give some background on the UIGEA and describe in detail the charges brought forth in the indictment. It will also provide some information on the poker websites that were shut down as a result. Part III will analyze the applicability of the UIGEA to the online poker industry and then look at the economic impact that Black Friday had on both advertising income and on the players that used the websites that were shutdown. It will then look at the international implications of the DOJ action and current legalization efforts for poker currently in Congress. Part IV will give recommendations for using Black Friday as a starting point for regulation of online poker and the future of the industry.

II. BACKGROUND

A. *Unlawful Internet Gaming Enforcement Act*

Prohibitions against Internet gambling have been a topic of debate in Congress dating from as early as 1997 with the introduction of the Internet Gambling Prohibition Act (IGPA).¹³ The purpose of the IGPA was to make it clear that the Wire Act, which prohibits the use of wire communication for transmission of bets or wagers,¹⁴ was applicable to online gambling.¹⁵ However, this bill failed to make it through Congress, as there were not enough supporters for a complete ban.¹⁶

In 2006, a new bill co-authored by Representatives Jim Leach and Robert Goodlatte, which sought to prevent online gambling by prohibiting the acceptance of any financial instruments for Internet gambling, was passed in the House.¹⁷ This bill found support in the Senate from Tennessee Senator Bill Frist, but he was unable to get it onto the calendar for a vote before the Senate adjourned for mid-term elections.¹⁸ Instead, Senator Frist had the bill that was to become the UIGEA added as a rider on the SAFE Port Act.¹⁹

The SAFE Port Act was an important piece of legislation, as it was

10. *Id.*

11. Alexandra Berzon, *U.S. Alleges Poker Site Stacked Deck*, WALL ST. J. (Sept. 21, 2011) [hereinafter Berzon, *U.S. Alleges Poker Site Stacked Deck*], <http://online.wsj.com/article/SB10001424053111904106704576582741398633386.html>.

12. *Id.*

13. Brandon P. Rainey, *The Unlawful Internet Gambling Enforcement Act of 2006: Legislative Problems and Solutions*, 35 J. LEGIS. 147, 148 (2009).

14. 18 U.S.C. § 1084 (2006).

15. *Id.*

16. *Id.*

17. H.R. 4411, 109th Cong. (2d Sess. 2006).

18. Rainey, *supra* note 13, at 149–50.

19. Ross A. Crutchfield, *Folding a Losing Hand: Why Congress Should Replace the Unlawful Internet Gaming Enforcement Act With a Regulatory Scheme*, 45 TULSA L. REV. 161, 163 (2009).

enacted to fix holes in the Maritime Transportation Security Act of 2002, passed in response to the 9/11 attacks.²⁰ It was also intended to make U.S. ports more secure from terrorist threats by requiring container inspection for radiation and included other security plans and training requirements.²¹ The bill had passed through the Senate and the House but, because there were differences in the versions passed, it went to a conference committee so these differences could be resolved.²² Frist had the UIGEA added to the end of this act in committee.²³ Once a bill comes from conference committee, it is not subject to amendment, so members of Congress were forced to approve the UIGEA in order to pass the much-needed SAFE Port Act.²⁴

The proponents of the UIGEA deemed the act necessary because traditional law enforcement methods were inadequate to properly enforce gambling prohibitions after the expansion of gambling to the Internet.²⁵ Congress found that most Internet gambling depends on funding player accounts through the use of credit cards, wire transfers, and other online payment systems.²⁶ Recognizing this, the Act prohibited people in the “business of betting or wagering” from knowingly accepting credit cards, electronic fund transfers, checks, or any other form of financial transaction in connection with “unlawful Internet gambling.”²⁷

The term “unlawful Internet gambling” is defined as placing, receiving, or knowingly transmitting a bet or wager by any means involving the Internet where that bet or wager is unlawful under any applicable federal or state law.²⁸ The UIGEA also provides a definition for a “bet or wager,” describing the term as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance.”²⁹ There must also be an agreement that a “person will receive something of value in the event of a certain outcome.”³⁰ This definition includes lotteries³¹ and provides exceptions for things like securities,³² commodities,³³ insurance,³⁴ and even fantasy sports.³⁵ It should be noted that absent from this statute is any specific mention of the term “poker.”³⁶

20. Constantine G. Papavizas & Lawrence I. Kiern, *2005–2006 U.S. Maritime Legislative Developments*, 38 J. MAR. L. & COM. 267, 268 (2007).

21. *See id.* at 268–72 (discussing the new developments added by the passage of the SAFE Port Act).

22. Crutchfield, *supra* note 19, at 163.

23. *Id.*

24. *Id.* at 164.

25. 31 U.S.C. § 5361(a)(4) (2006).

26. *Id.* § 5361(a)(1).

27. *Id.* § 5363(1)–(4).

28. *Id.* § 5362(10)(A).

29. *Id.* § 5362(1)(A).

30. *Id.*

31. *Id.* § 5362(1)(B).

32. *Id.* § 5362(1)(E)(i).

33. *Id.* § 5362(1)(E)(ii).

34. *Id.* § 5362(1)(E)(vi).

35. *Id.* § 5362(1)(E)(ix).

36. *Id.*

B. Indictment

On April 15, 2011, Preet Bharara, the U.S. Attorney for the Southern District of New York, announced the unsealing of an indictment charging eleven defendants with offenses including bank fraud, money laundering, and illegal gambling.³⁷ The defendants included payment processors for online poker websites and also the founders of the three largest Internet poker companies in the United States: PokerStars, Full Tilt Poker, and Absolute Poker.³⁸ Also included in the indictment was a restraining order against over seventy-five bank accounts used by the poker sites for payment and the seizure of five Internet domain names used by the companies to host their poker websites.³⁹ In addition, a companion civil case was brought against the defendants seeking the forfeiture of \$3 billion in assets gained through the alleged money laundering offenses committed.⁴⁰

Prior to the indictment, the poker websites utilized several strategies to enable American players to process payments in order to put money into their accounts. All three companies disguised payments as purchases from online merchants purporting to sell things such as “jewelry and golf balls,” when in reality, these online merchants never existed.⁴¹ Further, payment processors obtained bank accounts for each of the websites and lied to the banks about the nature of the transactions that were occurring with these accounts by setting up fake corporations that implied that they had nothing to do with the online poker industry.⁴² The poker companies also found small, struggling banks that were willing to process transactions in return for investment in the banks.⁴³ As an example, the SunFirst Bank in Saint George, Utah agreed to process poker transactions in return for a \$10 million investment in the bank.⁴⁴

C. Sites Shut Down

PokerStars is the largest of the three poker websites that was shut down by the DOJ.⁴⁵ It is estimated that the company made \$500 million a year from American players.⁴⁶ It holds its gambling license with the Isle of Man, a dependency of the British Crown.⁴⁷ Therefore, it is able to create its own

37. Bharara, *supra* note 3, at 1.

38. *Id.*

39. *Id.*

40. Complaint at 88, United States v. PokerStars, No. 1:11-cv-02564-LBS (S.D.N.Y. Sept. 20, 2011), available at <http://blogs.reuters.com/felix-salmon/files/2011/09/FullTiltPokerComplaint.pdf>.

41. Bharara, *supra* note 3, at 2.

42. *Id.* at 3.

43. *Id.*

44. *Id.*

45. Nathaniel Popper & Tiffany Hsu, *FBI Shuts Down Internet Poker Sites*, L.A. TIMES (Apr. 15, 2011), <http://articles.latimes.com/2011/apr/15/business/la-fi-poker-busts-20110416>.

46. *Id.*

47. Isle of Man Gambling Supervision Commission, POKERSTARS.COM, <http://www.pokerstars.com/iom/> (last visited Feb. 19, 2013).

domestic laws but depends on the United Kingdom for its foreign policy.⁴⁸ In 2005, in an effort to attract new businesses, the Isle of Man announced that it would allow casinos based on the island to take bets from American players.⁴⁹ The Isle still discourages taking sports wagers, however, because it believes that United States law prohibits this kind of betting but does not prohibit casino wagering like poker.⁵⁰

Full Tilt Poker was founded in Los Angeles, but it moved to Ireland when the UIGEA was passed under the belief that the U.S. government would not pursue action against the company if it went international.⁵¹ The Alderney Gambling Control Commission, a commission based in the British Channel Islands that regulated Internet gambling, governs Full Tilt.⁵² In a revised complaint filed in the Southern District of New York on September 20, 2011, it was alleged that Full Tilt defrauded its customers by “misrepresenting to players that their funds deposited into their online player accounts were secure and segregated from operating funds.”⁵³ In reality, Full Tilt used customers’ funds to “cover business expenses and pay hundreds of millions of dollars in distributions to professional poker players . . . and others who owned interests in Tiltware LLC.”⁵⁴ On March 31, 2011, Full Tilt owed players over \$390 million yet actually held only around \$59 million in its bank accounts.⁵⁵ Instead of separating players’ funds from operating funds, Full Tilt distributed almost \$444 million to its owners over a four-year period.⁵⁶

Starting around August 2010, Full Tilt had issues finding payment processors that could collect money from its U.S. players’ bank accounts.⁵⁷ Rather than not allowing the payments to be credited to the players’ accounts, Full Tilt credited the accounts with phantom funds.⁵⁸ Players would use these funds in games and the phantom money would be transferred to other users creating a “shortfall of approximately \$130 million” in play that Full Tilt had never actually collected.⁵⁹ Full Tilt relied on the assumption that the amount of withdrawals from the site would be less than the amount of money that the company actually held, but with the shutdown of the site on Black Friday, all

48. Matt Richtel, *Isle of Man Changes Gambling Rules*, N.Y. TIMES (Jan. 14, 2005), <http://www.nytimes.com/2005/01/13/technology/13iht-gamble.html>.

49. *Id.*

50. *Id.*

51. Popper & Hsu, *supra* note 45.

52. ALDERNEY GAMBLING CONTROL COMMISSION, www.gamblingcontrol.org (last visited Feb. 19, 2013); see Nathan Vardi, *Full Tilt Poker Makes Its Case for Why It Has Been Unable to Pay Back Players*, FORBES (Aug. 30, 2011), <http://www.forbes.com/sites/nathanvardi/2011/08/30/full-tilt-poker-makes-its-case-explaining-why-it-has-not-paid-back-players/> (explaining that the AGCC “suspended Full Tilt’s main egambling licenses”).

53. Bruce Zagaris, *U.S. Files Revised Complaint Against Foreign Internet Gaming Companies, Their Principals and Payment Processors Alleges Conspirators Dealt Bad Hand to Players*, 27 INT’L ENFORCEMENT L. REP. 1019, 1019 (2011).

54. Complaint at 105, *United States v. PokerStars*, 2012 WL 1659177 (S.D.N.Y. 2012) (No. 11 Civ. 2564 (LBS)).

55. *Id.*

56. *Id.* at 8.

57. *Id.* at 113.

58. *Id.*

59. *Id.*

of its American players wanted to get their money out of their accounts.⁶⁰ However, due to the distribution of players' money to its owners and the phantom funds credited to player accounts, Full Tilt did not have enough cash in its accounts to repay all the American players.⁶¹ As a result of this misappropriation of funds, Full Tilt had its license from the Alderney Gambling Control Commission revoked.⁶²

Absolute Poker is the smallest of the companies that was shut down and is headquartered in Costa Rica.⁶³ It is partnered with Ultimate Bet and owned by the same parent company, the Cereus Network, which itself is owned by Blanca Gaming.⁶⁴ Absolute Poker was subject to its own scandal in 2007 when it was revealed that an employee hacked into the computer program to allow himself to see the other players' cards during hands.⁶⁵ This employee won somewhere between \$400,000 and \$700,000 from other players on the site.⁶⁶

D. Party Poker Leaves the United States Market

There is some precedent that shows the eventual effects of the government indictment of the three largest poker sites.⁶⁷ After the passage of the UIGEA in October 2006, Party Gaming, which operates the website Party Poker, announced that it was leaving the U.S. market.⁶⁸ Party Gaming was a publicly traded company on the London Stock Exchange and lost 58% of its value upon this announcement mostly due to the fact that it generated 80% of its revenue from American players.⁶⁹ In the meantime, some of the sites that continued to cater to American players after the passage of the UIGEA saw large increases in visitors to their website.⁷⁰ The number of United States players using Full Tilt reportedly increased 600% after Party Poker left the market.⁷¹

60. *Id.* at 113–16.

61. *See id.* at 116 (explaining that Full Tilt's liabilities to players far exceeded the amount of money in its bank accounts).

62. Press Release, André Wilsenach, Alderney Gambling Control Comm'n, Media Release (June 29, 2011), available at <http://www.gamblingcontrol.org/userfiles/file/Media%20Statement%20-%20FTP%20suspension%20290611.pdf>.

63. Popper & Hsu, *supra* note 45.

64. Mike Bruner, *Indicted Poker Websites Bound for Bankruptcy*, NBCNEWS.COM (May 4, 2011), http://www.msnbc.msn.com/id/42906061/ns/business-us_business/t/indicted-poker-websites-bound-bankruptcy/.

65. Mike Bruner, *Online Poker Cheating Blamed on Employee*, NBCNEWS.COM (Oct. 19, 2007), <http://www.nbcnews.com/id/21381022/>.

66. *Id.*

67. *See* Christopher Grohman, *Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006*, 1 J. LEGAL TECH. RISK MGMT. 34, 60 (2006) (discussing Party Gaming's withdrawal from the U.S. online poker market in 2006).

68. *Id.*

69. *Id.*

70. Lori Tripoli, *The Post-Unlawful Internet Gambling Enforcement Act Online-Gaming Surge?*, 11 GAMING L. REV. 18, 18–19 (2007).

71. *Id.* at 19.

III. ANALYSIS

The Department of Justice indictment against the online poker industry presents an opportunity to review the way that online poker is regulated by the UIGEA. The current definition of bet or wager presents ambiguity as to whether poker is included as a prohibited activity. The indictment also created economic effects that reach further than just the websites that were shut down. Advertising outlets, players who have money left in accounts on the indicted websites, and the U.S. government with possibility of international sanctions were all affected by the online poker crackdown. Despite some obvious negative consequences, Black Friday has revived the debate on whether American poker players should be able to legally play online and has spurred efforts in Congress to make online poker legal in states that choose to do so.

A. *UIGEA Applicability to Poker*

The UIGEA does not explicitly prohibit a person from gambling on the Internet.⁷² Instead, it makes it illegal for banks and other institutions engaged in the business of betting and wagering to knowingly accept electronic fund transfers connected to “unlawful Internet gambling.”⁷³ The term unlawful Internet gambling is defined within the act to mean a bet or wager that is unlawful under any federal or state law, so that the enforcement of the UIGEA depends on the violation of a separate underlying statute.⁷⁴

1. *Possible Predicate Crimes*

Federal law provides a few possible predicate crimes on which the UIGEA may be based; none has a direct application to online poker. The Wire Act of 1961 prohibits the transmission of a wire communication “for information assisting in the placing of bets or wagers.”⁷⁵ However, recent statements made by the Department of Justice suggest this statute applies only to sports betting.⁷⁶ Other possible applicable federal laws like the Travel Act and the Illegal Gambling Business Act, like the UIGEA, require an underlying unlawful act to be enforced.⁷⁷

Without a federal law distinctly banning online poker, the UIGEA has to depend on state law to provide a predicate crime. This is a natural outcome

72. Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling's Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41, 45 (2010).

73. 31 U.S.C. § 5363 (2006).

74. *Id.* § 5362(10). The underlying state law used in the indictment of the poker websites was New York Penal Law Sections 225.00 and 225.05. Indictment at 24, *United States v. Scheinberg*, S3 10 Cr. 336 (LAK) (S.D.N.Y. 2011), available at <http://www.scribd.com/doc/53107543/Indictment-DOJ-vs-Scheinberg-Bitar-Tom-et-al>.

75. 18 U.S.C. § 1084(a) (2006).

76. See generally Memorandum Opinion from Virginia A. Seitz, Assistant Att'y Gen., Crim. Div., Dept. of Justice, *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act* (Sept. 20, 2011), available at <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>.

77. 18 U.S.C. § 1955(b) (2006); *United States v. Childress*, 58 F.3d 693, 719 (D.C. Cir. 1995).

given that the regulation of gambling is normally determined by state law.⁷⁸ An issue with this approach, however, is that each state has its own criteria for determining what constitutes illegal gambling.⁷⁹ A handful of states have expressly outlawed online gambling, but many have not yet approached the subject, instead depending on a general definition for all kinds of gambling.⁸⁰

Games are generally classified in three different categories: games of skill, games of chance, and hybrids that combine skill and chance.⁸¹ Most states' gambling laws apply to games of chance but not to games of skill,⁸² and for hybrid games most states use the "Dominant Factor Test" to determine whether a game is considered to violate a state's anti-gambling rules.⁸³ Under this test, a hybrid game is treated as a game of chance if failure or success in that game is determined predominately by chance regardless of whether some degree of skill is involved.⁸⁴

Poker can be characterized as a hybrid game that has elements of both skill and chance.⁸⁵ A mathematical study comparing skill and chance within a poker game provides evidence that skill is the predominant factor.⁸⁶ This study showed that results of a poker game can be attributed to 75% skill and 25% chance.⁸⁷

Despite the mathematical evidence, courts do not always define poker as a game of skill.⁸⁸ A Pennsylvania court applied the Dominant Factor test and found poker to be a game of chance because, "[w]hile . . . skill can determine the outcome in a poker game, players are still subject to defeat at the turn of the cards."⁸⁹ In *Joker Club, L.L.C. v. Hardin*, the Court of Appeals of North Carolina also determined that poker was primarily a game of chance.⁹⁰ This decision is based on the fact that although it is "more likely for skilled players to defeat novices, novices may yet prevail with a simple run of luck," and as a result, "the instrumentality for victory is not entirely in the player's hand."⁹¹

The previous examples should not be seen to impart the idea that all courts believe that poker falls under the category of gambling with chance

78. Brian Kane, *All In and a Call: Has Online Poker Raised State Sovereignty Stakes?*, 52 *ADVOCATE* 39, 39 (2009).

79. *Id.*

80. *Id.*

81. Gerd Alexander, Note, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is a Bad Bet*, 2008 *DUKE L. & TECH. REV.* 0006, ¶ 26 (2008).

82. See Chuck Humphrey, *State Gambling Law Summary*, *GAMBLING-LAW-US.COM* (Sept. 30, 2007), <http://www.gambling-law-us.com/State-Law-Summary/> (showing predominance of chance as an indicator of illegal gambling).

83. *Id.*

84. See, e.g., Opinion of the Justices No. 373, 795 So. 2d 630, 640-41 (Ala. 2001) (explaining that a game in which skill is more important than chance is not an illegal lottery).

85. See Roman V. Yampolskiy, *Game Skill Measure for Mixed Games*, 21 *PROCEEDINGS OF WORLD ACAD. OF SCI., ENG'G & TECH.* 308, 311 (2007) (analyzing the elements of skill and chance in poker).

86. *Id.*

87. *Id.*

88. E.g., *Commonwealth v. Dent*, 992 A.2d 190, 196 (Pa. Super. Ct. 2010) (analogizing poker to other games to determine whether it is a game of skill or chance).

89. *Id.* (citation omitted).

90. *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 631 (N.C. App. 2007).

91. *Id.* at 630.

being the predominant factor for success. In a recent ruling, the District Court in the Eastern District of New York categorized poker as a game of skill.⁹² The decision was based on extensive expert testimony from a statistician and concluded that “players draw on an array of talents” and “use these skills to win even if chance has not dealt them the better hand.”⁹³ These differences in rulings on the nature of poker, depending on the court that hears the case, display the need for greater specificity in gambling laws.

2. *Federal Law Definition or State Law Definition?*

It is clear that the UIGEA can be enforced when there is a violation of state law. What is not as clear is whether it is first required that the underlying activity be classified as gambling by the federal law or by the law of the state in which the underlying crime occurred. It was recently determined in the case *United States v. Discristina* that to violate the IGBA, another federal statute that regulates gambling businesses, the offense charged must be defined as gambling under the federal act independent of the state law used as the predicate crime for the statute.⁹⁴ The judge used this interpretation to rule that gambling as defined by the IGBA is limited to games predominated by chance.⁹⁵ Since poker is not predominately determined by chance, it does not fall under this definition.⁹⁶

The UIGEA faces a similar question as the one asked of the IGBA in the *Discristina* case. Does the actionable activity have to meet the definition of “bet or wager” as stated in the UIGEA to be enforceable, or is it sufficient to have met the definition of gambling under the state law which was violated? Without a specifically stated intent by Congress to incorporate the state definitions for gambling, the *Discristina* decision suggests that the definition of gambling under the federal law must be met.⁹⁷ There would presumably be no need to define “bet or wager” if the UIGEA was meant to depend on state definitions.⁹⁸

As opposed to the IGBA, the UIGEA does give a definition of “bet or wager” beyond just a non-exclusive list of activities that would qualify.⁹⁹ The most relevant term to poker in the definition is “a game subject to chance.”¹⁰⁰ It is not stated whether the Dominant Factor test should be used for hybrid games or whether any game with some element of chance involved falls under this definition.

92. *United States v. Dicristina*, No. 11-CR-414, 2012 WL 3573895, at *61 (E.D.N.Y. Aug. 21, 2012).

93. *Id.* at *6, *55.

94. *Id.* at *50. Similar to the UIGEA, the IGBA defines illegal gambling as “a violation of the law of a State . . . in which it is conducted.” 18 U.S.C. § 1955(b)(1)(i) (2006). However, unlike the UIGEA, there is no definition of gambling beyond a non-exclusive list of applicable activities. *Id.* § 1955(b)(2).

95. *Dicristina*, 2012 WL 3573895, at *56.

96. *Id.* at *60.

97. *See id.* at *47 (discussing whether Congress intended the federal statute to be dependent on state law).

98. *Id.* at *48.

99. 31 U.S.C. § 5362(1) (2006).

100. *Id.*

Commenters have argued that using this wording instead of using the “more popular phrase ‘game of chance’” broadens the scope of the act.¹⁰¹ Under this theory, adding the phrase “subject to” applies the UIGEA to any game that involves some element of chance, even those hybrid games, like poker, that would pass the predominance test in some jurisdictions.¹⁰² Taken with the ruling in *Discristina*, the result of this interpretation of the term is that poker is not considered gambling under one federal gambling law (IGBA) but considered to be a form of gambling under another (UIGEA).¹⁰³

B. Economic Impact of Black Friday

1. Television

The economic impact of Black Friday extends beyond the money lost by the poker sites. The top online poker companies paid tens of millions of dollars to support regular televised poker programs on major networks, including ESPN, Fox, Fox Sports Net, and Comcast.¹⁰⁴ The online poker sites would pay for advertising, but they would also spend money to pay for entire shows in deals known as “time buys.”¹⁰⁵ A time buy is similar to an infomercial, but, instead of using the bought airtime to sell a product, the poker websites would have the television network air poker tournaments that they created.¹⁰⁶

PokerStars had a deal with ESPN for \$20 to \$30 million per year for advertising and also supported a time buy show, but ESPN removed all advertising by the indicted poker sites after Black Friday.¹⁰⁷ ESPN2 was scheduled to show taped episodes of “2011 North American Poker Tour” on the Sunday after Black Friday, but it was not aired because of the indictment.¹⁰⁸ Fox removed the show “PokerStars.net Big Game” from its programming schedule.¹⁰⁹ Full Tilt paid millions every year to NBC for the show “Poker After Dark” that aired six nights a week, providing income at a 2 A.M. time slot that had lost money for NBC before the deal.¹¹⁰ Although ESPN plans to continue showing the “World Series of Poker,” the future of some of the less popular shows is uncertain.¹¹¹

2. American Players Need to Cash Out

Players using online poker sites keep money deposited in accounts

101. Alexander, *supra* note 81 ¶ 27.

102. *Id.*

103. *Discristina*, 2012 WL 3573895, at *60.

104. Schechner & Berzon, *supra* note 9.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Poker Programming Takes Hit After FBI's Crackdown on Sites*, USA TODAY (Apr. 17, 2011), http://www.usatoday.com/SPORTS/usaedition/2011-04-18-poker18_st_U.htm.

109. Schechner & Berzon, *supra* note 9.

110. *Id.*

111. *Id.*

maintained by the site.¹¹² PokerStars states that it holds all of the players' account balances in segregated accounts that are not used for operational expenses incurred by the site.¹¹³ This policy ensures that PokerStars can "fulfill its monetary obligations toward its online poker players, and provides further reassurance that player funds are always secure with PokerStars."¹¹⁴

The day after the Black Friday indictment, both PokerStars and Full Tilt Poker made announcements to their American clients, assuring them that the funds in their accounts on the sites were safe.¹¹⁵ Later that week, it was announced that the two websites had entered into domain-name use agreements with the U.S. government to allow the companies to use their seized domains to "facilitate the withdrawal of U.S. players' funds held in account with the companies."¹¹⁶

PokerStars was able to begin with cashouts for American players on the afternoon of April 26, only eleven days after the web site was shut down by the DOJ.¹¹⁷ Full Tilt, on the other hand, still has American players' money frozen in accounts.¹¹⁸ As of September 21, 2011, Full Tilt still owed players more than \$300 million, with about half of this amount credited to players from the United States and no promise of repayment in the near future.¹¹⁹ Full Tilt had already lost \$115 million to government seizure prior to Black Friday and another \$42 million was stolen by a payment processor, leaving it with only \$6 million in the bank.¹²⁰

Some American poker players had a large amount of money in accounts on the sites that were shut down. One professional player who had earned almost \$2.5 million in six years of play had about \$100,000 in his Full Tilt account and another \$50,000 in an account on PokerStars.¹²¹ He had received full reimbursement from PokerStars but, as of October 2011, still had not received any of the money from Full Tilt.¹²²

Players with money in accounts on Absolute Poker have also been unable

112. See, e.g., *PokerStars FAQs*, POKERSTARS.COM, <http://www.pokerstars.com/poker/room/faq/> (last visited Feb. 19, 2013) (explaining the banking arrangement it uses to separate players' accounts from the site's operational accounts).

113. *Id.*

114. *Playing With Real Money*, POKERSTARS.COM, <http://www.pokerstars.com/poker/real-money/> (last visited Feb. 19, 2013).

115. Gary Wise, *Poker Industry Looks Forward*, ESPN.COM (Apr. 16, 2011), <http://espn.go.com/espn/print?id=6372121&type=story>.

116. David McLaughlin & Beth Jinks, *Online Poker Companies Reach Accord With U.S. on Players' Access to Money*, BLOOMBERG (Apr. 20, 2011), <http://www.bloomberg.com/news/2011-04-20/online-poker-companies-reach-accord-with-u-s-on-players-access-to-money.html>.

117. Dan Cypra, *PokerStars Processing U.S. Player Cashouts*, POKERNEWSDAILY.COM (Apr. 27, 2011), <http://www.pokernewsdaily.com/pokerstars-processing-u-s-player-cashouts-18949/>.

118. Janet Morrissey, *Poker Inc. to Uncle Sam: Shut Up and Deal*, N.Y. TIMES (Oct. 8, 2011), <http://www.nytimes.com/2011/10/09/technology/internet/in-online-poker-a-push-to-legalize-and-regulate-the-game.html?pagewanted=all>.

119. Berzon, *U.S. Alleges Poker Site Stacked Deck*, *supra* note 11.

120. *Id.*; Nathan Vardi, *Full Tilt Poker Makes Its Case for Why It Has Been Unable to Pay Back Players*, FORBES (Aug. 30, 2011, 9:10 PM), <http://www.forbes.com/sites/nathanvardi/2011/08/30/full-tilt-poker-makes-its-case-explaining-why-it-has-not-paid-back-players/>.

121. Morrissey, *supra* note 118.

122. *Id.*

to receive their accumulated funds. The DOJ indictment left the site's parent company, Blanca Games, contemplating bankruptcy.¹²³ The Kahnawake Gaming Commission, the entity that licenses Absolute Poker, has suggested liquidating Blanca Games' assets and distributing the proceeds to players who had money in accounts on the site.¹²⁴ This solution has been submitted to the U.S. Attorney's Office for the Southern District of New York for consideration, but no action has yet been taken.¹²⁵ Without some action taken by Blanca Games to raise the income necessary to pay American players, it looks as though they will remain without reimbursement.

On July 31, 2012, players still seeking to recover funds from online poker accounts affected by the DOJ shutdown finally received good news.¹²⁶ It was announced that the United States had entered into a settlement agreement with PokerStars and Full Tilt Poker to resolve the \$3 billion civil lawsuit filed against the two companies in April 2011.¹²⁷ As part of the settlement, PokerStars agreed to forfeit \$547 million to the United States that would be used in part to reimburse American players who still had not received compensation.¹²⁸ PokerStars also agreed to acquire Full Tilt Poker and pay an additional \$184 million to help reimburse those players who had accounts on Full Tilt.¹²⁹ Despite settlement of the lawsuit, PokerStars is still prohibited from offering online poker to U.S. players using real money.¹³⁰ However, PokerStars' willingness to purchase Full Tilt suggests that it believes that online poker could eventually return to the United States.¹³¹ The primary reason to make such a large investment in a competing site is to put PokerStars in a good position to dominate the American market if online poker were made legal.¹³²

3. *International Implications*

Due to the fact that many of the online poker websites are operated outside of the United States,¹³³ the DOJ injunction also impacts the economies

123. Brunker, *supra* note 64.

124. Brian Pempus, *Kahnawake Gaming Commission Issues Statement on Beleaguered Absolute Poker Player Funds*, CARDPLAYER (Oct. 28, 2011), <http://www.cardplayer.com/poker-news/12230-kahnawake-gaming-commission-issues-statement-on-beleaguered-absolute-poker-player-funds>.

125. *Id.*

126. Press Release, Janice K. Fedarcyk, F.B.I. Assistant Dir. in Charge, Manhattan U.S. Attorney Announces \$731 Million Settlement of Money Laundering and Forfeiture Complaint with PokerStars and Full Tilt Poker (July 31, 2012), *available at* <http://www.fbi.gov/newyork/press-releases/2012/manhattan-u.s.-attorney-announces-731-million-settlement-of-money-laundering-and-forfeiture-complaint-with-pokerstars-and-full-tilt-poker>.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Jay Caspian Kang, *The Certain and Uncertain Future of Poker*, GRANTLAND (Aug. 1, 2012), http://www.grantland.com/story/_/id/8220815/the-pokerstars-purchase-full-tilt-731-million-settlement-state-poker.

132. *Id.*

133. See Benjamin C. Wickert, Note, *All In, but Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States*, 10 VAND. J. ENT. & TECH. L. 215, 217 (2007) (noting that nearly all of the Internet gambling sites are located outside of the United States).

of other nations. This is not a new issue, as it has already been the subject of trial at the World Trade Organization.¹³⁴ In 2003, the twin Caribbean Island nations of Antigua and Barbuda brought a complaint against the United States on the grounds that U.S. law prohibits gambling and betting services from other members of the WTO.¹³⁵ The WTO decided this case in favor of Antigua, saying that the United States could not block online gaming operators from Antigua from conducting business in the American market if it would, at the same time, permit online wagering on horse racing.¹³⁶ When the United States refused to change its laws to allow for online gambling operations in Antigua, the WTO awarded the island nation \$21 million in damages.¹³⁷ The ruling declared that instead of direct payment to Antigua, these damages would come from the allowance of Antigua to “violate copyright protections on goods like films and music from the United States.”¹³⁸

Antigua is only one of over thirty nations that filed claims for compensation with the WTO due to the United States’ stance on online gambling.¹³⁹ The U.S. government negotiated settlements with several of the nations.¹⁴⁰ Australia and Japan dropped their claims for an undisclosed amount, and the European Union dropped its claim in exchange for new trade opportunities with the United States in areas unrelated to Internet gambling.¹⁴¹

The online gambling industry is very important to some smaller nations like Antigua where online casinos serve as the nation’s second largest employer.¹⁴² The Black Friday indictment has a direct impact on the Antiguan economy, as Absolute Poker is based on the island.¹⁴³ With the shutdown of the online poker sites on Black Friday, the issue already decided by the WTO regarding the United States’ rules on Internet gambling could possibly be revisited to determine if more sanctions are necessary.¹⁴⁴ Harold Lovell, Antigua’s finance minister, went as far as to state that he was “concerned that

134. See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO (updated June 6, 2012), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (showing the case history of the dispute between Antigua and the United States over United States’ gambling).

135. Request for Consultations by Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1 (Mar. 27, 2003), available at [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds285/1\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICchanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds285/1)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICchanged=true#).

136. James Kanter & Gary Rivlin, *WTO Gives Antigua Right to Violate U.S. Copyrights in Gambling Dispute*, N.Y. TIMES (Dec. 21, 2007), <http://www.nytimes.com/2007/12/21/business/worldbusiness/21iht-wto.html>.

137. *Id.*

138. *Id.*

139. See Jason A. Miller, *Don’t Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions Than Internet Gambling*, 12 N.C. BANKING INST. 185, 207–08 (2008) (stating that Australia, Canada, Costa Rica, India, Japan, Macao, and twenty-seven countries from the European Union filed claims for compensation from the United States in the range of \$100 billion).

140. *Id.* at 208.

141. *Id.*

142. Annie Lowrey, *Caribbean Nation Gets an International Go-Ahead to Break U.S. Copyright Laws*, N.Y. TIMES (Jan. 28, 2013), <http://www.nytimes.com/2013/01/29/business/global/dispute-with-antigua-and-barbuda-threatens-us-copyrights.html>.

143. Jane Sutton, *Antigua Says U.S. Online Poker Shutdown Was Illegal*, REUTERS (Apr. 21, 2011), <http://www.reuters.com/article/2011/04/21/us-usa-antigua-poker-idUSTRE73K6Z020110421>.

144. *Id.*

at this point in time United States authorities continue to prosecute non-domestic suppliers of remote gaming services in clear contravention of international law.”¹⁴⁵ Although a complaint has yet to be filed with the WTO, this is a case that could arise and possibly cost the United States more money in the form of sanctions.

4. *Online Poker Alternatives*

The DOJ indictment may have taken the three largest poker sites offline, but Americans still want to play poker. Those who still desire to play are finding other places online that offer the game. There are still smaller websites that will process payments from the United States hoping to pick up players that are coming from one of the three websites that were shutdown.¹⁴⁶ Bovada, LockPoker, the Cake Poker Network, and many other sites are all still operating and catering to American players.¹⁴⁷ In the week following Black Friday, there was an expected drop in traffic on the three sites that were indicted by the DOJ.¹⁴⁸ Meanwhile, the Merge Network, the parent company of LockPoker, saw traffic increase by 61%, Bodog had 32% more users, and the Cake Network had an increase of 30%.¹⁴⁹

An increase in popularity of subscription poker websites has also been a result of the DOJ indictment.¹⁵⁰ These sites attempt to get around the UIGEA by allowing players to play for free with play money chips that may be later cashed in to win prizes.¹⁵¹ This business model allows the websites to classify the poker games as sweepstakes rather than gambling, which is legal in many states.¹⁵² Instead of depositing money into an account, a player pays a monthly subscription fee that allows them to enter tournaments with prizes such as cars and seats in live tournaments that are played for real cash.¹⁵³ The cost of these subscriptions is anywhere from \$20 to \$30 a month.¹⁵⁴

C. *Current Legalization Efforts*

Although the three major poker websites have been shut down by the

145. *Id.*

146. Morrissey, *supra* note 118.

147. See *Safe and Legal US Poker Sites for Real Money Players*, CARDSCHAT, <http://www.cardschat.com/us-poker-sites.php> (last visited Mar. 1, 2013) (providing a list of the top online poker sites for American players).

148. See *Who Are the Big Winners and Losers After “Black Friday”?*, POKER KING BLOG (Apr. 26, 2011, 4:11 PM), <http://www.pokerkingblog.com/2011/04/26/post-black-friday-traffic-trends-bodog-continues-to-surge-full-tilt-rebounds/> (showing that statistics from Pokerscout.com revealed a decrease in traffic by 28% for Pokerstars, 35% for Full Tilt Poker, and 65% for the Cereus Network, which owns both Absolute Poker and Ultimate Bet).

149. *Id.*

150. Earl Burton, *“Black Friday” Creates New Subscription Poker Sites . . . Will They Last?*, POKERNEWSDAILY.COM (Sept. 18, 2011), <http://www.pokernewsdaily.com/“black-friday”-creates-new-subscription-poker-sites...will-they-last-2014/>.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

United States the debate over legalizing online poker is just beginning. There are multiple arenas in which legislation regarding online poker is being considered.

The DOJ has reversed its interpretation of the Wire Act of 1961 in a recent opinion stating that it only applies to sports betting, and states have begun to take their own action by passing legislation regarding intrastate online poker and gambling. Some states have shown a desire to allow for online gambling while others have taken steps to make it illegal.

1. *Federal Legislation*

Not all members of the U.S. government agree that online poker should be banned. In response to the DOJ indictment on Black Friday, a bill was introduced by U.S. Representative Joe Barton that would allow states to “choose whether they want to allow residents to play poker on the Internet.”¹⁵⁵ This law would require potential operators to register for a gambling license in at least one state.¹⁵⁶ Although it would allow for states to take their own stance on whether online poker would be allowed, this bill would not make it legal for other casino games to be offered online.¹⁵⁷ The ultimate goal of Representative Barton’s Online Poker Act of 2011 is to create a “system to make sure that those who play for money are playing in an honest, fair system where they can reap the benefits of their winnings.”¹⁵⁸ The bill also proposes protection for people who have an addiction to gambling, mandates restrictions on use by minors, and refuses the use of credit cards to fund players’ accounts.¹⁵⁹

Barton is not the only U.S. Congressman that supports the legalization of online poker. Former New York Senator Al D’Amato is the current chairman of the Poker Players Alliance and has stated that “Congress should license and regulate Internet poker.”¹⁶⁰ Also, the bill introduced by Barton is not the first attempt at legalizing some forms of online gambling, as Representative Barney Frank proposed a bill to legalize and regulate online gambling in the United States in 2009.¹⁶¹ This bill proposed “safeguards against compulsive and underage gambling, money laundering, [and] fraud and identity theft.”¹⁶²

2. *Applicability of the Wire Act of 1961*

Along with the UIGEA, the Wire Act has also been a tool for the Justice

155. *U.S. Rep. Pushes Bill to Legalize Online Poker*, CBSNEWS (June 24, 2011), <http://www.cbsnews.com/stories/2011/06/24/politics/main20074163.shtml>.

156. *Id.*

157. *Id.*

158. Gary Mihoces, *New House Bill Would Clear Way for Regulated Internet Poker*, USA TODAY (June 24, 2011), http://www.usatoday.com/sports/poker/2011-06-24-house-bill-regulated-internet-poker_n.htm.

159. *Id.*

160. D’Amato, *supra* note 1.

161. Parmy Olson, *Gambling Firms Bet on Barney Frank*, FORBES (May 6, 2009), <http://www.forbes.com/2009/05/06/gambling-barney-frank-markets-equities-online.html>.

162. *Id.*

Department to use against online gambling.¹⁶³ The first part of the statute prohibits using “a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . on any sporting event or contest.”¹⁶⁴ It is clear that this portion of the statute does not apply to online poker; however, the second portion of the statute prohibits the “transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers.”¹⁶⁵ The lack of the qualifying term “sporting event or contest” in the second portion of the statute makes it unclear whether it applies to all bets or wagers or just those relating to sports.

New York and Illinois both recently made requests to the DOJ to clarify whether the Wire Act of 1961 prohibits the states from selling lottery tickets within their borders over the Internet.¹⁶⁶ In its opinion, the DOJ stated that when interstate transmissions of wire communications are not related to a sporting event or contest, they “fall outside the reach of the Wire Act.”¹⁶⁷ Although this opinion was specifically offered for intrastate online lotteries, because it limited the scope of the Wire Act to sporting events, it has implications for the future of online poker. The position of the DOJ in the past had been that all forms of online gambling, including poker, within the United States were illegal.¹⁶⁸ This recent opinion reverses that position and implies that the Wire Act is not an obstacle to the legalization of Internet poker.¹⁶⁹

3. *Commerce Clause Concerns*

The Commerce Clause gives Congress the power to regulate commerce between the states.¹⁷⁰ It is implied that this clause also includes a limitation that the states, through their own regulations, may not interfere with or place a burden on interstate commerce.¹⁷¹ Despite regulation of gambling being a traditional area of state power, it seems clear that Congress could permissibly regulate online poker within its power under the Commerce Clause.¹⁷² *American Libraries v. Pataki* applied the Commerce Clause to dissemination of material over the Internet, citing the need for uniformity due to the “unique nature of cyberspace.”¹⁷³

163. Laura A. D'Angelo & Kerry O. Irwing, *Department of Justice Improves the Odds of Online Gambling*, NAT'L L. REV. (Feb. 1, 2012), <http://www.natlawreview.com/article/departement-justice-improves-odds-online-gambling>.

164. 18 U.S.C. § 1084(a) (2006).

165. *Id.*

166. Edward Wyatt, *Ruling by Justice Dept. Opens a Door on Online Gambling*, N.Y. TIMES (Dec. 24, 2011), <http://www.nytimes.com/2011/12/25/us/online-gaming-loses-obstacle-at-justice-department.html?page-wanted=all>.

167. Memorandum Opinion, *supra* note 76, at 1.

168. Wyatt, *supra* note 166.

169. *Id.*

170. U.S. CONST. art. I, § 8, cl. 3.

171. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824).

172. *See American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 167 (S.D.N.Y. 1997) (explaining that Internet regulation among the states could implicate the Commerce Clause).

173. *Id.* at 184.

One of the concerns in allowing the states to regulate in an area that could be addressed by the federal government under the Commerce Clause is that non-uniform state regulations may increase operating costs to a point where businesses within the industry no longer want to engage in interstate commerce.¹⁷⁴ Compliance could become virtually impossible if state regulations are varied enough.¹⁷⁵ Creating a uniform federal regulation for online poker would solve this potential problem and allow for easier enforcement of any violations.

4. *State Legislation*

As a federal statute, the UIGEA only governs interstate activity.¹⁷⁶ This has allowed state legislatures to make their own laws regarding Internet gambling within their own borders. Many states that are struggling to balance their budgets are looking for new sources of revenue and are turning to the possibility of legalizing intrastate online gambling.¹⁷⁷ Despite the federal crackdown on online poker, President Obama has recognized this right of the states to determine whether it wants to permit online poker between its own residents.¹⁷⁸

In April 2011, the District of Columbia passed the Lottery Modernization Amendment Act of 2010.¹⁷⁹ This law defined a lottery as being “both games of skill and games of chance” and allowed these games to be offered over the Internet, so long as they are only played within the District.¹⁸⁰ Since poker falls within the definition of lottery provided by the act regardless of whether it is determined to be a game of skill or a game of chance, the District of Columbia had planned on creating a website that would allow people to play online poker for money.¹⁸¹ Revenue generated from the poker website would be used to supplement other areas of the District’s budget.¹⁸² Although the law allowing Internet gambling was repealed about a year after it was passed, this should not be seen as vindication that online gambling is not desired in Washington, D.C.¹⁸³ The reason for appeal was that some District of

174. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 807 (2001).

175. *Id.*

176. See 31 U.S.C. § 5362(10)(B) (2006) (defining the term “unlawful Internet gambling” to not include bets or wagers that are made exclusively within a single state).

177. Alexandra Berzon, *Nevada Sets Stage for Online Poker*, WALL ST. J. (Dec. 22, 2011) [hereinafter Berzon, *Nevada Sets Stage for Online Poker*], <http://online.wsj.com/article/SB10001424052970203686204577112890018052440.html>.

178. Brian Deese, *What We Have to Say About Online Poker*, THEWHITEHOUSE, <https://petitions.whitehouse.gov/response/what-we-have-say-about-online-poker> (last visited Feb. 19, 2013).

179. *iGaming DC: Legal Authority*, DC LOTTERY, <http://www.dclottery.com/AboutUs/igaminginfo.aspx> (last visited Feb. 19, 2013).

180. D.C. CODE § 3-1313(a)(1) (2001).

181. Michael Laris, *District’s Online Gambling Venture Clouded*, WASH. POST (Sept. 19, 2011), http://articles.washingtonpost.com/2011-09-19/local/35275324_1_online-casino-lottery-contractor-intralot.

182. *Id.*

183. See Tim Craig, *D.C. Council Rejects Internet Gambling*, WASH. POST (Feb. 7, 2012), http://www.washingtonpost.com/blogs/dc-wire/post/dc-council-rejects-internet-gambling/2012/02/07/gIQAX000wQ_blog.html. The Internet gambling provisions of D.C.’s lottery contract

Columbia council members opposed the way in which it was added to a lottery contract without proper notice to legislators.¹⁸⁴

Not surprisingly, Nevada has also considered allowing intrastate Internet gambling, including online poker.¹⁸⁵ In December 2011, the Nevada Gaming Commission approved regulations for intrastate online gambling.¹⁸⁶ The regulations allow casinos in the state to operate websites that would be limited to play by people within the state.¹⁸⁷ Some of the larger casinos in Las Vegas, like Bally's and Caesars, have already filed applications for licenses to start online gambling websites.¹⁸⁸ These websites could represent a lucrative source of revenue as it is estimated that they could provide \$180 million in extra money for the state.¹⁸⁹

Although some states want to pass laws to legalize online gambling within their borders, others have taken action to keep their citizens from gambling on the Internet. In 2006, the Washington legislature passed a law that made online gambling a criminal offense.¹⁹⁰ The law was challenged in the Washington Supreme Court in the case *Rouso v. State*.¹⁹¹ Rouso challenged the Washington law on the grounds that it violated the Commerce Clause, but the court held that the law was constitutional.¹⁹² Washington is currently the only state that has a law that prohibits online poker by its residents, but Utah is also considering passing a similar law.¹⁹³

5. *Opposition to Legalization of Online Gambling*

Although there are many supporters of legalizing online poker, there are others who argue against its legalization.¹⁹⁴ There are several reasons that opponents offer for why Internet gambling should not be sanctioned by the government.¹⁹⁵ Commonly, opponents of legalization argue that an Internet casino offers bettors unprecedented availability to betting outlets, as it allows gambling twenty-four hours a day, seven days a week from the home.¹⁹⁶ Also,

were added after the contract had already passed a council vote. *Id.* Some of the members of the council then stated that they were not aware they were voting to legalize Internet gambling. *Id.* Further issues with contracting for the rights to run the online gambling website helped lead to the call for repeal. *Id.*

184. *Id.*

185. Berzon, *Nevada Sets Stage for Online Poker*, *supra* note 177.

186. Chad Holloway, *Nevada Passes Online Poker Regulations*, POKER NEWS (Dec. 22, 2011), <http://www.pokernews.com/news/2011/12/nevada-passes-online-poker-regulations-11707.htm>.

187. Berzon, *Nevada Sets Stage for Online Poker*, *supra* note 177.

188. Holloway, *supra* note 186.

189. Berzon, *Nevada Sets Stage for Online Poker*, *supra* note 177.

190. WASH. REV. CODE ANN. § 9.46.240 (West 2012).

191. *Rouso v. State*, 239 P.3d 1084, 1095 (Wash. 2010).

192. *Id.*

193. Patrick Flanagan, *Utah Wants to Prohibit Online Poker: Would Be Second State to Do So*, GAMBLING911 (Dec. 30, 2011), <http://www.gambling911.com/poker/utah-wants-prohibit-online-poker-would-be-second-state-do-so-123011.html>.

194. *See, e.g.*, Spencer Bachus, *Online Gambling Leads to Crime and Hurts Young, So Why Encourage It?*, US NEWS (June 1, 2009), <http://www.usnews.com/opinion/articles/2009/06/01/online-gambling-leads-to-crime-and-hurts-young-so-why-encourage-it-asks-spencer-bachus> (presenting evidence for why online poker should be banned).

195. *See id.* (giving reasons for why online poker should not be legalized).

196. *Id.*

due to the remote nature of online betting, a credit card is the preferred method of payment, but using a credit card can “undercut a player’s perception of the value of cash, leading to addiction, bankruptcy, and crime.”¹⁹⁷

There are also issues with ensuring that underage players are not able to have access to gambling websites.¹⁹⁸ Underage gambling is an issue that is easy to monitor in a brick and mortar casino, but difficult to enforce when players are placing bets at a computer. Sheldon Adelson, the owner of the gambling industry’s largest publically traded company, Sands Corp., has stated his opposition to online gambling because “he doesn’t believe available technology is good enough to prevent young people from making wagers”¹⁹⁹

IV. RECOMMENDATION

It is clear that Black Friday has had a detrimental effect on the ability of Americans to play online poker, however, there could be a silver lining hidden in the government’s shutdown of the three largest poker websites. The action taken by the DOJ has made the legalization of online poker a relevant topic in Washington, D.C. Further, the relatively barren online poker landscape created by the removal of these websites presents a clean slate from which Congress can work to regulate online poker so that it may be made available to Americans once again. There are several reasons why the regulation of online poker would be superior to the current system that threatens to ban online poker altogether. First, new regulation would clear up the ambiguity that is present under the UIGEA in which forms of gambling are and are not covered by the law. Second, it is clear that Americans who want to play poker will find a place to do so, and regulation of the industry will protect these players. Finally, the online poker industry represents a potential source of revenue for both the federal government and state governments that is not currently being utilized.

A. *A Need for New Regulation*

Black Friday has shown the need for new regulation of online poker and highlighted the deficiencies of the UIGEA. First, the lengthy span of time that was required for the DOJ to prosecute offenders allowed too much time for the violators to reap huge financial benefits and competitive advantages before being punished. Second, the unclear definition of a bet or wager in the UIGEA should be supplanted by regulation that makes clear what kind of gambling is and is not allowed. Third, the new regulation can be passed by Congress in a more democratic manner outside of the committee referral process and receive input from all members.

197. *Id.*

198. *Id.*

199. Oskar Garcia, *Adelson Against Online Gambling Because Risk of Underage Players*, LAS VEGAS SUN (Dec. 7, 2011), <http://www.lasvegassun.com/news/2011/dec/07/us-online-gambling-sands-ceo-1st-ld-writethru/>.

1. *UIGEA Violators Reap Benefits*

The current system has rewarded those who are willing to risk breaking the law because of the lack of enforcement of the UIGEA. This became clear after the passage of the UIGEA in 2006 when Party Poker left the United States market, but sites like PokerStars, Full Tilt, and Absolute Poker were willing to take the legal risk of continuing to allow United States players to play on their sites.²⁰⁰ These websites operated cash poker games for United States players for five years before being shut down by the DOJ and made billions of dollars in revenue during that time.²⁰¹ A good portion of this revenue would have gone to Party Poker, who instead lost these profits because it made the decision to abide by the law by discontinuing its service to American players after the passage of the UIGEA.²⁰²

This trend will continue after Black Friday, as other websites will take the place of the three that were shut down. It has already been shown that companies like Bovada and the Merge Network have increased traffic to their websites, and they are earning the revenue that would have gone to PokerStars, Full Tilt, or Absolute Poker.²⁰³ It took almost five years for the DOJ to build its case against the three websites indicted on Black Friday.²⁰⁴ The websites that are willing to violate the UIGEA may decide that the money made while the DOJ builds its case is worth the risk of eventual lawsuits.²⁰⁵ The UIGEA has created a system where those who are willing to seek loopholes in the law are being financially rewarded by assuming the market share of those who comply.

2. *Ambiguity Makes Scope of UIGEA Unclear*

It has been discussed previously that the UIGEA is ambiguous in its application to online poker due to its dependence on federal and state laws and its unclear definition of the term bet or wager.²⁰⁶ On its face, the statute seems to apply to any game that contains some element of chance; however, most courts use the Dominant Factor Test to determine when a game is considered a game of chance.²⁰⁷ Using the Dominant Factor Test, to be considered a game of chance, the outcome must be determined primarily by chance rather than skill.²⁰⁸

These interpretive issues could easily be fixed by repealing the UIGEA and creating new legislation that provides for a clearer definition of what kind

200. Chris Parker, *Black Friday: How the Feds Shut Down Online Poker*, LA WEEKLY (Mar. 1, 2012), <http://www.laweekly.com/2012-03-01/news/online-poker-shutdown-black-friday-internet-gambling/2/>.

201. *Id.*

202. *Id.* (“Party Poker, the world’s largest site, decided to cash in its chips. It agreed to pay a \$105 million fine and leave the U.S. market in exchange for not being prosecuted.”).

203. *Safe and Legal US Poker Sites for Real Money Players*, *supra* note 147.

204. Wise, *supra* note 115.

205. *Id.*

206. See 31 U.S.C. § 5362(1) (2006) (defining bet or wager as “staking or risking . . . something of value upon the outcome of a contest of . . . a game subject to chance . . .”).

207. See Humphrey, *supra* note 82 (listing states that use the Dominant Factor Test).

208. Opinion of the Justices, *supra* note 84, at 637.

of online gambling is allowed. A starting point could be to make a clear-cut definition of what constitutes a bet or a wager. The UIGEA starts this task by explicitly stating that risking something of value on a sporting event is prohibited, but its use of the term “game subject to chance” is subject to too much interpretation.²⁰⁹ The new legislation should go further in defining what it deems to be a game subject to chance.

This could be accomplished in two different ways. First, Congress should state whether it intends to differentiate hybrid games from pure games of chance. This solves the current problem regarding uncertainty to whether the UIGEA applies to any game that has some dependence on chance or if it intends for some hybrid games to be exempt. Second, any definition for hybrid games could include a list of specific games and whether they are considered to be sufficiently based on skill to be considered legal. Exceptions are already specifically made for fantasy sports and for horse racing, activities that are specifically stated in the statute.²¹⁰ A list of permissible hybrid games would solve any ambiguity as to whether Congress intends the statute to apply to certain games that clearly contain a combination of skill and chance. If Congress intends to ban or allow online poker, it should be specifically stated in the wording in the statute.

3. *Online Gambling Legislation Created the Right Way*

Another benefit of replacing the UIGEA would be the opportunity to create online gambling regulation that is passed through Congress without being inappropriately attached to a bill meant for improving the safety of America’s ports.²¹¹ This would allow for the full utilization of the legislative process to create a law that is more representative of what the American people want out of the regulation of online gambling. Support for the legalization of online poker has already been shown in the states that have passed bills allowing intrastate poker games.²¹² Further, poker players are well represented on Capitol Hill, evidenced by the \$1.8 million that the Poker Players Alliance (PPA) spent on lobbying during 2010²¹³ and the sizeable contribution made to Representative Joe Barton to show support for his Online Poker Act of 2011.²¹⁴ Any action that Congress takes on online gambling should be done so by the proper legislative methods instead of using tricks that do not allow for proper debate of the topic.

209. 31 U.S.C. § 5362(1)(A).

210. *Id.* §§ 5362(1)(E)(ix), 5362(10)(D)(iii).

211. Papavizas & Kiern, *supra* note 20, at 268.

212. Berzon, *Nevada Sets Stage for Online Poker*, *supra* note 177; *iGaming DC: Legal Authority*, *supra* note 179.

213. Tarini Parti, *Players Rally Support for Legalization of Online Poker*, OPEN SECRETS BLOG (July 6, 2011, 1:40 PM), <http://www.opensecrets.org/news/2011/07/players-rally-support-for-legalization-of-online-poker.html>.

214. *Id.*

B. *Regulation Can Be Used to Protect American Players*

By exposing the lack of funds available at Full Tilt to refund the accounts of users of the website,²¹⁵ Black Friday uncovered the need for greater protection of American poker players. A federally regulated online gambling arena could ensure that poker websites maintain bank accounts that are sufficient for the repayment of all players upon request.

The federal government can make it illegal to process payment for gambling online, but this is not going to stop American citizens from finding outlets to play online poker. This fact is corroborated by the increased traffic at sites that have remained open after the exit of Party Poker in 2006 and the shutdown of PokerStars, Full Tilt, and Absolute Poker on Black Friday.²¹⁶ The current regulation does not stop people from playing online poker, but it pushes them to “shadier operations.”²¹⁷ Legitimate companies will withdraw from the U.S. market and create opportunity “for more nefarious elements to move into it.”²¹⁸ This creates a huge risk for those Americans who want to continue to play online poker, as they risk the likelihood of these less legitimate companies going bankrupt or acting fraudulently. Either scenario leads to American players not being able to recoup the money that is stored in the account on the website.

Poker players want Congress to take action to regulate online poker, because regulations are necessary to protect consumers from illegal online operators.²¹⁹ The American Gaming Association has gone as far as creating a Code of Conduct that outlines measures necessary to protect U.S. consumers, keep minors from gambling, and provide tools that will help problem gamblers.²²⁰

Regulation that allows for legalized online poker would attract well-established gambling companies back to the U.S. market, as there would no longer be the legal risk that currently exists for online gambling companies. Americans who play online poker can use these federally regulated websites with confidence that they will be paid upon request and without risk of financial loss.

C. *Economic Benefits*

Legalizing and regulating online poker would not only protect the players, but would also provide economic benefits to the government and to other industries connected to online poker.

215. Susanna Kim, *Online Poker Site Running Ponzi Scheme, DOJ Says*, ABC NEWS (Sept. 20, 2011, 2:34 PM), <http://abcnews.go.com/blogs/business/2011/09/online-poker-site-running-ponzi-scheme-doj-says/>.

216. Grohman, *supra* note 67, at 60.

217. Tripoli, *supra* note 70, at 19.

218. *Id.*

219. Howard Stutz, *Lobbyists Call on Congress to Legalize Internet Poker*, LAS VEGAS REV.-J. (Sept. 20, 2011), <http://www.lvrj.com/business/washington-lobbying-group-calls-on-congress-to-legalize-internet-poker-130191403.html>.

220. *Id.*

1. *Taxes*

The U.S. government has been missing out on a large source of potential revenue by prohibiting online gambling. A recent study has “estimated that the United States contributed \$6 billion to the \$22.6 billion global Internet gambling market in 2008.”²²¹ The online poker market could provide a large boost to a state’s or the federal government’s revenue stream. A study from California showed that legalizing online poker within the state would increase the state’s revenue by \$100 million to \$250 million a year.²²² Further, a study by the American Gaming Association estimates that legalizing online poker would generate about \$2 billion a year in new tax revenues for the federal government.²²³ While it may be argued that this would only make a small dent in a deficit that runs into the trillions of dollars, this is \$2 billion that does not have to be cut from other important governmental services like education.

2. *Other Economic Benefits*

Tax revenue is not the only economic benefit that would be gained by legalizing online poker. It is estimated that legalizing online poker would create 10,000 to 15,000 private and public sector jobs.²²⁴ It would also bring back the advertising revenue that online poker websites create for television stations through commercials and paying for poker programming, a boost of tens of millions of dollars that could aid a recovering economy.²²⁵ Finally, it would bring the United States into compliance with the WTO ruling in the case brought against it by Antigua and take away the threat of future monetary sanctions.²²⁶ The numerous other claims brought against the United States and the need for negotiated settlements with aggrieved nations would disappear.²²⁷

D. *How to Regulate*

Black Friday has put the issue of legalizing online poker back in the consciousness of legislators in Congress.²²⁸ For the reasons discussed above—the inadequacy of current online gambling law in the form of the UIGEA, the recognition of a need to protect the interest of American poker players, and potential economic benefits—a new regime of regulation needs to be created

221. Nicholas Bamman, *Is the Deck Stacked Against Internet? A Cost-Benefit Analysis of Proposed Regulation*, 19 J.L. & POL’Y 231, 242–43 (2010).

222. Michael Cooper, *As States Weigh Online Gambling, Profit May Be Small*, N.Y. TIMES (Jan. 17, 2012), <http://www.nytimes.com/2012/01/18/us/more-states-look-to-legalize-online-gambling.html>.

223. *Id.*

224. Stutz, *supra* note 219.

225. See Schechner & Berzon, *supra* note 9 (revealing an advertising deal between ESPN and PokerStars and stating that “poker money wasn’t huge but it helped” TV networks).

226. See Miller, *supra* note 139, at 207–08 (discussing the WTO complaint filed by Antigua alleging that U.S. gambling law constituted an illegal trade restriction and discussing the claims made by other nations and subsequent settlements).

227. *Id.*

228. See U.S. Rep. Pushes Bill to Legalize Online Poker, *supra* note 155 (discussing bill introduced in Congress by Joe Barton to legalize online poker).

that allows Americans to play online poker legally.

Fortunately, a guide for regulation is available in the form of state regulations for land-based casinos. Most states that currently allow for land-based (or water-based) gambling have a state Gaming Commission or Gaming Board that is in charge of administering the regulatory and tax collection systems for gambling within the state.²²⁹ Federal regulation could create a new office in the Commerce Department as suggested in the proposed legislation by Representative Barton.²³⁰ This office can bear the burden of enforcing gambling regulations instead of the current system that places the burden on financial processing institutions to ferret out payments going toward online gambling.²³¹ The new Federal Gaming Commission would have the ability to grant licenses to those companies that it deems fit to run online poker websites that would be available to American players. A selective licensing procedure can ensure that only those companies that are deemed stable will be legalized.

Protections for players on the licensed poker websites could be added as a condition of receiving a license. For example, the licensee would have to consent to keeping separate bank accounts: one holding the company's assets and the other covering the full amount of money stored in players' personal online accounts. This would avoid the problem encountered by Full Tilt after Black Friday by guaranteeing that there are always sufficient funds available to repay all customers. Also, the receipt of a license could require that the licensee comply with mandatory audits and review of company finances by the Federal Gaming Commission to prevent misuse of players' funds.²³²

Online poker presents other issues that do not need to be considered by land-based casinos. Addressing these issues, like the risk of minors having access to poker websites or the lack of controls to keep problem gamblers from going bankrupt, could placate those who oppose online gambling. Effective safety controls already used in the United Kingdom can be used as a template to build a system that keeps minors from gambling online.²³³ One example is requiring a user to provide personal information derived from their credit history when registering and then running the information through other systems like databases from the Social Security Administration and Departments of Motor Vehicles to confirm the responses.²³⁴ There are also

229. See, e.g., *About Us*, ILL. GAMING BOARD, <http://www.igb.illinois.gov/aboutus> (last visited Feb. 19, 2013) (displaying the Illinois Gaming Board as an example); see also, e.g., NEV. GAMING COMMISSION & STATE GAMING CONTROL BOARD, <http://www.gaming.nv.gov> (last visited Feb. 19, 2013) (displaying the main website for the Nevada Gaming Commission).

230. See *U.S. Rep. Pushes Bill to Legalize Online Poker*, *supra* note 155 (discussing bill introduced in Congress by Joe Barton to legalize online poker).

231. Miller, *supra* note 139 ("For financial institutions, the most intrusive section of the UIGEA is section 5364 because it forces them to 'adopt policies and procedures designed to block' the transfer of funds to and from organizations that are connected with Internet gambling.")

232. See, e.g., NEV. REV. STAT. ANN. § 463.159 (West 2012) (stating the Nevada Gaming Commission's requirement to audit financial statements of licensees whose revenue exceeds \$5 million and the Gaming Commission's discretion to require audits of licensees whose gross revenues are less than \$5 million).

233. *Protecting Children*, SAFE & SECURE INTERNET GAMBLING INITIATIVE, <http://www.safeandsecureig.org/content/key-issues> (last visited Feb. 19, 2013).

234. *Id.*

other measures that could be instituted that are less technologically complex.²³⁵

Although Representative Barton's proposed legislation presents many good ideas for legalizing online poker, not allowing the use of credit cards to fund players' accounts is not the best way to protect the interests of American players.²³⁶ As the easiest way to make a payment online, players will be encouraged to play at the unlicensed websites that are able to process credit card payments. The result would be many of the same issues that are present today where American poker players are playing at potentially unsafe websites. Instead of banning credit card use, problem gambling can be combatted in other ways. Players could have the option of setting their own limits for how much can be deposited to their account.²³⁷ Alternatively, players could be tracked to limit the amount of money wagered or lost over a certain period of time.²³⁸

E. A New Framework

Federal regulation of the online poker industry does not mean that the long history of states controlling gambling within its borders has to end. A compromise between the federal government's Commerce Clause powers and the states' traditional police power can be met by allowing states to have the ultimate decision on whether to allow online poker within their territory. Those states that want to allow online poker would be subject to the regulations created by the federal government, but those that do not want to legalize online poker are free to institute a complete ban. In this way, states maintain the choice of whether to allow Internet poker, but are forced to make a definitive declaration on its legality. This would create a uniform law that would make it easier for online poker websites to operate throughout the United States and would get rid of the uncertainty present in the many states that have yet to take a stance on online gambling and whether Internet poker falls under that definition.

The technology to keep residents from the states where online poker has been banned from playing already exists in the form of geolocation technology.²³⁹ As an example, subscribers to MLB.com's application for streaming television coverage of baseball games online are subject to blackout restrictions on certain games based on their geographic location at the time of access to the website.²⁴⁰ Access to federally regulated online poker websites could operate in much the same way. Users trying to access these websites from a state that has chosen not to allow online poker would be prohibited

235. *Id.* These measures include requiring prizes won by minors to be returned, requiring operators to provide links to filtering programs, or taking legal action against operators who do not comply with requirements regarding underage gambling prevention. *Id.*

236. *U.S. Rep. Pushes Bill to Legalize Online Poker*, *supra* note 155.

237. *Compulsive Gambling Safeguards*, SAFE & SECURE INTERNET GAMBLING INITIATIVE, <http://www.safeandsecureig.org/node/19/> (last visited Feb. 19, 2013).

238. *Id.*

239. King, *supra* note 72, at 62.

240. See MLB.TV, <http://mlb.mlb.com/mlb/subscriptions/index.jsp?product=mlbtv&affiliateId=MLBTVREDIRECT#restrictions> (last visited Feb. 19, 2013) (describing blackout restrictions).

from accessing the site.

Federal regulation that provides the general framework for a legalized online poker regime but still allows for states to make the ultimate decision to either allow or ban online poker offers several benefits. The ambiguity of what is or what is not unlawful gambling and what constitutes a bet or wager that currently exists as a result of the UIGEA would be solved. There would no longer be the need to decipher an individual state's gambling laws to determine whether online poker falls under its definitions. States would also be able to keep some control over their traditional power to regulate gambling within their borders, but the interstate nature of the Internet and the Internet poker industry requires that there is more uniformity between states, making some federal regulation necessary.

V. CONCLUSION

April 15, 2011, a day also known as Black Friday for players of online poker, saw the indictment and subsequent shutdown of the three most popular online poker websites. This indictment charged the owners of these websites and the owners of payment processing companies through which the websites funded players' accounts with violating the UIGEA. However, it is debatable whether the UIGEA actually applies to online poker.

The shutdown of the PokerStars, Full Tilt, and Absolute Poker websites has had profound economic consequences on a wide swath of the American public. The indictment has not only affected companies that operate online poker websites, but it has also taken away a source of income from those skilled in the game, and caused the disappearance in millions of dollars of advertising revenue.

Despite the obvious damage done to the online poker industry, Black Friday could serve as a catalyst for its eventual legalization. It has revealed flaws in the UIGEA, shown the need to create better protection for Americans who will continue to play, and shown the economic damage caused and economic opportunities missed due to banning online poker. It has raised renewed awareness of the debate over the legality of online poker and spurred new attempts for regulation and legalization. Black Friday could also make the legalization process easier as the removal of the three largest websites has created a clean slate for the implementation of new regulation. Ironically, the day that was the supposed end of the American online poker industry could prove to be its beginning.