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NOTES

The Pot's Right: It's Time for Congress To Go “All In” for Online Poker

Jeffrey S. Moad

INTRODUCTION

The stakes of operating an online poker company in the United States have always been high. By one estimate, six million poker players around the world paid $3.61 billion to play poker online in 2010. That same year, almost 1.5 million players in the United States alone paid the poker companies nearly $1 billion. But on “Black Friday”—April 15, 2011—the poker companies nearly lost it all. On that day, the United States Department of Justice unsealed indictments against the three largest online poker companies in the world: Full Tilt Poker, PokerStars, and Absolute Poker. In addition, the FBI seized five domain names that these poker companies allegedly used “to host their illegal poker games.” The criminal indictment and civil complaint against the poker companies and several individuals involved in their operations alleged bank fraud, money laundering, conspiracy, operation of an illegal gambling business, and violations of the Unlawful Internet Gambling Enforcement Act.

In July 2012, two of these online poker companies settled with the DOJ and agreed to forfeit $547 million to the federal government. After this settlement,
the DOJ filed a 145–page Second Amended Civil Complaint seeking forfeiture from multiple remaining parties in the case. Following the amended complaint, Howard Lederer, a well–known professional poker player and former member of the board of directors of Full Tilt Poker, also settled with the DOJ. Lederer’s settlement agreement required him to forfeit more than $1.25 million in cash, a 401k account in his name, multiple exotic vehicles, and several pieces of real property. Lederer admitted no wrongdoing, however, and maintained that Full Tilt Poker “was a legitimate business providing services to its customers within the bounds of the law.”

The wide array of charges against these companies and individuals reflects the complex and inconsistent web of civil and criminal law governing the operation of an online gambling business in the United States. The nine–figure settlements reflect the high stakes involved in the secretive international online poker industry.

This Note proposes that Congress act quickly to adopt federal legislation to replace the current statutory patchwork and develop a federal regulatory system with a federalist enforcement mechanism to govern the online poker industry. This legislation should allow states to opt out but should provide a definition of “illegal gambling” that excludes poker. Although online poker would no longer be a direct violation of a federal statute, it would remain illegal under the federal law in states that criminalize poker—either online or offline. The DOJ could continue to prosecute poker companies that operate in states that criminalize poker through provisions in the Travel Act or RICO, as both statutes can be triggered by predicate offenses under state laws. Ultimately, this Note argues that an online poker company should be able to provide its services to individuals located in states where poker is legal. There has not been


11 See id. at 2–6.

12 Id.


14 See discussion infra Part II.C.

15 See discussion infra Part II.C. The Travel Act provides a means of prosecution for promoting or managing “any unlawful activity.” 18 U.S.C. § 1952 (2012). This includes “unlawful activity” as defined by state law. See, e.g., United States v. Goldfarb, 643 F.2d 422, 426 (6th Cir. 1981) (“Unlawful activity’ is defined as any business enterprise involving gambling offenses in violation of the laws of the state in which they are committed.

16 See discussion infra Part II.C.
a better time for Congress to pass legislation to regulate, rather than ban, the online poker industry.

This Note proceeds in two parts. Part I examines several of the federal statutes that have been used to deter and prosecute this relatively new industry—including the Wire Act of 1961, the Travel Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), and the Illegal Gambling Business Act (IGBA). Part I also reviews a recent, high-profile interpretation of one of these federal criminal statutes—a 2011 memorandum from the DOJ regarding the controversial scope of the Wire Act that could have sweeping effects on the American online gambling industry.

After analyzing the current landscape, Part II advocates for a legislative overhaul of the current maze of federal statutes governing online gambling. In particular, it argues that the timing and politics are ripe for federal legislation aimed at maintaining federalism through a regulatory scheme that allows states to opt in or out. This section proceeds in three sub-parts. Part II.A asserts that a regulatory scheme will provide much-needed transparency to a system that has encouraged secrecy and undesirable conduct among both poker companies and consumers in the United States. Part II.B reasons that, in the aftermath of the 2011 DOJ Wire Act memorandum, a regulatory system should be preferable to the status quo for interests on nearly every side of the issue. On one hand, those who favor expanded Internet gambling prefer a carve-out for online poker. On the other, in the aftermath of the Wire Act opinion, online gambling opponents should prefer a federalist regulatory regime to avoid a "race to the bottom" between states developing their own expansive intrastate gambling operations. Part II.C then proposes a dual enforcement mechanism between the states and the federal government to garner support from state governments and ensure the highest level of compliance.

I. DECADES OF PATCHWORK IN THE FEDERAL CRIMINAL LAW

The federal criminal law governing the Internet gambling industry in the United States consists of a complex web of ill-equipped statutes passed over several decades. Complicating matters, these federal statutes rely heavily on state statutes regulating both online and offline gambling. At both levels of government, many of these statutes were passed decades before

22 See discussion infra Part II.B.
23 See id.
24 See discussion infra Part II.C.
the advent of the Internet. No federal statute specifically mentions online poker. But each statute described below plays a critical part in the deterrence and prosecution of the online gambling industry in the United States.

A. The Wire Act

Over the past two decades, the Wire Act\textsuperscript{25} has been the primary federal statute used by the DOJ to prosecute and deter the online gambling industry.\textsuperscript{26} The statute was enacted in 1961 with a series of federal statutes designed to curb organized crime by cutting off a major source of revenue for the criminal organizations—illegal gambling.\textsuperscript{27} The Attorney General at the time, Robert F. Kennedy, wrote in a letter to the House of Representatives that the Wire Act was enacted:

\begin{quote}
...to assist the various States...in the enforcement of their laws pertaining to gambling...and to aid in the suppression of organized gambling activities by prohibiting the...maintaining of wire communication facilities which...will be used for the transmission of certain gambling information in interstate and foreign commerce.\textsuperscript{28}
\end{quote}

Two major issues have arisen in recent years regarding the scope of the Wire Act: first, whether the statute applies to gambling on the Internet, and second, whether the statute applies to non-sports gaming such as Internet poker.

1. "Stone Tools" and "Brain Surgery": Applying the Wire Act of 1961 to the Internet.—Passed in 1961, it is not surprising that the Wire Act does not mention gambling on the Internet. In pertinent part, the Wire Act provides:

\begin{quote}
Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers...on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers...shall be fined under this title or imprisoned not more than two years, or both.\textsuperscript{29}
\end{quote}

There has been some debate as to whether the "wire communication facility" language in the statute includes the Internet. After all, the Wire Act was originally enacted to curb gambling through the national telegraph wire network in the 1960s—no small variation from the ever-expanding World Wide Web


\textsuperscript{28} Id.

the statute purports to govern today. In the earlier days of online gambling, some scholars argued that "wire communication facility" language should be limited to telephone communications. Today, however, it is generally accepted that the Wire Act applies to transmissions of wagers over the Internet.

Whether it makes sense to apply a 1961 statute to online gaming prosecution is another matter. Testifying before Congress on the current state of the Internet gambling laws in the United States and their effect on the Indian tribes, Professor I. Nelson Rose commented that "...using a 1961 law designed for telegraph wires against Internet poker has always been like using stone tools to perform brain surgery: It might work, but it would be extremely messy."

The DOJ has successfully used the Wire Act to prosecute an individual for operating an online sports betting operation in the past. In United States v. Cohen, the defendant was convicted of conspiracy to violate the substantive provisions of the Wire Act for operating a sports book in Antigua. Although sports gambling in Antigua was not illegal, the defendant took thousands of bets from individuals in the United States, including in New York where, under state law, sports gambling was explicitly illegal. Affirming Cohen's conviction, the Second Circuit stated that "[the defendant] established two forms of wire facilities, internet and telephone, which he marketed to the public for the express purpose of transmitting bets and betting information." The first person to be prosecuted for facilitating online gambling in the United States, Cohen was sentenced to twenty-one months in prison and fined $5000.

2. Sporting Events, Contests, and Statutory Construction: Is the Wire Act Limited to Sports Gambling?—While at least one court and the DOJ have now taken the position that the Wire Act applies to online gambling, there has been much debate over whether the statute applies to forms of gambling other than sports. This is a statutory construction issue: does the phrase "on any sporting event or contest" in the Wire Act modify the entire statute or stand on its own?

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30 See David G. Schwartz, Cutting the Wire: Gaming Prohibition and the Internet 6–7 (2005).
34 United States v. Cohen, 260 F.3d 68, 71 (2d Cir. 2001).
35 Id. at 70–71, 73.
36 Id. at 76.
38 18 U.S.C. § 1084 (2012) (emphasis added) ("Whoever being engaged in the business of bet-
phrase does not modify the entire statute, the Wire Act should not be used to prosecute Internet poker outfits because poker is clearly not a "sporting event or contest" like the sports book in United States v. Cohen.39

Judicial interpretations on this point have varied. In United States v. Lombardo, a federal court in the District of Utah found that the Wire Act does not just apply to sports betting, but to all forms of gambling.40 There, the defendant was charged with operating a website that served "the purpose of providing transaction processing services to illegal gambling websites."41 The court specifically rejected the defendant's argument that "the Wire Act reaches wire communications concerning betting or wagering on sporting events or contests only, and not on other games of chance such as those employed by online casinos ...."42

Conversely, in In re MasterCard International, a federal district court in Louisiana found that the Wire Act did not apply to Internet casino gambling and was limited to "sporting events or contests."43 In MasterCard, a class of gamblers who lost money playing online casino-style games sued various banks and credit card companies alleging a civil RICO violation with an underlying offense of illegal gambling under the Wire Act.44 The court first looked at the text and various cases interpreting the statute, finding that "the plain language of the statute and case law interpreting the statute are clear ...."45 The Wire Act "clearly requires that the object of the gambling be a sporting event or contest."46 Dismissing the complaint, the court stated that "Plaintiffs' argument flies in the face of the clear wording of the Wire Act and is more appropriately directed to the legislative branch than this Court."47 A three-judge panel in the Fifth Circuit unanimously affirmed.48

39 See Man jailed in 1st U.S. Online Gambling Conviction, supra note 36 ("FBI agents accessed the Internet sites and found information about betting on professional and college sporting events such as basketball, hockey, baseball and football.").
41 Id. at 1275.
42 Id. at 1278.
43 In re MasterCard Int'l, 132 F. Supp. 2d 468, 481 (E.D. La. 2001), aff'd, 313 F.3d 257 (5th Cir. 2002).
44 Id. at 473-75.
45 Id. at 480 (citing United States v. Kaczowski, 114 F. Supp. 2d 143, 153 (W.D.N.Y. 2000)); see also United States v. Sellers, 483 F.2d 37, 45 (5th Cir. 1973); United States v. Marder, 474 F.2d 1192, 1194 (5th Cir. 1973).
46 In re MasterCard Int'l, 132 F. Supp. 2d at 480.
47 Id. at 481.
48 In re MasterCard Int'l, 313 F.3d 257, 264 (5th Cir. 2002).
3. The DOJ's Unexpected Change of Heart May Have Mooted Both Questions.— After the DOJ abruptly announced a new stance on the scope of the statute, much of this debate may no longer matter in practice. For nearly a decade, the DOJ took the position that the Wire Act was broad enough to encompass all forms of gambling—not just sports. Since the Wire Act served as an underlying offense for RICO and the Travel Act, the statute was the DOJ's primary deterrent against online gambling. On the Friday evening before Christmas Eve in 2011, however, the DOJ announced a drastic change of course.

In December 2009, officials from the New York and Illinois state lotteries wrote to the DOJ requesting an opinion regarding the legality of gambling through online intrastate lotteries. The states were primarily concerned with the Wire Act prohibiting their gambling operations because the Unlawful Internet Gambling Enforcement Act (UIGEA) expressly exempts wagers "initiated and received or otherwise made exclusively within a single state . . . ." If the Wire Act did not apply to the Illinois and New York state lotteries, the states reasoned that they should be free to set up online intrastate gambling operations without the interference of the UIGEA or any other federal statutes.

Two years later, the DOJ responded with a curiously timed and detailed thirteen-page memorandum stating that the Wire Act should only apply to sports gambling. After a thorough analysis of the plain text of the statute and its legislative history, Assistant Attorney General Virginia Seitz found that "[i]nterstate transmissions of wire communications that do not relate to a 'sporting event or contest' fall outside of the reach of the Wire Act." The states could go forward with their online lottery programs and, more significantly, the DOJ had drastically changed its opinion on the scope of the statute. Without the Wire Act to deter Internet poker operations, the DOJ must now turn to other federal criminal statutes. And unless the federal government passes additional

49 See, e.g., GAO Internet Gambling, supra note 26, at 3 n.4 ("DOJ generally takes the view that the Wire Act is not limited to sports–related gambling activities, but case law on this issue is conflicting.").


53 For details on the UIGEA, see discussion infra Part I.D.


55 Id. at 1–2.

56 Id. at 1.
anti-gambling legislation, the states will be able to expand their intrastate online gambling industries to include any form of gambling not involving sports.\textsuperscript{57}  

\textbf{B. The Travel Act}  

The Travel Act is another piece of legislation passed before the advent of the Internet that has been used to prosecute online gambling companies.\textsuperscript{58} Like the Wire Act, the Travel Act was enacted in 1961 as a part of Attorney General Robert Kennedy’s initiative to combat organized crime.\textsuperscript{59} The Travel Act criminalizes interstate or overseas travel, use of the mail, or use of “any facility in interstate or foreign commerce, with intent to . . . promote, manage, establish, carry on, or facilitate . . . any unlawful activity.”\textsuperscript{60}  

“Unlawful activity” is the critical phrase in the statute. Without any “unlawful activity” to serve as a predicate offense, there can be no violation of the Travel Act.\textsuperscript{61} Activity can be unlawful under either state or federal law to trigger the Travel Act.\textsuperscript{62} In the Act’s definition of “unlawful activity,” the statute includes “any business enterprise involving gambling” but does not provide a definition of “gambling.”\textsuperscript{63} Rather, the Act depends on the definition of “gambling” and “unlawful activity” as found in “the laws of the State in which [the crime] is committed or of the United States.”\textsuperscript{64} In \textit{United States v. Goldfarb}, a case involving the prosecution of an improperly managed casino in Nevada, the court stated that “[i]t is abundantly clear that as a predicate to a Travel Act conviction, absent a distinct violation of a law of the United States, the defendants must have engaged in some form of unlawful activity prohibited by the law of [the state where the activity took place].”\textsuperscript{65}  

So even without a definition of “gambling,” the Travel Act can provide a federal means of prosecution against the online poker industry when used in conjunction with another state or federal statute. With the current statutory scheme, the Travel Act’s predicate offense for an online poker operation could be a violation of the UIGEA, the Illegal Gambling Business Act,\textsuperscript{66} or a state law criminalizing poker or online gaming. The Travel Act does not, on its own, provide a sufficient definition to prosecute online poker operations.\textsuperscript{67}  

\textsuperscript{57} See discussion \textit{infra} Part II.A.  
\textsuperscript{61} See Flood, \textit{supra} note 59, at 1045.  
\textsuperscript{62} See id.  
\textsuperscript{64} Id. § 1952(b)(1)(ii).  
\textsuperscript{65} United States v. Goldfarb, 643 F.2d 423, 426 (6th Cir. 1981).  
\textsuperscript{66} See discussion \textit{infra} Part I.E.  
\textsuperscript{67} Interestingly, the indictments against the poker companies allege a violation of the
Similar to the Travel Act, the Racketeer-Influenced and Corrupt Organizations Act (RICO) does not, by its own terms, criminalize online gambling. Enacted in 1970, RICO was obviously drafted well before the Internet but has nevertheless been used as a significant deterrent to the online gambling industry. The statute is highly complex and notoriously broad, but a full analysis of the statute and its history is unnecessary for an understanding of its impact on poker and online gambling. At its most basic level, a violation of RICO requires proof of the operation of an “enterprise” engaged in “racketeering activity.”

The definition of “enterprise” in the statute is very broad. Under RICO, an enterprise “includes any . . . corporation, association, or other legal entity.” An entity operating an Internet poker website, whether organized in the United States or elsewhere, would almost certainly meet this broad “enterprise” requirement.

RICO enumerates several examples of “racketeering activity” that can trigger liability under the statute. A predicate “racketeering activity” can arise as a violation of a particular state or federal statute. Several of these federal statutes are expressly listed in RICO as triggers of “racketeering activity,” including the Wire Act, the Travel Act, or the Illegal Gambling Business Act (IGBA).

The requirement of a triggering offense is critical to an understanding of the current and future application of RICO to online gambling operations. In practice, the Wire Act can no longer serve as a triggering offense for online poker operations after the DOJ’s 2011 memorandum describing the statute’s limited scope. Now, federal prosecutors and plaintiffs in civil suits must turn to the UIGEA, the IGBA, or state statutes to trigger RICO’s enhanced penalty and damages provisions.

While RICO relies on the gambling definitions of other federal and state statutes to impose civil or criminal liability, the statute remains a critical deterrent to operating an online gambling enterprise because of its severe

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69 RICO violations were an integral part of the “Black Friday” indictments. See Black Friday U.S. Attorney Press Release, supra note 6; Verified Second Amended Complaint, supra note 9.


72 See § 1961(4) (defining “racketeering activity”).

73 See id. For a discussion of the IGBA, see infra Part I.E.

74 See discussion supra Part I.A.3.
criminal and civil penalties. A criminal violation of RICO can result in imprisonment for twenty years to life, depending on the nature of the offense. The civil implications are also particularly severe for a violator moving a lot of money—for example, the popular online poker companies targeted in the “Black Friday” indictments—because the statute allows for treble damages, costs, and attorneys’ fees.

D. The Unlawful Internet Gambling Enforcement Act

The Unlawful Internet Gambling Enforcement Act is the only federal law to specifically address Internet gambling. The UIGEA was enacted in 2006 specifically “because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.” However, the UIGEA does very little to define “illegal gambling” and has been criticized by those on both sides of the expanded Internet gambling debate as flawed legislation that was hurriedly enacted without substantial congressional consideration. The UIGEA provides that “unlawful Internet gambling” means:

to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.

Thus, rather than providing a clear definition of “unlawful Internet gambling,” the UIGEA simply defers to the other federal statutes, which, as described above, provide little help in defining the games that are illegal. In the “Black Friday” indictments, for example, the DOJ relied on New York state law definitions to move forward on both direct violations of the UIGEA and conspiracy to violate the UIGEA.

The enforcement provisions in the statute are unique. Rather than directly banning individuals from gambling online or preventing online poker companies from providing gambling services in the United States, the UIGEA

76 See Verified Second Amended Complaint, supra note 9, at 109–110, 112, 115 (relying on RICO to make out forfeiture claims); Black Friday U.S. Attorney Press Release, supra note 6, at 1–2.
81 See Black Friday U.S. Attorney Press Release, supra note 6, at 1–2.
targets the financial transactions used to fund online gambling operations.\(^2\) The UIGEA requires financial institutions, such as credit card companies and banks, to identify transactions involving potential “unlawful Internet gambling” operations and block them.\(^3\) Significantly, a violation of the UIGEA can also trigger liability under RICO or the Travel Act.\(^4\)

\section*{E. The Illegal Gambling Business Act}

The IGBA was enacted to curb illegal gambling more generally.\(^5\) Therefore, unlike the statutes described above, the Illegal Gambling Business Act\(^6\) is not limited to online gambling.\(^7\) Still, the IGBA remains a powerful instrument to deter online poker operations. In the “Black Friday” indictments, for example, the DOJ alleged that the poker companies violated the IGBA.\(^8\) The punishment sought for each violation was substantial: five years in prison and a fine possibly exceeding $250,000.\(^9\)

The Illegal Gambling Business Act is similar to other federal gambling statutes in that it provides little guidance in defining “illegal gambling.” The Act provides a non-exhaustive list of activities that constitute gambling, including “pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.”\(^9\) The statute never mentions poker.

Instead, the IGBA may criminalize poker through the laws of the state where the business is located. The IGBA states that an “illegal gambling business” is one that, among other things, “is a violation of the law of a State or political subdivision in which it is conducted ....” The Second Circuit recently interpreted this statute in \textit{United States v. DiCristina}, holding that the IGBA

\begin{itemize}
  \item \(^3\) See §§ 5363, 5367.
  \item \(^4\) The indictment against the three major online poker companies alleges, in part, a conspiracy to violate this provision of the UIGEA. See Black Friday U.S. Attorney Press Release, \textit{supra} note 6, at 1–3.
  \item \(^5\) United States v. Sacco, 491 F.2d 995, 998 (9th Cir. 1974) (“The legislation was aimed at curtailting syndicated gambling, the lifeline of organized crime ....”).
  \item \(^8\) See Black Friday U.S. Attorney Press Release, \textit{supra} note 6, at 2, 5–7.
  \item \(^9\) Id. at 6.
  \item \(^11\) Id. § 1955(b)(1).
criminalizes the act of operating a business that, among other things, "violates the law of the state in which business is conducted." 92

Interestingly, this Second Circuit holding reversed an extensive district court opinion that found poker outside the scope of the IGBA. 93 The lower court made national headlines in 2012 by interpreting the IGBA to exclude poker from its definition of "gambling" because, unlike other casino games defined as "games of chance," poker was "a game of skill." 95 The Second Circuit asserted no opinion as to whether poker was a "game of skill" or "game of chance," instead holding that "the question of whether skill or chance predominates in poker is inapposite to this appeal." 96 And because poker was illegal under the law of the state in which the defendant operated his poker business, the Second Circuit found that the defendant violated the IGBA. 97

There are two significant points to take from the IGBA and the litigation over the statute's interpretation. First, the IGBA is one in a long line of federal statutes to rely on state law to define illegal gambling. There is no uniform standard of liability across the country under this statute; liability only attaches in states where the particular conduct is illegal. Second, the district court opinion illuminated a popular argument for distinguishing poker from other forms of gambling: the distinction between games of skill and games of chance.

II. GOOD POLITICS AND BETTER POLICY: IT'S TIME FOR FEDERAL ACTION ON INTERNET POKER

The timing has never been better to fold the current mess of federal legislation and begin anew with a federalist scheme of regulation. First, the current scheme is not working and has led to deceptive and undesirable conduct that fails to protect American consumers. A federalist regulatory scheme will provide much-needed transparency within the Internet poker industry to protect those consumers. Second, after the DOJ's flip-flop on its interpretation of the Wire Act, a new system should be preferable to the status quo for many interested parties all over the political spectrum. A federalist

92 United States v. DiCristina, 726 F.3d 92, 102 (2d Cir. 2013).


96 United States v. DiCristina, 726 F.3d 92, 100 (2d Cir. 2013).

97 Id. at 98–100.
scheme that bans many forms of Internet gambling but regulates online poker is likely a preferable compromise for anti-gambling activists, proponents of expanded gaming, those concerned with the power of the states in an area traditionally under their control, and those concerned with maintaining strong federal enforcement authority. Careful drafting will be critical to the proposed legislation to assuage interested parties that may have been overlooked, such as powerful state lotteries and convenience store owners.

A. A New Scheme Will Provide Much-Needed Transparency to Protect American Consumers

The recent history of online gambling prosecutions has produced a great deal of evidence that the current system is not working. The patchwork of state and federal statutes used to prosecute and deter Internet poker in the United States has resulted in behavior that is less desirable than the conduct it was intended to prohibit. For over a decade, a primary concern of the United States government regarding the online poker industry has been consumer protection from fraud.\(^9\) The current maze of federal legislation is not working to achieve this objective; Americans are still playing poker and online poker companies have resorted to various forms of deception to avoid American laws. A system that regulates, rather than outlaws, online poker should curtail much of this behavior and allow Internet poker companies to meet the strong demand for Internet poker in America.

Some of the most serious allegations in the “Black Friday” complaint against the major poker companies involved an elaborate cover-up and attempt to circumvent the UIGEA.\(^9\) The complaint alleged money laundering, bribery and that the operators of the poker sites set up faux companies to funnel money from players in the United States to the poker companies.\(^10\) These faux entities were allegedly created to avoid alerting the credit card companies and financial institutions of a UIGEA violation.\(^11\)

The “Black Friday” complaint is not the first time that an online gambling company has been accused of creating a facade to circumvent American online gambling laws. In United States v. Lombardo, discussed above, the defendant was found to have established a deceptive website, known as the “Gateway,” to fund American online gambling accounts.\(^12\) The court found that “the Gateway processed the bettor’s credit card payment information by mis-classifying the charge in order to hide its gambling nature, thus duping

\(^10\) See id. at 2.
\(^11\) Id.
\(^12\) United States v. Lombardo, 639 F. Supp. 2d 1271, 1275 (D. Utah 2007) ("Through the various entities, the Enterprise maintained a website called the 'Gateway,' which it used to facilitate payments made by bettors to various gambling websites.").
banks into disbursing funds."\(^{103}\) The case was decided in 2007, but the faux corporation was transferring money to illegal online gambling operations even prior to the UIGEA's enactment in 2006.\(^ {104}\) Thus, for over a decade, the current federal statutory patchwork and attempt to ban online poker has lagged behind corporations' efforts to satisfy the intense American demand to gamble on the Internet.

Congressional action to allow states to legalize and regulate online poker could put a quick end to this undesirable conduct. A regulatory scheme would allow for a new legal and transparent market for online poker sites. These legal poker sites could satisfy the demand that has given rise to the deceptive operations that are antithetical to the government's stated goal of encouraging American consumer protection. The scheme would encourage accountability among the Internet poker companies and protect American citizens from the fraudulent practices that have grown to dominate the industry over the past decade.

**B. The Politics Make Sense for a Carefully Drafted Statute**

A recent effort to pass this type of legislation illustrates how the political climate, while ripe for change, is also replete with potentially fatal obstacles. At the end of the 112th session of Congress, Harry Reid, the Democratic leader of the Senate from Nevada, and Jon Kyl, the former Senate Republican Whip from Arizona, created a unique coalition of political interests in an effort to legalize and regulate online poker but ban other forms of online gambling.\(^ {105}\) The two senators garnered some bipartisan support for a legal and regulated Internet poker regime in the final weeks of 2012, with Senator Reid telling one news outlet that "[w]e suddenly have Republican votes on Internet poker, two weeks before Christmas."\(^ {106}\)

Despite wide recognition of the problem and unprecedented support for a new regime, the senators' legislation was never introduced and the bill died

\(^{103}\) Id.

\(^{104}\) See id. at 1276 ("Count 1 of the Indictment also specifically alleges that 'no later than 2000,' Defendants knowingly and intentionally conspired to participate in and conduct the affairs of the Enterprise . . . .").

\(^{105}\) See Alexandra Berzon, Bipartisan Duo Pushes Online Gambling: Long-Shot Measure by Reid, Kyl Would Double Down on Online Poker but Limit Other Forms of Internet Wagers in States, WALL ST. J. (Dec. 5, 2012), http://online.wsj.com/article/SB100014241278873337100457815817413937486.html ("An unlikely coalition including Sens. Harry Reid and John Kyl, casino companies, anti-gambling activists, and convenience-store owners is pushing legislation that would legalize online poker but ban other Internet gambling . . . .").

\(^{106}\) Alan Farnham, Online Poker Could Become Legal in U.S. with Proposed Bill, ABC News (Dec. 13, 2012), http://abcnews.go.com/Business/online-poker-regulation-stalls-amid-tax-revenue/story?id=17948598. Senator Reid also noted that the legislation would die without a vehicle for enactment. Id. ("Without being vulgar, what the hell would I put it on?").
without a vehicle for enactment.\textsuperscript{107} After a draft of the legislation leaked, the negative response from various interest groups including state lotteries, Indian tribes, and gaming officials outside of Nevada (which the proposed legislation would have made “the de facto issuer of Web poker licenses”) revealed the need for delicacy in drafting a future bill.\textsuperscript{108} This Note argues that online poker legislation is not only passable, but that online poker as an alternative to the status quo is a necessity for so many interest groups that Congress must do something.

1. Gambling Opponents Should Prefer Regulations to the Status Quo.—Congress should act quickly to pass federal legislation to regulate online gambling because both advocates and opponents of expanded gambling prefer regulation over the current federal patchwork.\textsuperscript{109} Recall that after the 2011 DOJ memorandum limiting the scope of the Wire Act, the states are free to legalize any form of intrastate online gambling, with the exception of sports gambling.\textsuperscript{110} For those opposed to expanded gambling, time is of the essence to head off what could potentially be a significant online gambling expansion within the individual states.\textsuperscript{111} Without federal action, the states are free to sanction a wide range of purely luck-based casino games such as lotteries, roulette, blackjack, or even slots, to be played on the computers, smart phones, and tablets of their residents or visitors physically located within their borders.\textsuperscript{112}

In fact, several states have already begun to implement such programs. Since the DOJ memorandum, at least seven states and the District of Columbia have considered legislation authorizing some form of Internet gambling.\textsuperscript{113}

\textsuperscript{107} See id.

\textsuperscript{108} Steve Friess, \textit{How Reid Lost His Internet Poker Gamble}, POLITICO (Jan. 23, 2013), http://www.politico.com/story/2013/01/how-reid-lost-his-internet-poker-gamble-86595.html (reporting that Reid’s inability to win over “powerful stakeholders—from lottery directors to Native American tribes to gaming officials”—helped lead to the failure of the draft legislation).

\textsuperscript{109} See, e.g., Berzon, supra note 105 (“As Congress debates the federal budget, a Democratic senator strongly backed by Nevada casino interests and a Republican senator staunchly opposed to betting are working together to push an online-gambling bill into the mix.”).

\textsuperscript{110} See discussion supra Part I.A.3.

\textsuperscript{111} Sen. John Kyl pushed for legalization in 2012, suggesting that legislation legalizing online poker but banning other Internet gaming would be a “compromise” for antigambling activists. See Berzon, supra note 105.

\textsuperscript{112} One can only imagine the reaction amongst social conservatives—or the National Council on Problem Gaming— to the possibility of high-stakes slots or roulette on smartphones. See generally 2013 Goals, Nat’l Council on Problem Gaming (Feb. 4, 2013), http://www.ncpgambling.org/files/Board/Apr2013/2013%20Goals%20Statement%20NCPG.pdf (stating that a core goal of the NCPG is to “[c]onduct and support advocacy at [the] state and Federal level”).

Perhaps unsurprisingly, Nevada was the first to approve regulations concerning an intrastate online gambling system.\footnote{114} Delaware quickly followed, passing the Delaware Gaming Competitiveness Act of 2012.\footnote{115} After multiple failed attempts in New Jersey, Republican Governor Chris Christie signed a bill to allow Internet gambling in New Jersey in February 2013.\footnote{116} Following a conditional veto of an earlier online gambling bill, Governor Christie told one media outlet that New Jersey “should be an epicenter for that business.”\footnote{117} Under the New Jersey system, this regulated industry will be taxed at fifteen percent, and the state expects online gambling to help raise casino revenue by roughly $200 million in just one year.\footnote{118} New Jersey’s online poker system is now in its trial phase.\footnote{119} Although Utah became the first state to explicitly criminalize online gambling in 2012,\footnote{120} numerous other state legislatures have followed Nevada, Delaware, and New Jersey, proposing legislation that would allow online poker, online lotteries, or other forms of casino-style online gambling.\footnote{121}

Also, in light of the massive tax revenues expected in New Jersey and other states, some commentators expect that many other states will follow with their own Internet gambling legislation to fill substantial budgetary shortfalls.\footnote{122} Anti-gambling advocacy groups oppose a system that allows states to define or de-criminalize what is now “illegal Internet gambling” at the federal level.\footnote{123} As the expansion of intrastate online gambling in states like Nevada


118 Muskal, supra note 116 (“The state estimates that online gambling will help push the state’s Casino Revenue Fund from $235 million this year to $436 million next year.”).


121 See 2012 Legislation Regarding Internet Gambling or Lotteries, supra note 113 (noting that Delaware’s bill was signed into law June 28, 2012, and describing proposed legislation in other states).

122 See Cooper, supra note 114; see also I. Nelson Rose & Rebecca Bolin, Game On for Internet Gambling: With Federal Approval, States Line up to Place Their Bets, 45 Conn. L. Rev. 653, 656 (2012).

and New Jersey indicates, anti-gambling advocates' fears of full-blown Internet casinos are not completely unfounded. Former Senator Jon Kyl, for example, has been clearly opposed to any form of expanded Internet gambling since the industry's earliest days. In 1998 and 1999, Senator Kyl introduced the "Internet Gambling Prohibition Act," which would have provided stiff penalties for operators and participants in various forms of Internet gambling.  

Yet, despite his long-standing opposition, and projecting a vast expansion of Internet gaming among the states, Senator Kyl joined forces with Senator Reid in 2012, as discussed at the beginning of this section. They sought to strengthen the UIGEA by closing loopholes and emphasizing strict enforcement against all types of Internet gambling—except poker. Looking for support among socially conservative Republicans, Senator Kyl reasoned that "[o]ne man's online poker legalization bill is another man's Internet gambling ban . . . ." This willingness to compromise from a self-avowed social conservative should help to garner critical support from interests at both ends of the ideological spectrum.

2. Online Gambling Proponents Should Prefer a Regulatory System.—Many proponents of online poker have advocated vigorously for a regulatory system to head off the various gambling expansions by the states and implement a universal regulatory scheme. One national advocacy group—the Poker Players Alliance—is advocating for "laws that provide poker players with a secure, safe and regulated place to play." American poker players desire regulation for security and transparency and are willing to pay the taxes in exchange.  

In addition, most casinos and lottery directors, as potential operators of online poker entities, support online gambling. The major problem within this industry is not whether expanded gaming should be allowed at all, but instead how licenses would work. Casinos are in favor of expanded Internet gambling only so far as they can share in the profits. For online poker legislation

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125 See supra notes 105–106 and accompanying text.

126 See Friess, supra note 108.


128 See, e.g., id.; Hartley Henderson, Poker Players Rebuff Common Online Gambling Myths, iGAMING BUS. N. AM., Dec. 2013-Jan. 2014, at 38, 41–42, available at http://www.usgamingsurvey.com/USGS_in_JGB.pdf (reporting that surveys conducted by the U.S. Gaming Survey indicated that, contrary to popular belief, poker players "are more than happy to declare all winnings [for tax purposes] if it means the ability to play legal, regulated online poker").

129 One gaming–industry insider told Politico that "[Reid and Kyl's 2012 draft of the] poker bill was rife with points that were going to raise objections that were going to kill the bill . . . . Native Americans [who operate powerful tribal casinos] didn't see how their role would be advantageous to them." Friess, supra note 108.
to survive, legislators must take care to speak with some of the most influential interests: existing American casinos and online poker companies who already have the capacity to operate Internet poker rooms, state lotteries, state gaming commissions, and Indian tribes. The specific terms of the necessary compromises are beyond the scope of this Note. But if online gambling legislation history is any indication, all of these groups must be consulted before legislation is reintroduced.

C. A Federalist Enforcement Scheme Can Garner Support and Bolster Compliance

What should a legal system of Internet poker look like in the United States? Federalism is critical; legislation that does not give the states the ability to opt out is surely doomed. This Note proposes a federal regulatory scheme with a federalist enforcement mechanism that involves both state governments and the DOJ.

1. The States Must Play a Vital Role in Enactment and Enforcement.—One common argument against federal gambling legislation is historical. Gambling has traditionally been an area of state regulation. Any new federal online gambling legislation must soothe the states' concerns by giving each state the opportunity to opt out of the federal program. Utah, for example, is not likely to approve of the same plan that a state with a rich gambling history like Nevada or New Jersey would. Under the new, federalist system proposed in this Note, a regulated online poker company would be able to host games between members located in different states that do not criminalize poker—but not in those states that have opted out.

How could an online poker company or regulatory entity possibly track the location of all of its users to ensure compliance? The technology is already available and, in fact, is already being used to monitor the location of Internet gamblers in various states that have started intrastate gambling operations after the DOJ's Wire Act memorandum. Various companies specializing in IP address location, such as Geobytes, Inc., can reliably notify website operators of the exact location of visitors to their sites. This technology is now commonly

130 See U.S. Department of Justice Opinion on Internet Gaming: What's at Stake for Tribes: Hearing Before the S. Comm. on Indian Affairs, 112th Cong. 627 (2012) (statement of Dean Kevin K. Washburn) (“States should be able to opt out of gaming . . . .”); id. (statement of Professor I. Nelson Rose) (“A federal licensing law would not really change things that much: States have to be able to opt in or out.”).
131 See id. at 6.
132 See 2012 Legislation Regarding Internet Gambling or Lotteries, supra note 113.
134 See, e.g., Geobytes – Because Everyone's Somewhere, GEOBYTES, http://www.geobytes.com/
used to regulate user access to websites based on location and to provide other services to third-parties, particularly advertising departments.\textsuperscript{135}

Using geolocation technology, a private entity providing Internet poker services could limit access to those states that have opted into the federal regulatory scheme. The state or federal governments could regulate these entities using their own geolocation technology, but the threat of prosecution with stiff penalties at the state and federal levels should sufficiently encourage compliance. The individual online poker companies, then, would retain complete authority to allow or selectively implement an online poker program, while completely banning access within the borders of states like Utah that have decided to pass online gambling bans.\textsuperscript{136}

2. The DOJ Should Maintain Enforcement Power.—The federal government should also maintain a substantial prosecutorial authority over the industry. A federalist enforcement mechanism can maintain the investigatory and prosecutorial resources of the United States government while ensuring compliance with the minimum standards set forth by a regulatory body. Further, the federal government will be able to rely on existing statutes to prosecute the poker companies operating outside the boundaries of the regulatory scheme.

Two of the most significant federal instruments already existing to deter and prosecute online gambling—the Travel Act and RICO—should still serve a vital role in the federal enforcement of a new regulatory system. Both of these statutes require predicate offenses for their enforcement.\textsuperscript{137} Gambling statutes in the states that provide a definition of “illegal gambling” can serve as predicate offenses to trigger both RICO and the Travel Act.\textsuperscript{138} Thus, even though Congress will have decriminalized online poker at the federal level, the federal government could retain enforcement power with stiff civil and criminal penalties in states that have opted out of the proposed federal regulatory system through either of these two statutes. Further, even in states that opt into the online poker regulatory system, the DOJ would retain enforcement power over violators that step out of the regulatory boundaries. Treble damages and potential jail time under RICO should be a strong deterrent when combined with any other penalties in the legislation and promote full compliance.

\textsuperscript{135} Another common example of limiting access through geolocation technology is the black-out technology in live-streaming television. See, e.g., FAQs, Watch ESPN, http://espn.go.com/watchespn/faq#blackout (last visited Feb. 16, 2014) (discussing black-outs based on geographic region).

\textsuperscript{136} The full impact of geolocation technology and its implications in federalist gambling regulation is beyond the scope of this note. For a thorough discussion, see Kevin F. King, Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot, \textit{11 Colum. Sci. \& Tech. L. Rev.} 41 (2010).

\textsuperscript{137} See discussion supra Part I.B and Part I.C.

\textsuperscript{138} See discussion supra Parts I.B–C.
Conclusion

The time has come for Congress to act on legislation that abolishes the current maze of old and new federal statutes and establishes a federal regulatory scheme with a federalist enforcement mechanism for the online poker industry. The current system is not working to protect Americans and has led to a murky culture of money laundering, faux institutions, and secret wire transfers. There has not been a better time for significant change. The DOJ’s new interpretation of the Wire Act has already spurred states to test their own systems of intrastate online poker play. Federal legislation could set minimum requirements for these states to follow, legalize interstate play, and allow states to opt out, leaving state governments with some discretion over an issue traditionally handled by the states. In addition, such regulation—as an alternative to the status quo—has the potential to satisfy both opponents and proponents of online gambling. The time has come for Congress to protect the millions of Americans playing online poker each year by legalizing and legitimizing this industry. Now more than ever, the pot’s right for Congress to go “all in” for Internet poker.