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THE GREAT WILDCARD: HOW 2011 SHOOK THE ONLINE POKER WORLD AND BECAME A GAME-CHANGER IN THE BATTLE FOR LEGALIZATION

Kerry O’Brien*

I. INTRODUCTION

Call it a dead man’s hand: On Friday, April 15, 2011, Preet Bharara, the United States Attorney for the Southern District of New York, and Janice Fedarcyk, the Assistant-Director-in-Charge of the New York Field Office of the Federal Bureau of Investigations, unsealed an indictment against the operators of three Internet poker websites. The indictment charged the eleven defendants with conspiracy to violate the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), operation of an illegal gambling business, conspiracy to commit bank fraud, conspiracy to commit wire fraud, and money laundering conspiracy. In addition, the government seized the websites themselves. Users who tried to log into the sites were greeted by a message informing them that “This domain name has been seized by the Federal Bureau of Investigation.” Virtually overnight, the government dealt a crushing blow to the online poker industry in the United States.

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1. Those charged in the indictment were:
   - Isai Scheinberg, the founder of Pokerstars
   - Paul Tate, Director of Payments for PokerStars
   - Raymond Bitar, the CEO of TiltWare, which provided software for Full Tilt Poker
   - Nelson Burtwick, Director of Payments for TiltWare
   - Scott Tom, part-owner of Absolute Poker
   - Brent Beckley, Director of Payments and Risk Management at Absolute Poker
   - John Campos, Vice-Chairman of the Board and part-owner of SunFirst Bank; and
   - Ryan Lang, Ira Rubin, Chad Elie, and Bradley Franzen, all payment processors.


6. Id.

Three of the world’s biggest poker websites no longer served U.S. residents. \(^8\)

Mourning gamblers around the country referred to April 15th as “Black Friday.” \(^9\) Only days before the shut-down, Internet gamers had cheered as Washington D.C. became the first United States jurisdiction to allow internet gambling within its borders. \(^10\) Online gaming advocates had hoped state and federal legislatures would soon follow suit and legalize online gaming throughout the country. \(^11\) Instead, players woke up on April 15th to find that their accounts had been frozen and their world of online poker had all but disappeared. \(^12\)

Since the UIGEA was passed in 2006, authorities have not been able to come to agreement on even the most basic of questions: Is online poker illegal? \(^13\) The government has steadily argued that it is, \(^14\) but gaming advocates have pointed to vague statutory language to argue that it is not. \(^15\) The Black Friday case has the potential to settle the matter once and for all, since “‘[i]t will be the first time the Department of Justice takes on the looming question of whether federal law prohibits online poker.’” \(^16\)

Aside from Black Friday, a number of new developments in 2011 have highlighted the various ambiguities and inconsistencies in current gaming law and have showcased the political obstacles that must be conquered before remedial legislation can be imposed. During this year alone, Rep. Barney Frank and Sen. Jon Kyl, Congress’ most vocal advocate and its most vocal detractor of online poker, respectively, announced their retirements. Two pro-Internet gaming bills were introduced in Congress, one of them focusing solely on legalizing online poker. Washington D.C. became the first U.S. jurisdiction to allow Internet gambling within its borders. The Nevada legislature approved a bill legalizing intrastate web-poker and is poised to become the first state in the nation with a legalized, regulated Internet poker system in place.

This paper will examine the impact of 2011 on the battle over Internet poker. Part II will provide a short background of the “poker boom” in the United States, as well as a brief explanation of the UIGEA and its legislative predecessors. Part III will analyze the major parties in the struggle for federal legalization and explore the


8. Id.

9. Id.


11. Id.


13. Poker Face Off, supra note 7.


15. See Matt Richtel, Authorities Crack Down on Three Poker Sites, N. Y. TIMES, Apr. 16, 2011, in which Alfonse D’Amato, the Chairman of the Poker Players Alliance, was quoted: “Online poker is not a crime and should not be treated as such.”

16. Id.
current and future Congressional atmosphere in relation to its stance on legalization. Part IV will discuss and examine the major events impacting intrastate gaming in 2011, focusing on legalization in Washington D.C. and Nevada. Part V will discuss the developments in the Black Friday case and the recent Justice Department opinion clarifying the Wire Act of 1961. Part VI will provide a brief conclusion.

II. THE POKER BOOM AND THE UIGEA

The Poker Explosion in the United States

In 2003, a perfect storm was brewing in the poker world. A 28-year-old accountant from Nashville, Tennessee who liked to play online poker in his spare time found himself at the final table in the World Series of Poker (WSOP). A revolutionary little camera installed into the poker tables allowed television viewers for the first time to see the players’ cards as the game was being played, and ESPN was broadcasting the game to millions of television screens throughout the United States. The accountant, a man by the name of Chris Moneymaker, won the event and with it the $2,500,000 prize. Moneymaker’s victory led to an unprecedented boom in the poker industry that would come to be known as “The Moneymaker Effect.”

When Chris Moneymaker entered the main event at the 2003 World Series of Poker, he was one of 839 entrants. The next year, enrollment increased by over 300% when 2,576 entrants participated in the main event. Indeed, the WSOP’s main event has regularly drawn at least 5,500 people per year since 2005, topping out with 8,773 entrants in 2006. Moneymaker’s win also triggered a “televised poker” craze that led to the creation of several new poker-themed television series and made celebrities out of poker professionals like Doyle Brunson, Adam Goldman, Internet Player Flush with Pride after Second Poker Amateur Wins Big, The Seattle Times, May 30, 2004, available at http://community.seattletimes.nwsource.com/archive/?date=20040530&slug=poker30.


Team PokerStars, supra note 18.

Id. (“Inspired by the tale of how an amateur managed to beat hundreds of world-class players and earn a huge cash prize, millions of people began playing online and in card rooms across the globe.”).


Id.


For example, Celebrity Poker Showdown (Bravo Network), Poker Superstars Invitational Tournament (Fox Sports Net), Poker Royale (GSN), High Stakes Poker (GSN), Poker After Dark (NBC), and Pro-Am Poker Equalizer (ESPN).

Negreanu, and Gus Hansen.

Moneymaker qualified for the 2003 WSOP by winning an $89 satellite match on PokerStars.com, and his eventual victory drove hoards of Americans onto the Internet to seek their poker fortunes. However, the increased attention to the poker world soon strengthened the government’s interest in investigating the legality of online gaming. What was once hailed as poker’s greatest victory would soon become the impetus for a wave of regulatory measures, culminating with the controversial passage of the UIGEA in 2006.

Precursors to the UIGEA

Before the UIGEA was enacted in 2006, the federal government attacked online gaming with a variety of different statutes. Of these, the most commonly used was the Wire Act of 1961, which prohibited the transmission of wagering information. This statute criminalized the behavior of those who “knowingly use[d] a wire communication facility for the transmission . . . of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . .” Having been enacted well before the rise of the Internet, the Wire Act makes no specific mention of online gaming. Though the Department of Justice for years had steadily maintained that the Wire Act prohibited all forms of Internet gambling, the U.S. Court of Appeals in the Fifth Circuit found otherwise, holding “that the key statutory language refers only to wagers made on sports.” Because of the confusion over whether and how the Wire Act and other federal statutes applied to Internet gaming, Congress came to the conclusion that new legislation was needed on the matter.

19, 2012).  
32. Michael A. Tselnik, Note, Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act, 35 HOFSTRA L. REV. 1617, 1626 (2007). The most commonly used statutes were Conspiracy, Money Laundering, the Amateur and Professional Sports Act, the Racketeer Influenced and Corrupt Organizations Statutes, the Travel Act, and the Wire Act. Id.
34. Tselnik, supra note 32, at 1626.
37. The Justice Department recently reversed its stance on whether the Wire Act prohibits online gambling. For further discussion, see discussion infra Part V.B.
39. Tselnik, supra note 32, at 1627.
40. Wickert, supra note 36, at 222 (referencing H.R. Rep. No. 109-412, pt. 1, at 2 (2006) (“New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet,
In 1996, Senator Jon Kyl of Arizona attempted to amend the Wire Act to include Internet gambling by proposing the Internet Gambling Prohibition Act (IGPA). In addition to explicitly referencing the Internet “as a means of communication over which a person is prohibited from placing or receiving a wager,” the IGPA also defined “bets or wagers” as “the staking or risking by any person of something of value . . . upon the outcome of a contest, sporting event, or game of chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.” Thus, the IGPA would have criminalized online casinos and online poker rooms much in the same way that the Wire Act already prohibited sports wagering. Though the IGPA garnered some support in Congress, it “never made it out of committee in 1997, passed the Senate but not the House in 1998, and after several amendments failed again in 1999 and 2000.” Another bill also aimed at the prohibition of Internet gaming, the Unlawful Internet Gambling Funding Prohibition (UIGFP), suffered a similar fate and failed to pass in both 2001 and 2002.

Enacting the UIGEA

In 2006, the Unlawful Internet Gambling Enforcement Act was a last minute addition to the Security and Accountability for Every Port Act of 2006 (SAFE Port Act). The SAFE Port Act was passed just minutes before Congress adjourned for its fall recess, and President Bush signed the Act into law on October 13, 2006, less than two weeks after it had been passed. Since its surprise passage, the UIGEA has garnered a number of detractors, with one news outlet calling the legislation “cumbersome, confusing and potentially ineffective - further especially where such gambling crosses State or national borders.”)

41. Leonard, supra note 38, at 523.
43. Leonard, supra note 38, at 524.
44. S. 474.
45. Wickert, supra note 36, at 223.
46. Leonard, supra note 38, at 524.
48. Leonard, supra note 38, at 524.
52. Michael McCarthy and Jon Swartz, New Legislation May Pull the Plug on Online Gambling, USA TODAY, Oct. 3, 2006 (“The surprise passage of the law threw the online gambling industry into a tailspin Monday.”); see also Chuck Blount, Online Poker’s Future Stuck in Muddy State, SAN ANTONIO EXPRESS NEWS, Oct. 12, 2006 (“Since the unexpected passage of the Unlawful Internet Gambling Enforcement Act two weeks ago by the U.S. Senate, online poker players and the Web sites that depend upon them for business angrily continue to wait for the dust to settle.”).
53. Leonard, supra note 38, at 528 (“A large number of legal scholars, commentators, politicians, and interest groups fought the UIGEA before its passage, and have fought its enactment on a number of grounds.”).
The UIGEA prohibits any “person engaged in the business of betting or wagering [from] knowingly accept[ing], in connection with the participation of another person in unlawful Internet gambling . . . (1) credit . . . (2) an electronic fund transfer . . . (3) any check, draft, or similar instrument . . . or (4) the proceeds of any other form of financial transaction.” The statute does not prohibit online gaming by punishing individual gamblers. Instead, it criminalizes the behavior of online gaming companies and financial institutions, and aims to “block the flow of money to Internet casinos by prohibiting banks and other financial institutions from transmitting funds from within the United States to such websites.” The Secretary and Board of Governors of the Federal Reserve System, along with the Attorney General, were tasked with prescribing regulations that would help financial institutions develop policies and procedures which would effectively prohibit restricted transactions. In cases of violation, the legislation provided both civil and criminal penalties.

The main goal of the UIGEA was “to cut off the flow of money from the United States to foreign Internet casinos by imposing strict regulations on all domestic financial institutions designed to ‘identify and block or otherwise prevent or prohibit restricted transactions.’” Critics of the legislation were quick to point out what they deemed “glaring loopholes” within the Act that would prevent this goal from being realized. For example, the UIGEA did not expressly prohibit third party payment processors from transferring funds to Internet casinos. Thus, gamblers could circumvent the Act by depositing their money with third party processors which could then transfer the money to Internet gambling websites without fear of legal repercussion.

Because most online casinos were stationed abroad, commentators worried about whether the UIGEA could really be enforced: “[H]istory has shown that trying to enforce domestic laws on foreign website operators is virtually impossible.” Without enforcement, there were worries that the UIGEA might do more to endanger the American online gambler than to protect him. When many large, legitimate gambling websites closed their doors to American players after the passage of the UIGEA, critics feared that gamblers would “turn to unregulated and

56. Wajda, supra note 51, at 324.
58. Id. at § 5365.
59. Id. at § 5366.
60. Wajda, supra note 51, at 314.
61. Id. at 328.
62. Id.
63. Id.
64. Id. at 328 (citing John Gray, Texas Fold ‘Em, CAN. BUS., Oct. 9, 2006, at 44).
65. Id. at 330.
66. Id.
unsafe sites," rather than simply give up their gaming.

Skill vs. Chance: The Great Debate

The UIGEA defines bet or wager as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement . . . that the person or another person will receive something of value in the event of a certain outcome." Thus, the UIGEA clearly prohibits sporting events and contests, as well as games of pure chance like roulette and craps. Poker, however, does not fit neatly inside the statute's "game subject to chance" language.

Since the UIGEA was signed into law, online poker advocates have argued that the game is one of skill, and should therefore be exempt from the statute. Indeed, in 2006, popular online poker website PokerStars.com issued a public statement on its website declaring "[the UIGEA] provisions do not alter the U.S. legal situation with respect to our offering of online poker games." The statement went on to assert that "PokerStars believes that poker is a game enjoyed by millions of players and we remain committed to providing you a safe and fun environment in which to play." Four and a half years after issuing its statement, PokerStars was shut down by the federal government and charged with UIGEA violations. It remains to be seen if the U.S. District Court for the Southern District of New York will agree with PokerStars' assessment.

While poker advocates readily admit the element of chance in the game, they believe that "the fact that every hand of poker involves multiple decision points . . . multiple decisions at each decision point . . . and innumerable factors that call for skill to evaluate each of those decisions . . . establishes that poker is a contest of skill." Such advocates focus on the particular skills a player uses to succeed at the poker table, like "know[ing] the rules and the mathematical odds . . . know[ing] how to read [his] opponents' 'tells' and styles . . . know[ing] when to hold and fold and raise . . . [and] know[ing] how to manage [his] money." Thus, because "the structure and the rules allow sufficient room for a player's exercise of skill to

67. Id.
69. Id.
70. Frank Ahrens, New Law Cripples Internet Gambling: Banks Barred From Handling Transactions, WASH. POST, Oct. 14, 2006 ("The Poker Players Alliance, a lobbying group that opposes the new law, said it would ask Congress to exempt poker from the statute. The group considers poker a game of skill, not chance.").
72. Id.
73. Feldman, supra note 2.
75. Id. at 2.
76. Id. at 3-4.
overcome the chance elements in the game,”77 and because “the more skillful players tend to score better than less skillful players,”78 a relatively strong argument can be made that the game is one of skill, rather than chance.

Online poker opponents use the statutory language to support their view that poker is prohibited under the UIGEA.79 As mentioned earlier, the UIGEA includes within its definition of bet or wager “a game subject to chance.” Because of the chance element involved in the game, poker is, literally, a game subject to chance, and thus prohibited by the statutory language.80 Opponents view the “skill vs. chance” debate as “more of a nuisance to enforcement than a serious threat to effectiveness of the law.”81

What Next?

Since the UIGEA’s passage in 2006, “[i]nterested parties on both sides of the internet gambling issue have clamored for reform.”82 Legal scholars have proposed a number of alternatives and solutions83 to the UIGEA’s various plot holes. Some have gone so far as to predict its impending demise.84 Still, the law remains unchanged. Recent events have fueled arguments on both sides of the legalization debate. The next sections analyze those events and attempt to answer the question on every Internet gambler’s mind: After five years of frustration, are we any closer to a change?

III. Two Steps Forward, One Step Back: Analyzing the Major Players and Legislative Efforts Affecting the Push for Nationwide Legalization in 2011

Brick-and-Mortar Casinos

Traditionally, brick-and-mortar casinos were known for their opposition to

77. Id. at 2.
78. Id.
80. Id.
81. Id. at 177
83. See Wajda, supra note 51, at 313-14 (“A superior approach would be for the United States to follow the policies set forth in the Interstate Horseracing Act (IHA) allowing individual states to create their own laws concerning Internet casinos, and therefore give the states the freedom to run interstate operations with . . . similarly situated states, benefiting accordingly.”); Koenig, supra note 49 (“The potential upside [of regulation] is enormous . . . [especially in a time of national recession, it is unlikely that the U.S. will want to continue to allow gambling funds to drain out of the country.”); Nicholas Bamman, Is the Deck Stacked Against Internet Gambling? A Cost-Benefit Analysis of Proposed Regulation, 19 J.L. & POL’Y 231, 268-69 (2010) (“[M]illions of Americans will gamble over the Internet . . . [and] the federal government should capture this multibillion dollar industry for the United States.”).
84. Koenig, supra note 49 (“I am not alone in my prediction that the demise of the UIGEA will come quickly.”).
The Great Wildcard

legalized online gambling. Such institutions claimed that they were uncomfortable with the practice “because virtual operations [could not] be regulated to the degree necessary to ensure fairness, minimize social harm, and prevent problem gambling.” Critics were quick to point out ulterior motives for the casinos’ opposition to legalized online gambling, namely “[the concern] that Internet gambling [would] cannibalize their preexisting multi-million-dollar gambling operations.”

Despite their original opposition, brick-and-mortar casino companies began to re-evaluate their views as early as 2006, when Harrah’s Entertainment (currently known as Caesar’s Entertainment Corporation) and MGM Mirage expressed their interest in entering the online gambling business if it was legalized. Mitch Garber, CEO of Harrah’s Interactive (currently known as Caesar’s Interactive Entertainment) had formerly served as CEO of Partygaming, a popular Internet gambling website. He recognized that Harrah’s, which owns the World Series of Poker, would be able to expand that brand around the world and take advantage of online gaming opportunities abroad. Whereas other casinos watched the legalization debates with mixed feelings of fear and uncertainty, Harrah’s “embraced expansion efforts in the United States and was the [first real] aggressive proponent of casino gambling as a mainstream American pastime.”

Casino mogul Steve Wynn, CEO of Wynn Resorts, was initially opposed to the legalization of online poker. He believed that regulating Internet gaming would prove to be very difficult, and, “if the Internet people got in trouble it would bring the wrath of the government down on us in the live gaming community out here in Las Vegas.”

In 2008, the CEOs of a number of large gaming organizations, including Harrah’s, MGM-Mirage, and Wynn Resorts, assembled in Las Vegas for a meeting of the American Gaming Association (AGA). One of the crucial items up for discussion that day was “whether their powerful lobbying group would change its position on Internet gambling.” The group had previously opposed it. Harrah’s CEO Gary Loveman pushed for a policy change, but met staunch resistance in the

86. Id.
87. Id.
91. Id.
92. Id.
95. Id.
96. Id.
form of Steve Wynn.\textsuperscript{97} Because the AGA’s bylaws required unanimity, the policy went unchanged.\textsuperscript{98} However, by March 2010, Wynn was no longer an AGA member.

With two years to sit and watch poker website meet with enormous financial success, casino operators were ready to change their policy.\textsuperscript{99} The AGA declared its support for online gaming regulation, “represent[ing] a sea change [which was] one of the defining moments of the online poker landscape in the U.S.”\textsuperscript{100}

The AGA’s decision helped motivate Steve Wynn to reverse his anti-legislation views.\textsuperscript{101} He soon announced a partnership with Pokerstars.com, which was, at that time, the world’s largest Internet gambling company.\textsuperscript{102}

Then came Black Friday. But while individual gamblers grieved over the shutdowns, casino operators used them as an opportunity to advance their pro-regulation viewpoints, suggesting that “now might be the time to push for legalization and regulation of online poker games.”\textsuperscript{103} AGA Chief Frank J. Fahrenkopf, Jr., expressed the reasons behind this sentiment, saying that there was an entirely “different attitude on the Hill and in the country . . . the PokerStars and Full Tilt events . . . show the need for legalization and regulation of online poker . . . [w]hat we want is a clear definition of what is legal and illegal and to develop some tax revenue and jobs.”\textsuperscript{104}

Since Black Friday, Steve Wynn has terminated his partnership with PokerStars,\textsuperscript{105} but he still believes that the online gaming industry can be regulated.\textsuperscript{106} MGM-Mirage has entered into a business venture with online poker giant Bwin, subject to the legalization of Internet gambling in the United States.\textsuperscript{107} Caesar’s CEO Gary Loveman recently expressed his optimism for legalized online poker in the U.S., calling it an “inevitability.”\textsuperscript{108}

In October of 2011, the South Point casino in Las Vegas launched a free

\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{103} Dan Eggen, \textit{Online Poker Lobbyists Say Indictments Could Prove to be Good Luck for Gaming Interests}, WASH. POST, May 5, 2011.
\textsuperscript{104} Vardi, supra note 94.
internet play poker website. Owner Michael Gaughan hoped the “amusement only” site would “get[] our name out there among the poker community for when Internet poker is finally legalized.”

The Black Friday government crackdowns have seemingly strengthened brick-and-mortar casino operators’ resolve to enter the online gambling industry. With the closure of PokerStars, Full Tilt Poker, and Absolute Poker, casino corporations such as Caesar’s, MGM-Mirage, and Wynn are poised to enter the market with little competition and massive name-recognition if the federal government legalizes the industry.

The Political Environment: A History

The political debate over legalizing online poker, and indeed, online gambling in general, has historically broken down according to party lines, with Democrats advocating for legalization and Republicans advocating against it. Democrats saw legalization, regulation, and taxation as an effective way to gain additional revenue in a difficult economic environment, and believed that the ban created by the UIGEA was an “intrusion on individual liberty.” Republicans questioned the effectiveness of any potential regulation scheme and the morality of legalizing and regulating online gambling enterprises.

Since 2006, the poker community’s biggest political ally has been Rep. Barney Frank (D-Massachusetts). A non-gambler himself, Frank voted against the Act and has consistently worked to both clarify it and overturn it. In 2008, he teamed up with Rep. Ron Paul (R-Texas) to introduce H.R. 5767, commonly known as the Payments System Protection Act, which would have defined lawful Internet gambling transactions under the UIGEA. The resolution was later defeated in Committee. In September of 2008, Frank once again attempted to tackle the UIGEA, this time with H.R. 6870. Under this proposed legislation, all regulations of the UIGEA would have been suspended except those involving professional sports leagues. Like its predecessor H.R. 5676, H.R. 6870 also

116. Id.
117. Id.
118. Dan Cypra, Committee Approves Barney Frank’s HR 6870, POKER NEWS DAILY (Sep. 16, 2008),
would have defined lawful and unlawful Internet gambling under the UIGEA.\textsuperscript{119} This Act passed through the House Financial Services Committee, but lost its momentum in the wake of the economic downturn\textsuperscript{120} and failed to come up for vote before the Congressional session ended.\textsuperscript{121}

In 2009, Frank requested that the Obama administration delay a federal crackdown on illegal Internet poker while he worked on new legislation.\textsuperscript{122} In 2010, Frank introduced H.R. 2267, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act.\textsuperscript{123} This Act set up a licensing structure by which the government could regulate Internet casino companies.\textsuperscript{124} The House Financial Services Committee approved the Act, but it never received a floor vote.\textsuperscript{125} In 2011, alongside Rep. John Campbell (R-California), Frank co-sponsored H.R. 1174,\textsuperscript{126} which closely mirrored the failed H.R. 2267. He also co-sponsored Rep. Joe Barton’s (R-Texas) H.R. 2366,\textsuperscript{127} also known as the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act, which aimed to legalize online poker.

In 2010, the fight for legalization gained an unlikely advocate in the form of Sen. Harry Reid (D-Nevada). Though formerly opposed to Internet gambling, Reid changed his stance after a close election during which he received a significant amount of financial support from large brick-and-mortar casinos.\textsuperscript{128} That year, Reid circulated a draft bill seeking to legalize online poker.\textsuperscript{129} When political opposition mounted, however, he pulled the bill from Senate consideration.\textsuperscript{130} In 2011, Reid attempted to negotiate another online poker bill.\textsuperscript{131} Although negotiations fell through, Reid, during a meeting with media personnel, expressed his belief that Congress would take up the issue of Internet poker legalization “soon.”\textsuperscript{132}

Reid’s attempted 2010 legislation was defeated in large part by threatened
opposition\textsuperscript{133} from Sen. Jon Kyl (R-Arizona), one of the most vocal online gambling legalization critics in Congress. Kyl was a major supporter of the UIGEA’s passage in 2006 and has since worked steadily to ensure that online poker and all forms of online gambling made illegal by the UIGEA remain illegal.\textsuperscript{134}

Leading the fight against legalization in the House of Representatives is Rep. Spencer Bachus (R-Alabama). A staunch moral critic of gambling, Bachus freely expressed his anti-legalization sentiments before the UIGEA was even passed. As early as 2003, Bachus advocated criminalizing Internet gambling, arguing that such legislation would prevent gambling addiction and the disintegration of American families.\textsuperscript{135} He helped write the UIGEA\textsuperscript{136} and has resisted any and all efforts to overturn or amend it. Bachus led the fight against H.R. 5767\textsuperscript{137} and vowed to “do everything in [his] power” to stop H.R. 2267.\textsuperscript{138}

The Political Environment: How 2011 Changed the Game and What it Means for the Future of Internet Poker

Since 2006, the battle lines and major political players in the legalization debate have been relatively stable. However, 2011 brought jarring changes to both sides of the debate when online poker’s most vocal supporter and one of its most ardent opponents announced their respective retirements. In February of 2011, Jon Kyl announced that he would not seek re-election in 2012.\textsuperscript{139} Nine months later, Barney Frank announced the same.\textsuperscript{140}

Frank’s retirement is a blow to online poker advocates, but not a fatal one. Frank himself remains positive that Congress will eventually legalize online poker and he has confirmed that he will offer his continuing support to any pro-online poker legislative efforts.\textsuperscript{141} Though Frank is perhaps the most notorious online poker proponent in Congress, his fellow Congressmen John Campbell and Joe Barton, both of whom introduced pro-gambling legislation in 2011, can take up Frank’s mantle and push for future legalization.

Advocates also have a powerful ally in Harry Reid. Now that he has jumped onboard the pro-legalization bandwagon, Reid will likely continue to push for

\begin{itemize}
\item \textsuperscript{134} Chris Sieroty, \textit{Senators Seek Explanations on Gambling Policy}, \textit{LAS VEGAS REV.-J.}, Jul. 19, 2011.
\item \textsuperscript{138} \textit{Internet Gambling Bill Set for Markup Tuesday}, \textit{WASH. INTERNET DAILY}, July 26, 2010.
\item \textsuperscript{141} Steve Tetreault, \textit{Retiring Frank will Continue Internet Gambling Push}, \textit{LAS VEGAS REV.-J.}, Nov. 29, 2011.
\end{itemize}
online gaming reform. In 2010, Reid dropped his proposal because of threatened opposition from Jon Kyl. Kyl’s retirement leaves a gap in the Senate, as he has left no clear and immediate successor to take up his anti-legalization platform. This gap may provide the perfect opening through which Reid can push a new bill. With the support and financial backing of large brick-and-mortar casinos, he has significant incentive to enact pro-gaming legislation and significant backing with which to do it.

In 2011, the Republican Party underwent an idealistic shift in relation to its views on legalization. Though the party had historically opposed pro-gambling legislation on moral grounds, the two major legislative proposals introduced in the House were sponsored or co-sponsored by Republican members. John Campbell justified his position in financial terms, arguing, “With this [legislation], it won’t be Americans playing on foreign sites, it will be foreigners playing on American sites,” while Joe Barton argued that poker should be exempted from the UIGEA’s penalties because it is a game of skill, rather than of chance. Both Congressmen have expressed beliefs that the current prohibition on Internet gambling is unenforceable. Even perennial online gambling opponent Jon Kyl warmed somewhat to the idea of legalized online poker when, in the summer of 2011, he published the following statement on his website: “Efforts to carve out an exception for games like poker, which many believe is a game of skill, may be considered.... I cannot [yet] make a judgment about their merits; but I will consider them carefully as long as they leave in place the broader proscriptions against online betting.”

This is not to say that all Republicans have shifted their views. Spencer Bachus, who replaced Barney Frank as Chairman of the Committee on Financial Services, for example, remains committed to his opposition against all forms of legalized Internet gaming. His supporters include Rep. Lamar Smith (R-Texas), who chairs the Judiciary Committee, and Rep. Dave Camp (R-Michigan), chair of the Committee on Ways and Means. Both Smith and Camp joined Bachus in protesting Harry Reid’s attempted 2010 legislation, alleging, “Congress should not take advantage of the young, the weak and the vulnerable in the name of new revenues to cover more government spending.”

The newfound ideological divide within the Republican Party could have dramatic implications on the fight for legalization. It must be remembered, however, that 2012 is an election year, which means that every new piece of legislation is a potential liability. Whether already hesitant Republicans would be willing to support such controversial legislation when such actions could reap drastic repercussions remains to be seen, but staunch, widespread support

142. See discussion supra Part II.D.
144. Id.
145. Kosman, supra note 110.
throughout the Party seems unlikely. Of course, supporters could wait until the election has ended and try to attach an online poker bill to a must-pass piece of legislation, much in the same way the UIGEA was passed in 2006, but the success of such efforts is far from guaranteed.

The Proposed Legislation of 2011

On March 17, 2011, Rep. John Campbell introduced H.R. 1174, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act. This Act was based primarily on findings that foreign Internet casinos offer American gamblers a multitude of gaming options, with oversight provided by a variety of licensing and regulatory schemes, and that the United States has developed no federal or state regulatory process to ensure that its citizens are protected in their dealing with these foreign Internet gambling providers. It recommended that the United States implement a licensing and regulatory framework through which it could both protect its underage and otherwise vulnerable citizens and provide a safe and effective gambling environment for those who choose to gamble online. Under H.R. 1174, any person or entity applying for licensing that violated the UIGEA by participating in illegal Internet gambling activity would be deemed unsuitable for future licensing. The bill had 29 co-sponsors, 24 of them Democrats and 5 of them Republicans.

On June 24, 2011, Rep. Joe Barton introduced H.R. 2366, the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011. This Act was based primarily on the finding that, because Internet casinos are operated out of foreign countries, their growth has “raised numerous policy, consumer protection, and enforcement concerns for Federal and State governments.” The Act sought to clarify some of the ambiguities created by the passage and subsequent enforcement of the UIGEA, namely, the legal status of online poker. By defining poker as a game of skill, rather than a game of chance, the Act proposed that Internet poker be licensed and regulated. The bill had 26

149. Id. § 5381.
150. Id. The bill recommended that Internet gambling providers comply with strict regulatory and protective standards, and ensure that they:
(A) are in good financial and legal standing, and of good character, honesty, and integrity;
(B) utilize appropriate technology to determine the age and location of users;
(C) adopt and implement systems to protect minors and problem gamblers;
(D) adopt and implement systems to enforce any applicable Federal, State, and Indian tribe limitations on Internet gambling; and
(E) have in place risk-based methods to identify and combat money laundering and fraud relating to Internet gambling, and to protect the privacy and security of users.
Id.
151. Id. § 5383(d)(3)(E).
153. Id. § 2.
154. Id. (“Poker is distinct from the class of games of chance traditionally defined as gambling in that, players compete against each other, and not the . . . entity hosting the game . . . and that over any significant
co-sponsors, 19 of the Democrats and 7 of them Republicans.

In November of 2011, Barton told news outlets that he believed he had the support to get his legislation passed in the House as long as it came up for vote, which he hoped would happen in the summer of 2012. However, the bill’s relative lack of co-sponsors had some critics worried: If Barney Frank’s legislative effort in 2010 garnered 70 co-sponsors and had “[n]o[ ]where close to the votes [needed] to pass on the House floor,” how could Barton hope to pass his bill? John Pappas, Executive Director of the Poker Players Alliance, attributed this disparity to traditional party divides, commenting, “Rep. Barton would rather add a Republican and add a Democrat rather than add five-to-six Democrats at a time.” He also predicted that silent Republican support was probably far greater than the low number of vocal Republican co-sponsors.

Barton’s bill earned a somewhat surprising detractor in the form of the AGA, which announced that it intended to introduce its own competing bill later in 2011. The AGA’s disapproval stemmed mainly from the lack of punitive measures against Internet gambling providers that had done business after the passage of the UIGEA. Whereas the AGA’s ideal bill would, like Campbell’s bill, have cleared the playing field for well-known, established brick-and-mortar casino corporations to enter into the online poker market, Barton’s provided no such assurances. Despite its intentions, however, the AGA never introduced its own rival bill in 2011.

As previous trial and error has proven, pro-gaming legislation is a difficult sell in Congress. Morality and regulatory concerns plague any all proposals brought to light. For this reason, Barton’s H.R. 2366 stands a better chance of becoming law than Campbell’s H.R. 1174. Barton’s bill limits its scope to online poker, which has earned a certain social acceptance denied to all other forms of Internet gambling. This general acceptance, coupled with persuasive arguments that poker is a game of skill rather than of chance, makes legalized web poker an easier pill to swallow than all-inclusive legalized Internet gambling.

However, Barton’s bill is far from “slam dunk” legislation. Though the Congressman may well have significant silent support from Republicans, that support could dwindle in election year 2012. Even normally supportive Democrats might be hesitant to support legislation on such a controversial topic when political control is at stake. Additionally, if the legislation does manage to pass the House, it may not gain crucial support from Harry Reid once it gets to the Senate due to AGA
opposition over the lack of penalties for UIGEA violators.

Currently, Nevada is developing a licensing and regulatory system for its legalized intrastate poker program.\textsuperscript{161} Congress will probably take a wait-and-see approach to its own legislation while observing the effectiveness of the Nevada scheme. While legalized online poker does indeed seem an inevitability, it will likely come about once individual states have shown that their software technology can prevent underage users from gambling online and that governmental entities can safely and effectively run Internet poker rooms. Nevada’s program is due to be up and running in mid-to-late 2012. If the program is implemented in a timely manner and proves successful, new poker-based legislation proposed in 2013 or 2014 will have a far more likely chance of passage than either H.R. 1174 or H.R. 2366.

\section*{IV. Spotlight on Washington D.C. and Nevada: How 2011 Impact ted Intrastate Legalization}

\textit{Washington D.C.}

On April 13, 2011, the District of Columbia became the first United States jurisdiction to permit Internet gambling.\textsuperscript{162} A provision for legalized gambling was included in the District’s 2011 budget proposal and, once the thirty day period in which Congress could object to such provisions expired, online gambling became a reality in D.C.\textsuperscript{163}

Rather than spending significant money and resources developing its own software, D.C. officials entered into a partnership with Intralot, a Greece-based company, to operate the gaming software.\textsuperscript{164} The District hoped to use the money generated by online gaming to “offset budget costs and help social services programs.”\textsuperscript{165} It estimated that the gambling program could generate $2.2 million during 2012 and up to $8.9 million per year by 2015.\textsuperscript{166}

The District of Columbia was able to legalize Internet gaming within its borders due to the UIGEA’s exemption for intrastate gambling, which allows states to legalize online gaming as long as that gaming is confined within the borders of the state.\textsuperscript{167} To test the new system, D.C. officials decided “to set up twenty to thirty online gambling ‘hot spots’ in hotels, bars, clubs, and other venues across the

\begin{itemize}
  \item \textsuperscript{161} See discussion infra Part IV.B.
  \item \textsuperscript{163} \textit{Id.}
  \item \textsuperscript{164} \textit{Id.}
  \item \textsuperscript{165} \textit{Id.}
  \item \textsuperscript{167} Ronald J. Rychlak, \textit{The Legal Answer to Cyber-Gambling}, 80 MISS. L.J. 1229, 1240 (Summer 2011).
\end{itemize}
Along with Texas Hold 'Em poker, games like Blackjack, electronic scratch-off tickets, and Victory at Sea (similar to the game Battleship) would be offered to web gamblers. If the hot-spot experiment went well, officials planned to open up gaming to all home computers in the District by the end of 2011.

Officials enacted a number of safety measures in order to protect underage citizens and problems gamblers from abusing the system. In addition to limiting access to the gaming website to those inside D.C.'s borders, an age restriction of 19 and up was implemented. Nineteen was chosen so that minors would be kept out of the web gaming, but the potentially lucrative college student market could participate. The system included a number of protective measures meant to ensure responsible gaming, like requiring players to set up and register with accounts, instating a weekly deposit limit of $250 to prevent high-stakes betting, shutting down the gaming operation between 4 and 10 am every day, electronically monitoring players and, should the need arise, cutting them off.

Despite the District's best intentions, its plans for legalized Internet gambling met with resistance from the start. City council members demanded that community meetings be held to gauge public opinion before any gaming measures were enacted. In September of 2011, the D.C. Council decided to re-examine the entire Internet gaming program due to irregularities in the software operator bidding process. Council member Tommy Wells remarked that the legislation:

[N]ever went through a proposed bill process . . . It went through as a rider, and it wasn't called gambling, it was called iGaming. So there was no real weighing of this by the council . . . My proposal says let's walk it back and start over so that there can be a full hearing process. Then there can be a full report from the committee that explains the issues they weighed so that we know that they asked about enforcement and that they dealt with the issue of integrity. We need to know that those who gamble online are going to be safe.

After nine community meetings, D.C. officials were convinced that their program was legally sound and publically supported. In November of 2011, they announced that they had no intention of changing the components of the web-based


170. Jouvenal, supra note 168.

171. Howell, Jr., supra note 169.


gambling plan. Consequently, because delays forced the program’s implementation into 2012, Washington D.C. is poised to become the second U.S. jurisdiction to allow Internet gambling within its borders. While the D.C. Council dragged its feet in approving the gaming program, the Nevada legislature approved and passed a bill legalizing in-state Internet poker. America’s brick-and-mortar gambling capital is now positioned to become its future Internet gambling capital.

**Nevada**

On March 10, 2011, Assembly Bill 258 was introduced in the Nevada Legislature. The proposed legislation sought to set up a licensing, regulatory, and enforcement scheme for online poker. As originally proposed, Assembly Bill 258 required the Nevada’s Gaming Commission to license online poker operating companies as long as they met basic regulatory standards. In other words, existing Internet gambling companies could not be denied licenses simply because they ran unlicensed operations in the past. To an everyday observer, this no-punishment provision may have seemed an odd addition to a Nevada bill, considering that the AGA, made up of several prominent Las Vegas casino owners, protested Joe Barton’s H.R. 2366 because of its lack of a similar punishment clause. However, PokerStars.com was a major proponent and lobbyist for the legislation, and was a driving force behind the provision. Of course, large brick-and-mortar casinos still benefitted from the legislation, which required “online sites . . . to have a partnership with an existing non-restricted license holder or an affiliate that has been in business for at least five years.”

In April 2011, shortly after Black Friday, the Nevada Assembly passed an amended version of AB 258. The “original bill would have prohibited the Nevada Gaming Commission from denying a license to online poker sites such as PokerStars . . . was stripped from the [amended version of the] bill.” The partnership provision, however, was left intact. The language of the amended AB

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179. Id.
180. See discussion supra Part III.D.
258 also underwent a change: [all] mention of poker was removed and replaced with “interactive gaming,” which, Assembly Chairman William Horne assured, still encompassed card playing.185 On June 10, 2011, Governor Sandoval signed AB 258 into law.186

In August 2011, The Nevada Gaming Control Board released187 its proposed interactive gaming regulations.188 These mainly consisted of “rules for the finding of entity suitability, technology approvals, audit and record-keeping, and customer enrollment” as well as procedures and processes for disciplinary violations.189 The regulations set the legal online gambling age at 21 and included a number of anti-cheating provisions designed to protect both service providers and gamblers; [these] provisions prohibited inter-account transfers between players, allowed each gambler only one account, and required website operators to save records of hand histories for at least five years.190 The Board later issued a draft for the Minimum Internal Control Standards for Interactive Gaming191 in which it drew upon the fraud allegations against Full Tilt Poker192 and provided that all revenue collected from online poker would be deposited into a segregated, separated bank account.193

As of December 2011, six gaming companies194 have applied to participate in Nevada’s Internet poker program.195 Depending on software and technology approval, the first intrastate poker websites could be functional as early as spring 2012.196

Since the legislation’s inception, there have been concerns over the lack of a

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185. Pempus, supra note 183.
189. Id.
190. Id.
192. For further discussion, see discussion infra Part V.A.
194. These companies are: Cantor Gaming, Shuffle Master, Reno-based International Game Technology, Bally’s Technology, Caesars Entertainment and the South Point.
federal law permitting online poker. Indeed, AB 258 “stipulate[d] that [non-intrastate] Internet gambling would not be implemented until sanctioned by Congress or the Justice Department.” Critics argue that “the limited size of the Nevada population” will prove too small to make the intrastate poker scheme profitable. Such arguments are cause for concern:

U.S. Digital Gaming, estimates a network of online-poker sites would need at least 70,000 active users to be viable and would likely be able to get to that size within 1½ years, producing about $180 million in revenue. Getting there isn’t a sure bet. Before a federal government crackdown on allegedly illicit poker websites this spring, [Nevada] had around 25,000 online-poker players, according to PokerScout.com, a website that tracks online-poker play.

Nevada, however, did not implement AB 258 simply for the financial gains to be made through intrastate gambling. Instead, it hoped to get a head start on Internet gaming regulation in preparation for possible nationwide legalization. Nevada has always been considered the industry leader where gambling is concerned, and intends to be the industry leader where Internet gambling is concerned as well. If the state’s web poker program proves successful, its regulatory structure will likely be copied by other states and will form the backbone of an eventual federal regulatory scheme.

V. Black Friday and Other Recent Developments

A. Black Friday: A Continuation

Whereas some observers interpreted Black Friday to mean the death of Internet poker in America, others took a more positive approach, arguing that the crackdown highlighted the need for a legalized, regulated system. Indeed, the shutdowns did not curb demand: the sites that continued to serve Americans saw their business increase after Black Friday.

In September 2011, authorities alleged that Full Tilt Poker was a “global Ponzi scheme” that robbed web-gamers of at least $390 million. After the shutdowns,
investigators said they discovered that Full Tilt Poker had not segregated its funds and [had] distributed $443.8 million to its board . . . .

In other words, "[d]espite lacking the money to fund all U.S. players' accounts, the company continued to credit players with their winnings while embezzling millions . . . ."

Of the eleven Black Friday defendant, three- Brent Beckley, Bradley Franzen, and Ira Rubin  pled guilty to the charges against them. Beckley and Rubin are expected to receive a sentence of 12 to 18 months in prison, Franzen has not yet been sentenced, but faces as many as 20 years in prison for money laundering. Defendants Chad Elie and John Campos, be tried in March 2012. The six remaining defendants currently remain abroad and no legal action other than the indictments has been taken against them.

B. Justice Department Opinion

In late December 2011, the Justice Department made public an opinion in which it reversed its former position that all forms of online gambling are illegal. The opinion was issued in response to inquiries made by New York and Illinois asking the Justice Department if the Wire Act of 1961 prevented states from selling online lottery tickets within the borders of the state. The Department clarified that the Wire Act applied only to sporting events.

Even though the opinion was written in terms of online lottery tickets, Internet gambling proponents applauded Justice Department's reversed stance, remarking that "[i]t und[id] the single obstacle that was preventing the states from authorizing all forms of Internet gambling." Because the UIGEA explicitly exempts intrastate gambling from penalty, states are now free to enact intrastate gambling programs, including online poker programs, without fear of federal intervention.

207. Id.
211. Id.; Neumeister, supra note 208.
212. Bray, supra note 209.
216. Id.
217. Id.
Some experts predict that the "[t]he next step... could be for states to enter into compacts with each other to have interstate Internet wagering."\textsuperscript{219}

VI. CONCLUSION

Since the UIGEA was passed in 2006, there has existed in Congress an uneasy stalemate between supporters and detractors of legalized Internet gambling. In 2011, that stalemate began to crumble. Economic concerns, various political shake-ups, and the rising social acceptability of online poker as a legitimate hobby all contributed to a more general acceptance of legalized Internet poker by members of Congress. Two Republicans rallied for the cause and critical observers believe Republican support for web poker is larger than its vocal minority might indicate. Although poker supporter Barney Frank announced his retirement, several Congressmen are poised to take up his mantle and continue the fight for legalization. In the Senate, with news of John Kyl's retirement, Harry Reid seems to have a clear path through which to push new web-poker legislation.

Those Congresspersons who are on the fence about legalized online gambling will look to Washington D.C. and Nevada as those jurisdictions implement legalized gaming programs within their own borders. Though the D.C. program has been hindered by delays, it will likely be up and running in 2012. The Nevada program will begin issuing licenses in February 2012 and poker websites will be up and running by the end of the year. Political concerns will mostly center on whether legalized online gaming can be effectively regulated by state governments and whether technology exists that can keep underage players and cheaters out of web-casinos. The moral opposition will want to see that suitable measures have been taken to prevent addicted or "problem-gamers" from abusing the programs as well. The Nevada program will likely be the more influential of the two: Because Nevada is considered the gaming capital of America and has a wealth of knowledge and experience in dealing with gaming matters, both federal and state governments will look to its program and laws when developing their own Internet gaming regulatory structures.

Though the Black Friday shutdowns sent a shockwave through the Internet poker world, they highlighted the need for the enactment of reliable regulatory measures. Whether or not some politicians choose to see it, the dawn of legalization is on the horizon. In 2011 alone, the political support base for such legalization widened, states chose to implement their own programs in the hope that such programs might influence nationwide legalization, and the Justice Department reversed its long held stance that the Wire Act prohibited all forms of Internet gambling.

Once individual jurisdictions prove that Internet poker can be safely and effectively regulated, the main argument against legalized web-poker will lose its traction and its support. State and federal regulation will be able to provide what the UIGEA could not: A clear definition of what is and is not permissible in regard to

\textsuperscript{219} Wyatt, \textit{supra} note 215, at 27.
Internet poker and realistic, enforceable penalties against web-casinos that choose to defy regulation.

The cards have been dealt. The stakes are high. Despite numerous bluffs and attacks, America’s newest national pastime refuses to fold its hand. Online poker advocates are all in. Let the showdown begin.
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