

1-1-2015

## Chopped Pot: Legalizing Online Poker in the United States in a Manner That Benefits Consumers, Businesses, International Trade Obligations and Government Revenue Collection

Josh Albin

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/jibl>



Part of the [International Trade Law Commons](#)

---

### Recommended Citation

Albin, Josh (2015) "Chopped Pot: Legalizing Online Poker in the United States in a Manner That Benefits Consumers, Businesses, International Trade Obligations and Government Revenue Collection," *Journal of International Business and Law*. Vol. 14: Iss. 1, Article 5.

Available at: <https://scholarlycommons.law.hofstra.edu/jibl/vol14/iss1/5>

This Notes & Student Works is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Journal of International Business and Law by an authorized editor of Scholarship @ Hofstra Law. For more information, please contact [lawscholarlycommons@hofstra.edu](mailto:lawscholarlycommons@hofstra.edu).

# **CHOPPED POT: LEGALIZING ONLINE POKER IN THE UNITED STATES IN A MANNER THAT BENEFITS CONSUMERS, BUSINESSES, INTERNATIONAL TRADE OBLIGATIONS AND GOVERNMENT REVENUE COLLECTION**

*Josh Albin\**

## **INTRODUCTION**

In 2003, in a prime time television slot on ESPN, an unknown accountant from Tennessee won \$2.5 million.<sup>1</sup> In the poker community it is unanimously agreed to that this event was a significant contributor to what was known as the “poker boom.”<sup>2</sup> To the rest of the world, it was the manner that this fairytale occurred in which a man turned \$39 in his online poker account into an entry to the World Series of Poker (“WSOP”) main event and went on to win the \$2.5 million first prize that made online poker immensely popular with millions of Americans.<sup>3</sup> No longer was the greatest prize in poker only something that was going to be won by the best “pros,”<sup>4</sup> but anyone with a little money and a dream could be the next WSOP Champion. For the next 3 years online poker became an enormously popular unregulated industry within the United States, that is until Congress passed and implemented the Unlawful Internet Gambling Enforcement Act (“UIGEA”), which began to curb the U.S. gambling industry.<sup>5</sup> Since the enactment of UIGEA, online poker has continued to operate legally in other countries. In the U.S. it went through a period where it was perceived to be illegal, which eventually lead to a major shut down of companies that continued to offer access to U.S. players.<sup>6</sup>

A multi-year period existed that made it nearly impossible for Americans to play online poker in the U.S., although it still was prominent in other nations.<sup>7</sup> Everything suddenly changed when the Department of Justice (“DOJ”) re-evaluated the meaning of the Federal Wire Act, stating that it applied specifically to sports betting.<sup>8</sup> The statement led states to believe they could now offer online poker<sup>9</sup> (and other online casino gaming) and without waiting for Congress to act, states began to take it upon themselves to pass their own

---

\* Candidate for J.D., Hofstra University School of Law, 2015.

<sup>1</sup> Chad Holloway, *Chris Moneymaker Reflects on Historic WSOP Win a Decade Later*, POKERNEWS.COM (May 2, 2013), <http://www.pokernews.com/news/2013/05/chrismoneymaker-reflects-on-historic-wsop-win-a-decade-late-14898.htm>.

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> Ryan Hallagan, *Is Online Poker Ever Coming Back in the US?*, ARTICLE3.COM (January 24, 2013), <http://www.article-3.com/is-online-poker-ever-coming-back-in-the-us-911003>.

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> Whether Proposals by Illinois and New York to use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. Att’y Gen. 12 (2011) [hereinafter O.L.C.].

<sup>9</sup> *See id.*

online poker and gaming laws.<sup>10</sup> While online poker is currently legal in the United States because of the DOJ opinion, and some states have passed legislation to allow online poker, Americans living in a state with legal online poker are restricted to only playing online poker against others currently located within their own state borders.<sup>11</sup>

This note will focus on exploring issues with online poker as it currently exists and operates in the U.S. and propose solutions for those deficiencies. Primarily it will analyze and put forth solutions that will allow American consumers to play online poker in a system that provides them the regulatory and consumer protection, which they have been deprived of for many years expand corporate gaming profits for struggling American gaming companies<sup>12</sup> create an American regulatory system for online poker that will comply with international law and successfully integrate the international community already playing online poker; and propose a system that will benefit state and federal governments at the same time.

Part I of this note will detail the history of online poker in the U.S. It will show the immense popularity of the game and the potential for a major market in the U.S. Part II will examine online poker's legality in Europe along with interpretations of foreign trade agreements by the WTO relating to countries' obligations to allow online poker across international borders. Part III will examine the current legality of online poker at a federal level in the U.S., including failed attempts to pass legislation in Congress as well as laws that may pose potential problems in their current state. Part IV will examine legal online poker as it exists in the U.S. at a state level along with the issues state laws have in maximizing the potential of the online poker market. Part V will explain the federal legislation that should be passed to protect consumers, protect state autonomy, provide great economic opportunity for the U.S. and bring the U.S. into compliance with its trade obligations.

## I. THE POPULAR RISE OF ONLINE POKER

### A. The Poker Boom

By the late 1990s as the Internet had become common in American homes, Americans were able to play poker from the comfort of their own living room.<sup>13</sup> No longer having to travel to a casino, which in many cases meant traveling to a different state, Americans could sit on their couch and play poker against thousands of players located all over the United States and other countries. At the time, there were multiple sites that allowed players to transfer money into their player accounts via credit card, bank deposit and other electronic methods withdraw their funds from their accounts and receive payment by check or direct deposit into checking accounts or other online money services.<sup>14</sup> What had been a

---

<sup>10</sup> See David Saleh Rauf, *DOJ Internet Gambling Ruling Splits Tribes*, POLITICO, (Jan. 5, 2012, 7:02 AM), <http://www.politico.com/news/stories/0112/71109.html>.

<sup>11</sup> See Howard Stutz, *Nevada Online Poker Websites Still in their Infancy*, LAS VEGAS REV.-J. (Nov. 4, 2013), <http://www.reviewjournal.com/business/nevada-online-poker-websites-still-their-infancy>.

<sup>12</sup> See Bill O'Driscoll, *'Bad Times': Many Major Casinos Saddled with Heavy Debt*, USA TODAY (Feb. 29, 2012), available at <http://usatoday30.usatoday.com/money/economy/story/2012-02-27/casinos-s>.

<sup>13</sup> See David B. Kuznick, *Betting Blind: Problems with Proposed Federal Regulation of Online Poker*, 12 J. HIGH TECH. L. 450, 463 (2012).

<sup>14</sup> Press Release, U.S. Attorney S.D.N.Y., Manhattan U.S. District Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in

LEGALIZING ONLINE POKER IN THE UNITED STATES

game that prior to the Internet was exclusively played in casinos and illegal underground games, was now being played by millions of people all over the world from their own homes.<sup>15</sup>

The key moment that triggered what has become known as the “poker boom” was when Chris Moneymaker won the World Series of Poker in 2003, after getting a seat for the main event tournament from an online satellite tournament.<sup>16</sup> A satellite tournament in poker is one in which a participant plays a tournament where the winners, instead of receiving cash, receive a “buy in” or “seat” in another tournament that would cost more than the original satellite.<sup>17</sup> Thus, in cases like Moneymaker’s, many people were playing in the \$10,000 main event while all they actually bought in for was the smaller amount used to play a satellite tournament to win a seat in the main event. Poker is not like spinning the lever on a slot machine where you have pre-determined odds of winning (and thus in the long run will likely lose). In fact poker is a combination of math and game theory, which when combined together will yield better results for better players.<sup>18</sup> It had been widely known that the best poker “professionals” (meaning they play for a career) were winning the World Series of Poker every year until 2003, not because they were luckier than everyone else but because they were better.<sup>19</sup> Thus, when Moneymaker became the first amateur player to win the World Series of Poker, an enormous surge in the popularity of poker among the general populous was suddenly created.<sup>20</sup> If he could beat the rest in the world, why couldn’t some other casual poker player accomplish the same? What became known as the “Moneymaker Effect,” exponentially grew the popularity of poker worldwide.<sup>21</sup>

### B. The Internet Making Poker More Profitable Than Ever

Poker that is played in a casino has never been a big revenue driver.<sup>22</sup> Because it is one of the least profitable parts of the casino, poker rooms are often found in a back corner of the casino.<sup>23</sup> Casinos make their money on poker in a few ways. The casino (or “house”) charges fees to the players fees in order for them to play, the reason being that poker is played against another player and not the house.<sup>24</sup> These fees are charged in two different forms; an entry fee in a tournament or a “rake,” in a cash game.<sup>25</sup> In tournament poker, a participant

---

Illegal Gambling Proceeds (Apr. 15, 2011), <http://www.justice.gov/usao/nys/pressreleases/April11/scheinbergetalindictmentpr.pdf>.

<sup>15</sup> See Kuznick, *supra* note 13, at 450.

<sup>16</sup> *Id.* at 463-64.

<sup>17</sup> *Id.* at 464.

<sup>18</sup> *Id.* at 466-67.

<sup>19</sup> See Hallagan, *supra* note 5.

<sup>20</sup> See Kuznick, *supra* note 13, at 463.

<sup>21</sup> *Id.* at 464-65.

<sup>22</sup> Hannah Dreier, *Las Vegas Casinos Decide Not To Bet On Poker Rooms*, THE HUFFINGTON POST (Feb. 28, 2013, 7:06 AM), [http://www.huffingtonpost.com/2013/02/28/las-vegas-casinos-decide-\\_n\\_2780410.html](http://www.huffingtonpost.com/2013/02/28/las-vegas-casinos-decide-_n_2780410.html).

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> *Bellagio Poker Room Review*, PART TIME POKER, [http://www.parttimepoker.com/bellagio-poker-room-review\\_\(last visited Dec. 17, 2014\)\[hereinafter Bellagio Poker Room Review\]](http://www.parttimepoker.com/bellagio-poker-room-review_(last visited Dec. 17, 2014)[hereinafter Bellagio Poker Room Review]).

pays an entry fee, a percentage of which goes directly to the casino.<sup>26</sup> The percentage ranges anywhere from 3%-10% depending on the size of the tournament buy in; but generally if the tournament buy in is greater the fee is a lower percentage than if the tournament has a smaller buy in.<sup>27</sup> For example, a tournament that cost \$500 to enter could have a fee of \$50 withheld that goes directly to the house. In a tournament with 1,000 players, this would equate to the casino making \$50,000 just for hosting the tournament. The other way casinos make money on poker is in cash or “ring” games.<sup>28</sup> These are games in which participants buy in for a specific amount and play for actual cash.<sup>29</sup> The casino sets pre-determined limits where it takes a small percentage out of each pot (a “rake”) when it reaches a certain size.<sup>30</sup> Generally, a casino will take a dollar from the pot automatically and then another dollar after each increment of \$10 put in the pot, with a maximum rake of \$4.<sup>31</sup> As the size of a ring game increases the casino may instead take “time,” in which the players pay a pre-determined rate every half hour; however the time method is primarily only used in bigger games where players are buying in for at least \$1,000 or more.<sup>32</sup> Most casinos will be taking anywhere from \$6-\$10 per half hour per player in a time game.<sup>33</sup>

While this may seem like a pretty decent business model for casinos because they have zero risk unlike normal slot machine and table games, it is not as lucrative as it looks. First, poker played in person (or “live”) is not a very fast game. In a fast ring game a table may only have 20-30 hands dealt per hour, and not all of these hands will reach a maximum rake of \$4.<sup>34</sup> Because of this an average table may only take in \$30-\$120 per hour. When the casino factors in paying the dealers, cocktail waitresses, other poker room employees, often paying for free drinks for the players and after giving out player comp dollars, the casino does not make as much money as it may seem.<sup>35</sup> Even though the tournaments may seem lucrative and profitable as described above, such tournaments would probably only be put on once every few months by a casino (because tournament circuits rotate from casino to casino).<sup>36</sup> Thus, in the prior example a casino is not actually putting the full \$50,000 towards their bottom line, nor is it able to run tournaments of that size every day.<sup>37</sup>

Internet poker companies make their money through the same tournament fee and rake system as the casinos, but have many business advantages because of the nature of

---

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *Bellagio Poker Room Review*, *supra* note 25; See Ashley Adams, *Poker Room Review: Foxwoods Casino*, POKERNEWS.COM (Jul. 8, 2007), <http://www.pokernews.com/news/2007/07/room-review-foxwoods-casino.htm>.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*; see also *Bellagio Poker Room Review*, *supra* note 25.

<sup>34</sup> See *How Profitable is Live Poker?*, BLUFF EUROPE (Jul. 4, 2011), [http://www.bluffeurope.com/poker-news/en/poker\\_strategy/How-profitable-is-live-poker-\\_10793.aspx](http://www.bluffeurope.com/poker-news/en/poker_strategy/How-profitable-is-live-poker-_10793.aspx).

<sup>35</sup> See *Bellagio Poker Room Review*, *supra* note 25.

<sup>36</sup> See *Poker Tournaments – Schedule and Results*, CARDPLAYER, <http://www.cardplayer.com/poker-tournaments> (last visited Dec. 17, 2014). See Hannah Dreier, *As Trend Wanes, Las Vegas Casinos Fold Poker Rooms*, LAS VEGAS SUN (Mar. 1, 2013), <http://www.lasvegassun.com/news/2013/mar/01/trend-wanes-las-vegas-casinos-fold-poker-rooms/>.

<sup>37</sup> See *id.*

LEGALIZING ONLINE POKER IN THE UNITED STATES

online poker.<sup>38</sup> First, online poker is played much faster than live poker.<sup>39</sup> Because there is no actual physical shuffling required, never a need to make change from pots or stack chips, it is not uncommon for an online poker table to play 200+ hands per hour.<sup>40</sup> Second, for the same reasons Internet poker sites can play the same tournament as was described above in a single day, and does not have to compete with traveling tournament circuits, allowing them to offer the same tournament more frequently.<sup>41</sup> Finally Internet poker does not require paying dealers, cocktail waitresses and other employees to run the games, all of which minimize the profitability of what is actually raked in as revenue. Thus, considering the ability of Internet poker to offer more frequent tournaments and lower staffing costs, there is significantly more money to be made in online poker tournaments. Players also benefit because they do not need to travel and thus do not incur as much overhead expenses. Also, because everything is electronic it is easy for the sites to actually take a pure 10% rake; meaning they will take amounts less than a dollar (instead of a pot of \$11 having \$2 taken out, the online site would only take out \$1.10).<sup>42</sup>

In many ways, by being played on the Internet, online poker was designed to be more profitable for the house. The combination of lower costs to run games and more hands per hour make it the ideal way to make money hosting poker games. In 2010 it was estimated that PokerStars, which at that time was the biggest online poker company in the world, was making \$1.4 billion per year in revenue and \$500 million in profits.<sup>43</sup> Internet poker companies' profits skyrocketed as a result of Moneymaker's win. In 2010 it was estimated online poker was a \$4.8 billion annual business.<sup>44</sup> It is estimated that this number has grown to \$15 billion worldwide.<sup>45</sup>

### C. Washington Passes UIGEA

Aware of the popularity and amounts of money being wagered by Americans playing online poker, and faced with uncertainty regarding its legality in the U.S., Congress and President George W. Bush signed UIGEA.<sup>46</sup> The UIGEA specifically attacked online poker and gambling by regulating banks in an effort to prevent the financial transactions used to fund player accounts.<sup>47</sup> Instead of specifically passing legislation that stated online poker

---

<sup>38</sup> See *PokerStars Poker Table Rake*, POKERSTARS.COM, <http://www.pokerstars.com/poker/room/rake/> (last visited Dec. 17, 2014) [hereinafter *PokerStars*].

<sup>39</sup> *How Profitable is Live Poker*, *supra* note 34.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *PokerStars*, *supra* note 38.

<sup>43</sup> Nathan Vardi, *PokerStars: Online Gambling's Quiet Giant*, FORBES (Feb. 10, 2010 6:00 PM), <http://www.forbes.com/2010/02/10/internet-gambling-pokerstars-business-beltway-pokerstars.html>.

<sup>44</sup> *Id.*

<sup>45</sup> Richard Finger, *Online Gambling: A Pastime Whose Time Has Come*, FORBES (Jun. 30, 2013), <http://www.forbes.com/sites/richardfinger/2013/06/30/online-gambling-a-pastime-whose-time-has-come/>.

<sup>46</sup> See Rotem Nicole Moran, *Winner, Winner, No Chicken Dinner: An Analysis of Interactive Media Ent'mt & Gaming Ass'n v. Att'y Gen. of the U.S. and the Unjustified Consequences of the UIGEA*, 31 LOY. L.A. ENT. L. REV. 55, 61 (2011).

<sup>47</sup> Unlawful Internet Gaming Enforcement Act, 31 U.S.C. § 5361 (2006).

was illegal, the statute prevented American financial institutions from making payments to gambling sites. Specifically, it stated that

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling- (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card).<sup>48</sup>

Due to the nature of online poker and the fact that all the deposit methods involved some sort of electronic transaction- usually an electronic bank transfer or credit card deposit - this was effective at curbing online poker.<sup>49</sup> The statute was passed in 2006, but it did not become effective until January 19, 2009, and banks were not required to comply with UIGEA until December 1, 2009.<sup>50</sup> However, due to logistical issues with the language of the statute and unpreparedness by banks to comply by blocking these types of transactions the Federal Reserve Board of Governors and Department of the Treasury extended the compliance deadline to June 1, 2010.<sup>51</sup> Specifically the Treasury stated that was an extension was granted because “[T]he Agencies believe that a six month extension is sufficient for regulated entities to address issues related to the definition of ‘unlawful Internet gambling.’”<sup>52</sup> Additionally the government never provided the banks and payment processing companies with a “blacklist” of who not to process transactions for.<sup>53</sup> Despite the delays relating to the implementation of UIGEA, it took effect on June 1, 2010.<sup>54</sup> The result of the enactment of UIGEA was the withdrawal of access to all online poker sites that were listed on the London Stock Exchange (“LSE”).<sup>55</sup> However, many sites, most notably Full Tilt Poker and Poker Stars continued to offer access to U.S. players.<sup>56</sup>

---

<sup>48</sup> § 5363(1).

<sup>49</sup> See Brant M. Leonard, Note, *Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens*, 57 DRAKE L. REV. 515, 527 (2009).

<sup>50</sup> Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 BERKELEY TECH. L.J. 529, 545 (2010).

<sup>51</sup> Stephen A. Murphy, *Poker Players Grateful as UIGEA Delayed Six Months*, CARDPLAYER (November 27, 2009) <http://www.cardplayer.com/poker-news/8053-poker-players-grateful-as-uigea-delayed-six-months>.

<sup>52</sup> Gary Wise, *A Positive Delay*, ESPN (Nov. 30, 2009), <http://sports.espn.go.com/espn/poker/columns/story?id=4701438>.

<sup>53</sup> See Ciaccio, Jr., *supra* note 50, at 545.

<sup>54</sup> Matthew Kredell, *UIGEA Goes into Full Effect*, POKERNEWS (June 1, 2010), <http://www.pokernews.com/news/2010/06/uigea-goes-into-full-effect-8378.htm>.

<sup>55</sup> Andy Sullivan, *New Law Won't Stop Internet Gambling*, PCWORLD (Nov. 21, 2006, 1:00 AM), <http://www.peworld.com/article/127928/article.html>.

<sup>56</sup> Andrew M. Nevill, Note, *Folded Industry? Black Friday's Effect on the Future of Online Poker in the United States*, 2013 U. ILL. J.L. TECH. & POL'Y 203, 223 (2013)..

#### D. Continuation of Online Poker in the U.S. After UIGEA and “Black Friday.”

The main effect of UIGEA’s enactment was not a major decline of Americans playing online poker, but rather a consolidation of where Americans played.<sup>57</sup> Prior to UIGEA Party Poker (also known as Bwin.Party and traded as BPTY on the LSE) was the international leader in online poker, but their withdrawal from the U.S. market was estimated to cost them up to 90% of their revenue and sent their stock prices plunging.<sup>58</sup> However, because they were willing to continue to offer poker to Americans, Poker Stars and Full Tilt Poker became the two main online poker companies operating within the U.S.<sup>59</sup> UIGEA required banks to block certain types of payments (primarily electronic payments) used to fund “unlawful Internet gambling,” however UIGEA never actually identified what “unlawful Internet gambling” meant.<sup>60</sup> Although the term “unlawful Internet gambling” had not been clarified as to whether it included online poker, Full Tilt and PokerStars were still having trouble receiving direct deposits from American players and needed to create methods to circumvent the UIGEA restrictions.<sup>61</sup> Because nothing in UIGEA made the banks responsible for what happened to money after a transfer was made to a non-gambling entity, Full Tilt and PokerStars used third parties to accept the initial deposit from the U.S. bank and then had the third party processor reroute the money to them.<sup>62</sup> Thus, when a player in the U.S. wanted to make a deposit, Poker Stars and Full Tilt would credit the player’s account in the amount of the deposit and then have a third party charge that amount directly to the player’s American bank account or credit card.<sup>63</sup> The third party sites set up by Full Tilt and PokerStars were in many cases fake Internet retail companies claiming to sell items such as watches, bicycles, golf clubs etc.<sup>64</sup> The sham set up by these companies allowed online poker to continue with little regard for the restrictions of UIGEA because the banks believed they were facilitating transactions with foreign retail merchants, and were not in a position to know that the money paid to a clothing retailer would later be transferred to fund an online poker account.<sup>65</sup> On the day that UIGEA went into effect there were almost 60,000 people still playing on the Full Tilt and PokerStars websites.<sup>66</sup>

On Friday April 15, 2011 the U.S. District Attorney for the Southern District of New York unsealed an indictment against Full Tilt Poker and PokerStars.<sup>67</sup> Not only did these sites immediately stop offering online poker to their American consumers, but the

---

<sup>57</sup> See Simon Bowers, *Ray Bitar, Full Tilt Poker Founder, Strikes Deal with US Prosecutors*, GUARDIAN, (Apr. 9, 2013, 3:40 PM), <http://www.theguardian.com/uk/2013/apr/09/ray-bitar-full-tilt-poker-pleads-guilty> [hereinafter Bowers, *Ray Bitar*].

<sup>58</sup> Simon Bowers, *Players Walk Away as U.S. Law Wipes Out 90% of Party Gaming’s Poker Revenue*, THE GUARDIAN (Oct. 16, 2006), available at <http://www.theguardian.com/business/2006/oct/17/usnews.gambling>.

<sup>59</sup> Bowers, *Ray Bitar*, *supra* note 57.

<sup>60</sup> Ciaccio, Jr., *supra* note 50, at 542-43, 545.

<sup>61</sup> See Bowers, *Ray Bitar*, *supra* at note 57.

<sup>62</sup> Kerry O’Brien, Note, *The Great Wild Card: How 2011 Shook the Online Poker World and Became a Game-Changer in the Battle for Legalization*, 38 J. LEGIS. 295, 300 (2012).

<sup>63</sup> *Id.*

<sup>64</sup> Bowers, *Ray Bitar*, *supra* note 57.

<sup>65</sup> See O’Brien, *supra* at note 62, at 300.

<sup>66</sup> Kredell, *supra* note 54.

<sup>67</sup> See Kuznick, *supra* note 13, at 452.



“.com” domains were seized by the Department of Justice (“DOJ”).<sup>68</sup> All of a sudden, hundreds of millions of dollars held in the player accounts of American poker players were inaccessible to the American players.<sup>69</sup> This day ended up being called “Black Friday” by the poker community.<sup>70</sup> While both Full Tilt and PokerStars were accused of violating UIGEA, the most severe accusations came against Full Tilt Poker which was accused of running a full-fledged Ponzi scheme.<sup>71</sup> When the DOJ returned the “.com” domains to Full Tilt and PokerStars to facilitate cash withdrawals for American players, it became immediately apparent that Full Tilt had a serious problem coming up with funds.<sup>72</sup> Leading up to the indictment Full Tilt was having trouble securing third party processors to fund player accounts.<sup>73</sup> Instead of waiting to receive the payment before crediting the funds to the players’ accounts, Full Tilt funded the players’ account, and by failing to secure third party processors to make these transactions, created a \$130 million shortfall.<sup>74</sup> Full Tilt believed it would be able to survive the shortfall because players tended to never withdraw the entirety of their player account, but the seizure of the website by the DOJ led Americans to attempt withdrawing all their funds at once.<sup>75</sup> At the time of the shutdown, Full Tilt had \$59 million in its bank accounts, but owed its players over \$390 million.<sup>76</sup>

The result of Black Friday was essentially a complete end to online poker in the United States.<sup>77</sup> While other providers attempted to seize the opportunity and offer poker to American consumers, it was not the same experience and was not nearly as successful.<sup>78</sup> Black Friday resulted in hundreds of millions of dollars of American’s money being held up in cyberspace.<sup>79</sup> Players who made a living playing poker often used their online poker accounts as bank accounts.<sup>80</sup> These players were left crippled as they no longer had the ability to make the money they had in the past because in poker you can only win as much money as you are able to bet.<sup>81</sup> Some players had as much as \$150,000 in their accounts at

---

<sup>68</sup> *Id.*

<sup>69</sup> Nevill, *supra* note 56, at 208.

<sup>70</sup> *Id.* at 204.

<sup>71</sup> *Id.* at 207-210. See also Susanna Kim, *Online Poker Site Running Ponzi Scheme, DOJ says*, ABC NEWS (Sept. 20, 2011 2:34 PM), <http://abcnews.go.com/blogs/business/2011/09/online-poker-site-running-ponzi-scheme-doj-says/>.

<sup>72</sup> David McLaughlin & Beth Jinks, *Online Poker Companies Reach Accord With U.S. on Players’ Access to Money*, BLOOMBERG (Apr. 20, 2011, 1:54 PM), <http://www.bloomberg.com/news/2011-04-20/online-poker-companies-reach-accord-with-u-s-on-players-access-to-money.html>. See also Bowers, *Ray Bitar*, *supra* note 57.

<sup>73</sup> Nevill, *supra* note 56, at 208.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 208-09.

<sup>76</sup> *Id.* at 208.

<sup>77</sup> James Romoser, Note, *Unstacking the Deck: The Legalization of Online Poker*, 50 AM. CRIM. L. REV. 519, 520 (2013).

<sup>78</sup> See Nevill, *supra* note 56, at 217.

<sup>79</sup> See *id.* at 213-14.

<sup>80</sup> Because websites have maximum limits on deposit amounts, it was not uncommon for players to “build a bankroll” and leave it in their online poker account because it would allow them to play bigger games in the future. See *id.* at 213-14. It was common practice to withdraw smaller amounts of money for living expenses as needed, but use the poker account as a primary bank account. See *id.*

<sup>81</sup> KEN WARREN, KEN WARREN TEACHES TEXAS HOLD’EM: THE MOST COMPREHENSIVE BOOK EVER WRITTEN ON HOLD’EM, 14 (1<sup>st</sup> ed. 2003).

LEGALIZING ONLINE POKER IN THE UNITED STATES

the time of seizure, with no immediate knowledge of when they would be able to have access to that money.<sup>82</sup> Because the “.com” domains were seized, American players could not even log into their account and attempt to withdraw their money on Black Friday.<sup>83</sup> Those players who were lucky enough to have been using PokerStars instead of Full Tilt began to get repaid as early as October of 2011; and if poker was their primary income, they could only continue to play on PokerStars by moving to a country where it was legal.<sup>84</sup> Those who had been using Full Tilt were left without remedy for years due to insufficient funds.<sup>85</sup> The repayment process of the \$150 million still owed by Full Tilt to American players finally began in January 2014, almost 3 years after Black Friday, but only \$82 million was approved for payment.<sup>86</sup>

Now that players had witnessed federal criminal indictments against poker companies, the enthusiasm and trust in the online poker system had been shattered, compared to the past when there was only uncertainty about its legality despite UIGEA.<sup>87</sup> Thus, even though other providers such as Bovada and LockPoker attempted to offer poker to Americans, the lack of trust, inaccessibility to funds and sense of fear that resulted from Black Friday scared many Americans away.<sup>88</sup> Americans that have continued to play in the post-Black Friday era have been potentially worse off. It is estimated that Americans currently make up \$6 billion of the \$15 billion annual online poker revenues.<sup>89</sup> Because of the illegality of sites overseas, American players are sometimes forced to pay up to 15%-20% to withdraw their funds, leaving them in a dangerous and vulnerable position.<sup>90</sup>

**E. The Online Poker Industry Outside of the U.S. After UIGEA and Black Friday.**

After the passage of UIGEA, companies that were publically traded on the LSE, most notably Party Poker, immediately withdrew access from American players.<sup>91</sup> BPTI lost 58% of its market cap the following day.<sup>92</sup> However, by 2008 Party Poker continued to operate in European countries where online poker was legal.<sup>93</sup> Even after Black Friday, PokerStars was allowed to continue to operate in Europe after it settled with the DOJ for \$547 million and agreed to purchase Full Tilt and pay another \$184 million towards reimbursement

---

<sup>82</sup> Janet Morrissey, *Poker Inc. to Uncle Sam: Shut up and Deal*, N.Y. TIMES (Oct. 8, 2011) available at [http://www.nytimes.com/2011/10/09/technology/internet/in-online-poker-a-push-to-legalize-and-regulate-the-game.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/10/09/technology/internet/in-online-poker-a-push-to-legalize-and-regulate-the-game.html?pagewanted=all&_r=0).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* See also John Mehaffey, *Timeline: Two Years Since Black Friday*, USPOKER (Apr. 15, 2013 1:00 PM), <http://www.uspoker.com/blog/timeline-two-years-since-black-friday/3779/>.

<sup>85</sup> Dan Cypra, *DOJ Approves \$82 Million in U.S. Full Tilt Repayments*, POCKETFIVES (Jan. 23, 2014), <http://www.pocketfives.com/articles/doj-approves-82-million-us-full-tilt-repayments-589154/>.

<sup>86</sup> *Id.*; see generally Nevill, *supra* note 56.

<sup>87</sup> See Nevill, *supra* note 56, at 217; Cypra, *supra* note 85.

<sup>88</sup> See Nevill, *supra* note 56, at 217.

<sup>89</sup> Finger, *supra* note 45.

<sup>90</sup> *Id.*

<sup>91</sup> Nevill, *supra* note 56, at 209.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 209.

of Full Tilt player accounts.<sup>94</sup> The belief behind PokerStar's cooperation with the DOJ in acquiring Full Tilt is that it would help it re-enter the American market if online poker was legal in the future.<sup>95</sup> Meanwhile, other operators have entered and seen increased traffic in the European market since Black Friday.<sup>96</sup> Additionally American companies such as Caesars Entertainment have opened online poker operations in Europe under their WSOP brand.<sup>97</sup>

## II. LEGAL ONLINE POKER IN FOREIGN NATIONS

### A. Online Poker in the EU

Because of the nature of the European Union and its intent to allow easy access into member states' markets, online poker has been successfully operating across state borders in Europe.<sup>98</sup> While EU member states do not have to offer online poker, they cannot restrict it either because of the fundamental freedoms under the Treaty of Functioning of the EU.<sup>99</sup> Because of the fundamental freedoms, the European Court of Justice ("ECJ") has held that a member state cannot restrict the ability of its citizens to partake in online gaming, including online poker, run by an entity in another member state, but still allowing them to play on the site of an entity within their own sovereignty; except if they can establish their restrictions protect their consumers in a "consistent and systematic" way.<sup>100</sup> As a result it is difficult for one state to allow online poker, gaming or lotteries while trying to restrict it to only in-state operators especially since the ECJ requires compelling reasons that public interest objectives meet the "consistent and systematic" requirement for such restrictions.<sup>101</sup> As recently as September of 2013, the ECJ has ruled on the issue of the restriction of online poker in a country where the government still allows online gaming from entities located within the state.<sup>102</sup> In a case involving Italy, where the government attempted to block out- of- country providers of online poker, but had already legalized online "cash games" in 2011, the ECJ held that the restriction was contrary to EU law.<sup>103</sup> The preliminary ruling emphasized that a country under EU law is not able to favor its own interests in a sector over from the interest of another member state.<sup>104</sup> The ruling also stated that a member state under Articles 43 and 49

---

<sup>94</sup> *Id.* at 215.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 217.

<sup>97</sup> *Dragonfish Launches Free Play WSOP*, DRAGONFISH, <http://www.dragonfishtech.com/news-events/2010-archive/articles/free-play-wsop.htm> (last visited Dec. 18, 2014).

<sup>98</sup> See Eric Pfanner, *Europe Unleashes Online Gambling to Fill Coffers*, INT'L N.Y. TIMES (July 27, 2010), [http://www.nytimes.com/2010/07/28/technology/28eurogamble.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/07/28/technology/28eurogamble.html?pagewanted=all&_r=0).

<sup>99</sup> See Press Release, European Comm'n, Commission Requests Member States to Comply with EU Law When Regulating Gambling Services (Nov. 20, 2013), available at [http://europa.eu/rapid/press-release\\_IP-13-1101\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-13-1101_en.htm?locale=en).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Brian Pempus, *European Court: Italy Cannot Block Online Poker*, CARDPLAYER (Sep. 23, 2013), <http://www.cardplayer.com/poker-news/16176-european-court-italy-cannot-block-online-poker>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

of the European Convention, is not precluded from placing a police-type restriction upon a company of another member state, offering services to one within its state, however, such restrictions must be the same for the companies from other member states as they are for the companies operating within that member state.<sup>105</sup> This ruling has seemed to justify major players PokerStars and Bwin having the right to operate in any state in the EU that allows online gaming because they themselves are operated from an EU member state.<sup>106</sup> Thus, the current environment that exists in the EU allows online poker operators, located in an EU member state, to operate across the other EU member states that allow online poker in their own territory.

### B. Current Status of EU and the U.S. Free Trade Agreements

The EU and the United States are both members of the World Trade Organization (“WTO”).<sup>107</sup> Membership to the WTO requires member states to abide by certain open market policies, which the U.S. has potentially come into conflict with in passing federal restrictions on online poker in the past.<sup>108</sup> The WTO has stated that the U.S. is in violation of its Article XVI obligations under the General Agreement on Trade in Services (“GATS”) by restricting foreign companies from offering online poker in the United States.<sup>109</sup> However, the U.S. has been able to fight off penalties for many years by arguing that they are protected and able to restrict such business under Article XIV(a).<sup>110</sup> Article XIV(a) gives countries the right to restrict access to businesses that affect “public moral and public order.”<sup>111</sup> Examples of businesses that affect “public moral and public order” are those that may encourage money laundering, underage gaming, compulsive gambling and fraud.<sup>112</sup>

Despite the argument that the U.S. was allowed to prohibit online poker due to the Article XIV(a) exception, a recent ruling by the WTO, involving a dispute between the U.S., Antigua and Barbuda seems to have addressed the issue of whether the U.S.’s prohibition of online poker is justified under Article XIV(a).<sup>113</sup> In its judgment, the WTO stated that the U.S. was in violation of the WTO after implementing UIGEA because it restricted online gaming businesses from operating in the U.S.<sup>114</sup> The WTO stated that there is a “zero quota” rule that applies to Article XVI and if they allow some market access they have to allow all

---

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Understanding the WTO: The Organization*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Dec. 18, 2014).

<sup>108</sup> See Michael Grunfeld, Survey, *Don’t Bet on the United States’s Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUM. BUS. L. REV. 439, 480-81 (2007).

<sup>109</sup> *Id.* at 485.

<sup>110</sup> *Id.* at 487.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 489.

<sup>113</sup> Editorial, *A New Front in Global Trade Wars*, N. Y. TIMES, Feb. 7, 2013, available at [http://www.nytimes.com/2013/02/08/opinion/a-new-front-in-global-trade-wars.html?\\_r=0](http://www.nytimes.com/2013/02/08/opinion/a-new-front-in-global-trade-wars.html?_r=0) [hereinafter *Global Trade Wars*].

<sup>114</sup> *Id.*

market access.<sup>115</sup> Because the U.S. has many forms of gambling including poker, lotteries, and sports betting, it cannot prevent foreign companies from having market access.<sup>116</sup> The WTO also struck down the “morals” defense because the U.S. allowed off track horse betting, which was conducted by telephone and online, making it to similar to the type of business they sought to restrict from Antigua and Barbuda.<sup>117</sup> Further complicating the issue is the fact that because the U.S. refused to settle with the two nations, the WTO has actually granted Antigua and Barbuda the right to violate U.S. patents and copyrights on American movies, books, pharmaceuticals and other consumer products in an amount up to \$21 million per year, as compensation for the estimated loss of 4,000 jobs resulting from restrictions on entering the American market.<sup>118</sup> Antiguan officials have repeatedly stated they would prefer to settle than go forward and violate American IP protections, but no progress has been made.<sup>119</sup> The U.S. has yet to suffer from this ruling, primarily because the U.S. is a major trade partner for these two nations and they are cautious not to upset the U.S.,<sup>120</sup> but the ruling highlights the issue of the potentially dangerous position the U.S. would be in if a major trade partner that they could not ignore in the same way filed a similar suit.<sup>121</sup>

### III. THE LEGALITY OF ONLINE POKER IN THE UNITED STATES AT A FEDERAL LEVEL

#### A. Failed Congressional Legislation

After Black Friday there were immediate calls to legalize online poker through federal legislation. The first major attempt was from Representative Barney Frank (D-MA), who introduced the Internet Gambling Regulation, Consumer Protection, and Enforcement Act of 2009 (Internet Gambling Act or “IGA”).<sup>122</sup> The IGA applied to all online gambling; meaning electronic casino games in addition to online poker, and was designed to provide a licensing method for online gaming along with a way to enforce the tax code on online gaming.<sup>123</sup> Frank’s main argument behind the bill was based on Congressional Budget Office (“CBO”) estimates that the licensing fees would lead to \$283 million in government revenue over the first nine years; and the companion bill to the IGA, the Internet Gambling Tax Act, would “generate as much as \$40 billion for the federal government and \$30 billion for state governments.”<sup>124</sup> The IGA would regulate online gaming in all states, but give states the choice to opt out and not offer online gambling within their borders.<sup>125</sup> This bill would not

---

<sup>115</sup> Grunfeld, *supra* note 108, at 483.

<sup>116</sup> *Id.* at 484.

<sup>117</sup> *Antigua- United States WTO Internet Gambling Case*, ANTIGUA WTO, available at <http://www.antiguawto.com/WTODispPg.html> (last visited Dec. 18, 2014).

<sup>118</sup> *Global Trade Wars*, *supra* note 113.

<sup>119</sup> *Global Trade Wars*, *supra* note 113.

<sup>120</sup> See Liat Clark, *WTO Grants Antigua Right to Launch ‘Pirate’ Site Selling U.S. Media*, WIRED.CO.UK (Jan. 29, 2013), <http://www.wired.co.uk/news/archive/2013-01/29/antigua-legitimate-piracy>.

<sup>121</sup> See *id.*

<sup>122</sup> Kuznick, *supra* note 13, at 470. (citing H.R. 2267).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 470-71.

<sup>125</sup> *Id.* at 471.

LEGALIZING ONLINE POKER IN THE UNITED STATES

restrict access to foreign players, or in the case of poker, from allowing players in a United States jurisdiction from playing against someone in another country.<sup>126</sup> This bill originally failed to even make it in front of the House floor for a vote, and although it was reintroduced in the House in 2011 it has yet to pass.<sup>127</sup>

The other major Congressional attempt came from Senate Majority Leader Harry Reed (D-NV) when he introduced the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening the UIGEA Act of 2010 (Internet Poker Act or “IPA”).<sup>128</sup> Unlike Frank’s bill, which would have legalized all online gaming, the IPA would have only legalized online poker.<sup>129</sup> The IPA would only apply to states that currently offer “live” (casino based) poker at the time of passage.<sup>130</sup> In order for a regulated state to opt out, the Governor of that state must make such intentions explicitly in writing.<sup>131</sup> Also unlike the IGA, the IPA prevents United States residents from playing poker online against people from other countries.<sup>132</sup> Finally, the IPA has a 15-month blackout period, during which no company could operate until licenses had been granted from regulatory agencies.<sup>133</sup> The purpose of the blackout period is to prevent companies which would be ready to operate from the moment of the IPA’s passage from gaining an unfair advantage.<sup>134</sup> This has been criticized by the main poker lobby, the Poker Players Alliance (“PPA”), as potentially crippling any chance of a legal online poker market because players would likely play on other sites (run by companies with no intent of gaining a long term license) that were available to them at the moment of passage of the IPA and once they became accustomed and accumulated funds on those sites it would subsequently minimize the potential American player base.<sup>135</sup> The IPA bill failed to pass in 2010, but has been used as a basis to pass federal legislation for online poker in Congress.<sup>136</sup>

**B. The Justice Departments Reinterpretation of the Federal Wire Act and States Individual Legalization of Online Poker**

The biggest victory towards the legalization of online poker in the United States was not any Congressional legislation, but was an actual policy change from the DOJ on interpreting the law that had been the reason for arguments that online poker was illegal in the first place.<sup>137</sup> In 2011, New York and Illinois presented the DOJ with a preliminary question of whether their new policies regarding the sale of lottery tickets would violate the Wire Act.<sup>138</sup> The DOJ answered the question by stating that the Wire Act applies to interstate

---

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 472.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 472-73. (citing Internet Poker Act § 108(b)(1)(c)).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (citing Internet Poker Act § 104(b)(3)(A)(ii)).

<sup>133</sup> *Id.* (citing § 118(a)).

<sup>134</sup> *Id.*

<sup>135</sup> *See id.*

<sup>136</sup> *Id.* at 472.

<sup>137</sup> O.L.C., *supra* note 8, at 1, 6.

<sup>138</sup> *Id.* at 1.

transmission of sports betting and sports betting only.<sup>139</sup> Since in the past, the Wire Act was the law used as the primary basis to argue online poker was illegal, states took this new opinion to mean that the past reasoning for online poker's illegality was no longer valid.<sup>140</sup> As long as the states confined the online gaming within their own borders, it would be classified as intrastate commerce and the Wire Act would have no applicability.<sup>141</sup> The DOJ's decision "eliminates virtually all federal barriers for state-legal Internet gambling."<sup>142</sup> Thus, from the moment the new statement came out from the Department of Justice, states that in the past had wanted online poker, or had an interest in protecting their existing poker industry, began attempting to pass legislation that would legalize online poker in their own state.<sup>143</sup>

#### IV. ISSUES THAT EXIST WITH CURRENT STATE BASED LEGISLATION AND THEIR FAILURE TO SUCCESSFULLY INTEGRATE AN INTERNATIONAL PLAYER POOL

Since the re-interpretation of the Federal Wire Act by the Department of Justice, Nevada, Delaware and New Jersey have all legalized online poker (New Jersey legalized all online gaming including casino style games).<sup>144</sup> The rush by states to get into the industry is logical, as the estimated value of the U.S. poker market is upwards of \$2 billion per year.<sup>145</sup> However, as of now no state has been willing to offer any form of online gaming beyond that which is offered only to people within their own state.<sup>146</sup>

##### A. Online Gaming in New Jersey

Since online poker is currently only operating on an intrastate level, New Jersey is currently the largest market for online poker in the U.S. In 2014 New Jersey signed into law No. 1903, which "permit[s] Internet gaming equipment to be located at certain secure facilities in Atlantic City."<sup>147</sup> SB 1903's intent is to further support the 1976 amendment to

---

<sup>139</sup> *Id.*

<sup>140</sup> See Nevill, *supra* note 56, at 219.

<sup>141</sup> See Joe Cahill, *Rolling the Dice: States Double Down in Bid to Lure Online Gamblers*, A.B.A. J. (Aug. 1, 2012, 7:40 AM), [http://www.abajournal.com/magazine/article/rolling\\_the\\_dice\\_states\\_double\\_down\\_in\\_bid\\_to\\_lure\\_online\\_gamblers/](http://www.abajournal.com/magazine/article/rolling_the_dice_states_double_down_in_bid_to_lure_online_gamblers/).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Darren Heitner, *U.S. Government Seeks to Set Internet Poker Free...Through New Regulations*, FORBES (July 15, 2013, 9:45 AM), <http://www.forbes.com/sites/darrenheitner/2013/07/15/u-s-government-seeks-to-set-internet-poker-free-through-new-regulations/>; see also Darren Heitner, *Online Gaming Legalized In New Jersey and Virgin, Others Building Virtual Boardwalk Empires*, FORBES (Feb. 4, 2014, 8:26 AM), <http://www.forbes.com/sites/darrenheitner/2014/02/04/is-online-gambling-virgin-on-new-territory-in-the-garden-state/2/>.

<sup>145</sup> Bob Pajich, *The Rebuilding of Online Poker in America*, CARDPLAYER (Jul. 4, 2013), <http://www.cardplayer.com/poker-news/15846-the-rebuilding-of-online-poker-in-america>.

<sup>146</sup> See Heitner, *supra* note 144.

<sup>147</sup> *Editorial: Congress Must Reverse Foolish Online Poker Policy*, LAS VEGAS REV. J. (Nov. 19, 2014, 12:01 AM), <http://www.reviewjournal.com/opinion/editorial-congress-must-reverse-foolish-online-poker-policy>; Assemb. No. 1903, 216th Leg., 2014 Sess. (N.J. 2014); see UNLV CTR. FOR GAMING RES., UNITED STATES

LEGALIZING ONLINE POKER IN THE UNITED STATES

the New Jersey State Constitution that allowed for casino gaming in Atlantic City.<sup>148</sup> The original purpose of allowing casino gaming in Atlantic City was to help revitalize the city as a resort destination; and SB 1903's text acknowledges that Atlantic City has been in financial trouble from a gaming perspective because of regional and global competition.<sup>149</sup> SB 1903 also states in its introduction that its purpose is to help "preserve, restore and revitalize," Atlantic City, because it is a "critical component" of the State's economic infrastructure, and provides "substantial contributions" to the "general health, welfare, and prosperity of the State and its residents."<sup>150</sup>

SB 1903 details the history of online gambling, noting that it was an unregulated industry run by offshore companies that faced no enforcement; and that consequentially there was no consumer protection.<sup>151</sup> Most importantly SB 1903 mentions UIGEA, and then proceeds to explain that it believes UIGEA provides exceptions that "permit individual states to create a regulatory framework to enable intrastate Internet gambling, provided that the bets or wagers are made exclusively within a single state under certain circumstances."<sup>152</sup> The bill states that an effective system under the regulatory control of the state would provide the state with tax revenue it has been illegally losing to foreign operators; protect underage residents from gambling; ensure the games offered are "fair and safe;" and that finally also help the economic stability of Atlantic City.<sup>153</sup>

SB 1903 limits who may operate online gaming sites and provides that "all hardware, software, and other equipment that is involved with Internet gaming will be located in casino facilities in Atlantic City or in other facilities in Atlantic City that are secure, inaccessible to the public, and specifically designed to house that equipment, and where the equipment will be under the complete control of a casino licensee or its Internet gaming affiliate;" or as the bill simply suggests, all activity and wagers must run through a server located in an Atlantic City casino.<sup>154</sup> The bill requires that "only those of good character and fitness who meet strict criteria may participate in Internet gaming operations in New Jersey."<sup>155</sup> In order to play through an online-casino in New Jersey, the player must be located within the territorial limits of New Jersey.<sup>156</sup>

The most contentious part of the bill has involved the requirement of "good character and fitness," in order to operate a gaming site in New Jersey, as it has been the primary reason for keeping out the world-wide leader in online poker, PokerStars.<sup>157</sup> On December 11, 2013 the New Jersey Division of Gaming Enforcement decided to suspend any

---

ONLINE GAMING – MONTHLY STATEWIDE & NATIONAL DATA 1 (2014), available at [http://gaming.unlv.edu/reports/US\\_online\\_gaming.pdf](http://gaming.unlv.edu/reports/US_online_gaming.pdf).

<sup>148</sup> Assemb. No. 1903, 216th Leg., 2014 Sess. (N.J. 2014).

<sup>149</sup> *Id.* § 1(1)(a-b).

<sup>150</sup> *Id.* § 1(1)(c-d).

<sup>151</sup> *Id.* § 1(1)(f).

<sup>152</sup> *Id.* § 1 (1)(g).

<sup>153</sup> *Id.* § 1(1)(h).

<sup>154</sup> *Id.* § 1(1)(j-k).

<sup>155</sup> *Id.* § 1(1)(h).

<sup>156</sup> *See id.* § 1(3)(h)(6).

<sup>157</sup> *See* Nathan Vardi, *New Jersey Suspends Review of PokerStar's Online Gambling License*, FORBES (Dec. 11, 2013, 12:23 PM), <http://www.forbes.com/sites/nathanvardi/2013/12/11/new-jersey-suspends-review-of-pokerstars-online-gambling-license/>.



review of PokerStars' application for entry into the New Jersey market.<sup>158</sup> The Division's primary reason for denying review of the application is because of PokerStars continued affiliation with its founder, Isai Scheinberg, who is still facing a federal indictment: "The Division's determination is based primarily on the unresolved federal indictment against Isai Scheinberg for the alleged violation of federal gambling statutes, namely[...] the UIGEA, and the involvement of certain PokerStars executives with Internet gaming operations in the United States following the enactment of UIGEA."<sup>159</sup> PokerStars had been attempting to buy the Atlantic Club Casino in Atlantic City so it would have had a brick and mortar casino, which it could use to run its online gaming operations legally in New Jersey.<sup>160</sup> The deal to buy the property fell through when "Rational Group's (PokerStars) plan to secure preliminary licensing approval" became delayed.<sup>161</sup> It would appear PokerStars was only interested in buying the now closed Atlantic Club for the purpose of being able to offer online poker in New Jersey, which demonstrates the value in the market if they were willing to pay \$15 million for what is now an abandoned building.<sup>162</sup>

Online poker (and gambling) has only been in operation for two months in New Jersey.<sup>163</sup> The total profit brought in by the Atlantic City casinos was \$7.4 million from online gaming in December and \$9.5 million in January.<sup>164</sup> The impact has already been positive for the financially struggling Atlantic City casinos.<sup>165</sup> Without online gaming in New Jersey, casino revenue would have been down 9.2% for January, but was only down 4.6% from a year ago because of the additional revenue.<sup>166</sup>

## B. Other States Currently Operating Online Gaming

Nevada and Delaware are the only other states currently offering online poker.<sup>167</sup> As of the 2013 census, Nevada has roughly 2.8 million residents and Delaware roughly 900,000 residents.<sup>168</sup> These combined populations still pale in comparison to the almost 8.9

---

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Donald Wittkowski, *PokerStars' Parent Company Gives up Bid to Buy Atlantic Club Casino*, PRESSOFATLANTICCITY (Aug. 3, 2013, 2:00 AM), [http://www.pressofatlanticcity.com/communities/atlantic-city\\_pleasantville\\_brigantine/pokerstars-parent-company-gives-up-bid-to-buy-atlantic-club/article\\_0f42af04-fbc5-11e2-a863-0019bb2963f4.html](http://www.pressofatlanticcity.com/communities/atlantic-city_pleasantville_brigantine/pokerstars-parent-company-gives-up-bid-to-buy-atlantic-club/article_0f42af04-fbc5-11e2-a863-0019bb2963f4.html).

<sup>161</sup> *Id.*

<sup>162</sup> Wayne Parry, *Atlantic Club Casino Shuts its Doors*, TOCASINO (Jan. 14, 2014, 2:20 PM), <http://www.tocasino.net/casino-news/3884-atlantic-club-casino-shuts-its-doors.html?tmpl=component&print=1&layout=default&page=>.

<sup>163</sup> Wayne Perry, *Atlantic City Casino Win Down \$4.6M in January*, YAHOO FINANCE (Feb. 12, 2014, 3:36 PM), <http://finance.yahoo.com/news/atlantic-city-casino-win-down-203622116.html>. Online gaming debuted in New Jersey in December 2013. *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *See id.*

<sup>166</sup> *Id.*

<sup>167</sup> Brett Collson, *Top 10 Stories of 2013: #1 The Launch of Regulated Online Poker in the U.S.*, POKERNEWS (Jan. 1, 2014), <http://www.pokernews.com/news/2014/01/top-10-2013-1-17101.htm>.

<sup>168</sup> Nevada – State and County Quick Facts, U. S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last visited Dec. 22, 2014); Delaware – State and County Quick Facts, U. S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last visited Dec. 22, 2014).

## LEGALIZING ONLINE POKER IN THE UNITED STATES

million residents that reside in New Jersey.<sup>169</sup> Because these states believe in order to avoid conflict with federal law, they must restrict online poker offerings to those located within their own state, states with smaller populations are at a major disadvantage.

Nevada law permits online gaming,<sup>170</sup> but has only allowed companies to offer online poker to residents.<sup>171</sup> The major difference between the Nevada and New Jersey law is that Nevada has a provision giving the Governor the power to enter into interstate gaming compacts.<sup>172</sup> The inclusion of this provision showed Nevada's desire to expand their online market beyond the confines of their borders and limited population.

In February 2014, Nevada and Delaware announced that they had reached an agreement to merge their player pools for online poker.<sup>173</sup> The agreement allows each state to implement their respective state gambling taxes.<sup>174</sup> Specific operation details have yet to be worked out, but two bodies will be created that will represent each state in oversight of the interstate online poker operation.<sup>175</sup> The agreement also created the flexibility to add additional states to the compact in the future.<sup>176</sup> Commenting on the agreement, A.G. Burnett of the Nevada Gaming Control Board noted "It contemplates the ability of other states to join, and it gives full deference to each states' own regulatory process as long as that process follows strict standards for player protection, licensing, and technical standards."<sup>177</sup>

### C. Potential Issues with Indian Gaming Regulatory Act

In 1976, the Supreme Court settled a dispute that arose in Minnesota regarding Itasca County's attempt to tax Native American land in *Bryan v. Itasca County*.<sup>178</sup> In *Bryan*, the county had attempted to tax the Petitioner for his mobile home, which was located on an Indian reservation held in trust by the United States for members of the Chippewa Tribe, which Bryan was a member of.<sup>179</sup> The Court held "[i]f Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so."<sup>180</sup> This decision paved a path for Native Americans living on reservations held in trust by the U.S. to start offering live casino

---

<sup>169</sup> New Jersey – State and County Quick Facts, U. S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last visited Dec. 22, 2014).

<sup>170</sup> 2013 Nev. Stat. Ch. 2, AB 114, *available at* [https://www.leg.state.nv.us/Statutes/77th2013/Stats201301.html#CHz2\\_zABz114](https://www.leg.state.nv.us/Statutes/77th2013/Stats201301.html#CHz2_zABz114).

<sup>171</sup> Brian Pempus, *WSOP Real-Money Nevada Online Poker Underway*, CARDPLAYER (Sep. 19, 2013), <http://www.cardplayer.com/poker-news/16164-wsop-real-money-nevada-online-poker-underway>.

<sup>172</sup> 2013 Nev. Stat. 4 at § 6.

<sup>173</sup> Christopher Palmeri, *Nevada Joins with Delaware for Multistate Online Poker Pact*, BLOOMBERG (Feb. 25, 2014, 2:45 PM) <http://www.bloomberg.com/news/2014-02-25/nevada-joins-with-delaware-for-multistate-online-poker-pact-1-.html>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> 426 U.S. 373, 373 (1976).

<sup>179</sup> *Id.* at 375.

<sup>180</sup> *Id.* at 390.

gaming.<sup>181</sup> In 1987, the Supreme Court directly weighed the question of whether or not counties and states could enforce their own gaming regulatory laws on tribal lands in *California v. Cabazon Band of Mission Indians*.<sup>182</sup> In *Cabazon*, the state attempted to enforce restrictions on bingo-style gaming that was occurring on tribal land.<sup>183</sup>

The Court held that when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.<sup>184</sup>

Unless the states choose to prohibit gambling altogether, *Cabazon* forbade them from attempting to regulate gambling on tribal lands.<sup>185</sup> The result of *Cabazon* was that if the game was not entirely prohibited in the state, it could not then be prevented from taking place on the Indian reservation, as that would be considered a regulatory action.<sup>186</sup> In applying the decision to the bingo games the state was trying to prevent in *Cabazon*, unless the state prohibited all bingo and lottery games that were currently offered in California (including church bingo), it could not regulate the tribe, even if the tribe's games were for more money and a profit unlike the "church bingo" games.<sup>187</sup> *Cabazon* and *Bryan* are credited as being the two cases that were the legal foundation for the Native American gaming industry.<sup>188</sup>

Soon after these rulings Congress passed the Indian Gaming Regulatory Act ("IGRA") in 1988.<sup>189</sup> IGRA specifically repeated the *Cabazon* holding by stating "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."<sup>190</sup> The general purpose of IGRA was that there needed to be federal guidelines for approving "standards or regulations for the conduct of gaming on Indian lands," primarily because the Supreme Court held the individual states are prohibited from regulating the tribes.<sup>191</sup> IGRA created a National Indian Gaming Commission ("NIGC"),<sup>192</sup> which has the power to temporarily halt gaming activities, levy fines, and approve ordinances and management contracts in regards to class II and class III gaming as defined in IGRA.<sup>193</sup> Class II gaming

---

<sup>181</sup> Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous \$ 147 County Tax Notice Helped Bring Tribes \$ 200 Billion in Indian Gaming Revenue*, 92 MINN. L. REV. 919, 921 (2008).

<sup>182</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>183</sup> *Id.* at 205.

<sup>184</sup> *Id.* at 205.

<sup>185</sup> *See id.* at 209-11.

<sup>186</sup> Connie K. Haslam, Note, *Indian Sovereignty: Confusion Prevails- California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083(1987), 63 WASH. L. REV. 169, 181 (1988).

<sup>187</sup> *See id.* at 180.

<sup>188</sup> *See Washburn, supra* note 181, at 920.

<sup>189</sup> Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701-2721).

<sup>190</sup> *Id.* § 2701(5).

<sup>191</sup> *Id.* at § 2701(2)-(3).

<sup>192</sup> *Id.* at § 2704.

<sup>193</sup> *Id.* at § 2705(a).

## LEGALIZING ONLINE POKER IN THE UNITED STATES

includes “games of chance commonly known as bingo,” and “card games that are explicitly authorized by the laws of the State, or are not explicitly prohibited by the laws of the State and are played at any location in the State,” but class II does not include any “banking card games,” meaning any card games where you play against the casino, not other players.<sup>194</sup> The NIGC in 1998 offered an advisory opinion that poker (as long as it is not being banked by the casino or house) is a class II game.<sup>195</sup> Class I gaming “means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations,” and does not require federal regulation.<sup>196</sup> Class III gaming “means all forms of gaming that are not class I gaming or class II gaming.”<sup>197</sup> Class III gaming includes traditional casino gaming; such as slot machines, blackjack, craps, roulette and other casino based table games where you play against the house.<sup>198</sup> The significant difference between Class I and II in comparison to Class III is that Class III requires “conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.”<sup>199</sup> Initially, some states attempted to block Class III gaming by refusing to enter into compacts with the tribes.<sup>200</sup> However, they eventually gave in because there was too much potential revenue to be gained by entering into an agreement with the tribes.<sup>201</sup> The states’ negotiation process with the tribes could almost be categorized as blackmail in the sense that they would hold out unless they were guaranteed a certain amount of the profit generated by the tribal gaming.<sup>202</sup> The result of this compact process was agreements where the states would get gaming revenue by allowing the tribes to offer it.<sup>203</sup> For example, in Connecticut, which has two tribal compacts with the Mashantucket Pequot’s and Mohegan’s (Foxwoods Resort Casino and Mohegan Sun Resort Casino), each tribe pays the state of Connecticut 25% of their slot machine revenue on a monthly basis.<sup>204</sup> However, the compacts are only in regards to Class III gaming - “nothing in this compact shall be to affect the operation by the Tribe of any Class II Gaming,” as required per IGRA.<sup>205</sup>

---

<sup>194</sup> *Id.* at § 2703(7)(A)(i-ii).

<sup>195</sup> Letter from Penny Coleman, Deputy General Counsel, to Philip Shea, Esq., (March 23, 1998) *available at* [http://www.nigc.gov/Reading\\_Room/Game\\_Classification\\_Opinions-old/Card\\_Games/Card\\_Games-11.aspx](http://www.nigc.gov/Reading_Room/Game_Classification_Opinions-old/Card_Games/Card_Games-11.aspx).

<sup>196</sup> § 2703(6).

<sup>197</sup> *Id.* at § 2703(8).

<sup>198</sup> Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 52 (2007).

<sup>199</sup> § 2710(d)(1)(C).

<sup>200</sup> Fletcher, *supra* note 198, at 56-7.

<sup>201</sup> *Id.* at 58.

<sup>202</sup> *See id.* at 59.

<sup>203</sup> *Id.*

<sup>204</sup> *See CT Casinos End 2013 with Declining Slots Revenue*, HARTFORDBUSINESS.COM (Jan. 15, 2014), <http://www.hartfordbusiness.com/ARTICLE/20140115/NEWS01/140119953>.

<sup>205</sup> The Mohegan Tribe – State of Connecticut Gaming Compact, Mohegan Tribe-State of Connecticut, Apr. 25, 1994, *available at* [http://www.ct.gov/dcp/lib/dcp/pdf/gaming/tribal\\_state\\_compact\\_mohegan%5B1%5D.pdf](http://www.ct.gov/dcp/lib/dcp/pdf/gaming/tribal_state_compact_mohegan%5B1%5D.pdf).

## V. A SYSTEM WHERE ALL PARTIES WIN

The biggest problem that currently exists in creating a sustainable and successful legal online poker market in the U.S. is that all current legislation governing online poker significantly limits player pools by only allowing people to play within state boundaries. The ability for an online poker site to be successful, first and foremost relies on the ability of the site to garner the most traffic possible.<sup>206</sup> The more traffic and players mean that the more “fish”<sup>207</sup> are available for the full-time players to play against, thus providing the greatest statistical and profitable edge.<sup>208</sup> From the perspective of the recreational player, more people playing on an online poker site provide them with the most variety of game selection and less likelihood they will be playing against a “pro.”<sup>209</sup> Thus, the best long-term sustainable business model requires poker sites to have the ability to offer their games to the most number of players possible.

In order to create such an environment there are several areas that will need to be corrected and adjusted under U.S. law, as it currently stands. These changes, if implemented, should lead to the greatest gain for all parties involved. First, they will provide a vibrant marketplace for the American consumer to play online poker against the largest number of possible participants, including foreign players. Second, it will create a well-regulated industry that protects the American and foreign consumer from the type of fraud that has gone on in the past. Third, it will allow American businesses to compete on equal footing in an industry that is currently dominated by foreign competitors. Fourth, will provide an easy way for state and federal governments to track online gaming revenue from individuals and provide increased tax revenue that the U.S. governments has been missing out on for years, since the majority of key online players have been playing in foreign jurisdictions. And finally, it will bring the U.S. into compliance with its obligations under the WTO and GATS, and prevent any further decisions against the U.S., such as the Antigua/Barbados judgments.

### A. Pass Federal Legislation Expressly Giving States the Choice to Allow Online Poker in Their Own Jurisdiction

Legislation granting power to the states to regulate online poker and conduct transactions across state and international borders is the best way for Congress to address the current lack of federal regulation. Unlike the bills that have been introduced by Representative Frank and Senator Reid, this proposal would not actually create federal regulation of online gaming. Instead, the bill should explicitly declare that the states are allowed to enter into agreements which would allow their residents to play with residents of other states and countries.

---

<sup>206</sup> See Kuznick, *supra* note 13, at 475.

<sup>207</sup> *Top 5 Skills that Separate a Poker Shark from a Poker Fish*, MIRROR (March 6, 2013), <http://www.mirror.co.uk/features/poker/top-5-skills-separate-poker-1746205>.

<sup>208</sup> Warren, *supra* at note 81, at 124. “[y]our profit comes from the mistakes your opponent makes. You don’t have to be the best player in the game. Usually, the only thing you need is not to be the worst player in the game. Playing against just one or two bad players is all you need to show a profit in the long run.” *Id.*

<sup>209</sup> *Id.*

## LEGALIZING ONLINE POKER IN THE UNITED STATES

This proposal would eliminate the intrastate barriers that currently exist in order to avoid potential conflicts with the Wire Act and UIGEA. States like New Jersey and Nevada would no longer be restricted to only offering online poker to residents within their own state for fear of conflict with federal law. The result would help immediately create larger player pools and help improve the current online poker sites. For example, the online poker sites run by Caesar's currently operate as two different distinct companies in Nevada and New Jersey, but at passage of the proposed regulation, they would be able to combine their player pools into one. Thus, in the case of a company like Caesar's, it would no longer have to operate separate businesses offering the exact same product in different states.

The main difference with this approach in comparison to current proposals that involve the states entering into compacts with one another is that this would not require negotiation between states.<sup>210</sup> Instead, the proposed bill would allow for a state to choose if they wanted to allow their residents to play online poker or not. If they chose to allow online poker, any company would be allowed to enter the market (as long as they complied with gaming regulations). Thus, it would simplify the question for the state legislatures to a simple "yes or no" in regards to allowing online poker. This would create a system that is substantially similar to the way the two major interstate lotteries operate.<sup>211</sup>

Powerball and Megamillions are the two major multi-state lotteries in the U.S., but they are still not offered in some states. Thus, any state that chose not to allow online poker would be allowed to reject anyone from playing within its borders; similar to the ban on the sale of Powerball and Megamillion tickets. Currently the states that offer online poker legally utilize geo-location based software.<sup>212</sup> This software allows the poker site to determine where the player is located when they log into the site, and if the player is not located within the state borders, they are denied access until they move within the states borders. The Congressional bill would require the online poker operators to utilize geo-location software. The benefit of this proposal is that it will mirror the interstate lottery system, and allow states autonomy if they choose to restrict online poker. Additionally, this proposal should be free of conflict with the Wire Act and UIGEA since it does not relate to sports betting and only allows for online poker.

### B. Creating Federal and State Profits

Another part of the legislation should deal specifically with taxation and the responsibility of the poker sites to keep records of player win/loss statements. Unlike a poker room in an actual casino the benefit of online poker is that it is incredibly easy to track what a player wins or loses and thus accurately reflect that on their tax statements. In a poker room within a casino, the responsibility is solely on the player to report their winnings if that total is under \$10,000 in a given session of playing.<sup>213</sup> Because of this, it is not unrealistic that a

---

<sup>210</sup> Marco Valerio, *Nevada Bullish on Online Poker Compacts, But California's Schuetz Sees 'A Tough Sell,'* ONLINE POKER REPORT (Jan. 17, 2014, 7:08 AM), <http://www.onlinepokerreport.com/10297/nclgs-interstate-gaming-policy>.

<sup>211</sup> Chris Isidore, *Seven States That Don't Have Lotteries*, CNN (December 17, 2013, 1:16 PM), <http://money.cnn.com/2013/12/17/news/economy/states-without-lotteries>.

<sup>212</sup> See generally *Geolocation Infographic*, ULTIMATEGAMING.COM, <https://playercare.ultimatepoker.com/hc/en-us/articles/200434385> (last visited Feb. 9, 2014).

<sup>213</sup> See Bank Secrecy Act, 31 U.S.C. § 5311 (2012).

poker player would never consider reporting \$300 they made at the poker table. On the other hand, a player who lost \$300 is still likely to report that loss on their tax return. Thus, a major problem with live in person poker is that many people will report their losses, but not their minor wins (ones where a person may be comfortable holding the cash instead of feeling the need to deposit it in the bank), creating an imbalance in actual net income that gets reported to the IRS.

However, the benefit of online poker is that every deposit and withdrawal from a player account is recorded; making it very easy to create an accurate paper trail of the wins and losses the player has in a given year. Thus, the legislation should require certain recording methods for all online poker site operators, similar to record keeping practices that are required of publically traded companies; except the difference being that the record keeping is not only of the company expenditures and profits, but those of their players.

Such a requirement would create more transparency on actual players' income and would prevent tax fraud when players play online. It is no secret that tax fraud is extremely common amongst successful poker players.<sup>214</sup> Allowing American companies to run online poker is the best and easiest way to be able to accurately track the income of some extremely successful players as well as prevent tax fraud, which has been much easier to do, when the companies offering poker have no reporting obligations to the IRS.

Additionally, each individual state has different tax laws when it comes to income tax and "gambling taxes."<sup>215</sup> This would create an inherent issue of determining where the income was earned. When a person living in Pennsylvania is on vacation in Florida, and is playing online and happens to score a six-figure win which state gets to benefit from that?<sup>216</sup> However, online poker would create a more complex situation than one where a person commutes from Connecticut to New York City every day<sup>217</sup> because it is not unrealistic to think a player could earn money in many different states over the course of the year. Even with geo-location software, such accurate record keeping would require the poker sites to track where every win occurs. While some may be quick to put the burden to keep track of such records on the poker site operators, it is not unrealistic to think that a person could start a tournament or even a single hand in a cash game in one state and finish it in another.<sup>218</sup> Thus, if a person entered a tournament in New Jersey (where they are domiciled), and then finished it while playing on the train to Boston, and wins \$50,000 in the tournament upon arrival in Boston, which state gets to claim the victory for tax purposes? The reality is that given the mobile nature of online poker, it is not farfetched to think that such a problem could arise. Thus, the federal legislation should simplify the problem and not leave it for the states to battle it out. Instead, the federal legislation should only require the websites to provide an individual's general win/loss statement when a state requests it. Thus if a state wants to audit a resident it can easily do so, but all winnings will be considered as being won in the state they are domiciled. In a scenario where a high income tax paying state like New York believes that someone is evading New York State income taxes by claiming they are

<sup>214</sup> See generally Josh Nagel, *Daniel Negranu to U.S. Poker Players: Move Out Now*, COVERS, <http://www.covers.com/articles/articles.aspx?theArt=235001> (last visited Dec. 21, 2014).

<sup>215</sup> Josh Ritchie, *How Are Gambling Winnings Taxed?*, TURBOTAX BLOG (Mar. 30, 2012), <http://blog.turbotax.intuit.com/2012/03/30/how-are-gambling-winnings-taxed/>.

<sup>216</sup> See *id.*

<sup>217</sup> See *id.*

<sup>218</sup> See, e.g., Party Poker Mobile, <http://nj.partypoker.com/mobile.html> (last visited Dec. 21, 2014).

LEGALIZING ONLINE POKER IN THE UNITED STATES

domiciled in Florida, it should be left up to New York to pursue such claim just as they would with something like short-term investment income.

**C. Create Federal Requirements That Online Poker Operators Must Follow**

An issue would arise where a state agreeing to allow its residents to play online poker, the state may want to impose different restrictions upon poker sites which are allowed to offer games to its residents as opposed to the laws of the state where the site is actually operating. Currently in person casino gaming laws differ from state to state. Some states offer only slot machines and electronic table games, compared to other states that offer the full variety of live table games (e.g. blackjack, roulette, craps etc.). Since playing poker over the Internet would lead to gaming across state borders, as opposed to when a player walks into an actual casino and is only playing within that state, it would be impracticable for a poker site to have to have different regulations for players in different states.

This legislation should solve this problem by having federal regulatory standards for these poker sites, assuring an online poker provider that if it complies with those regulations, it will have access to enter the market in any state where online poker has been made legal. This would be the best solution because it would create an open and fair market place for online poker sites. If the states were allowed to set their own regulations, it could lead to a process of discrimination where in state online poker providers would be given favoritism for approval to offer online poker to its own residents over an out of state provider. Thus, setting federal guidelines would sidestep the potential for any state favoritism.

**D. Making Peace with the Native American Casinos.**

One of the most difficult issues to solve is how to incorporate an across- state-borders online poker site without offending existing tribal pacts between state governments and Native American tribes within their state that offers live casino gaming. For example, Connecticut has two tribal agreements with Foxwoods and Mohegan Sun, granting the two tribes exclusive rights to offer casino gaming in Connecticut in return for a specific percentage of all the slot machine revenue: “The Tribe agrees that, so long as no change in State law is enacted to permit the operation of video facsimiles by any other person and no other person within the State lawfully operates video facsimiles, the Tribe will contribute to the State a sum equal to twenty-five percent (25%) of gross operating revenues of such games operated by the tribe.”<sup>219</sup> Thus online poker run by outside- the- state operators could create an issue where no state would want to risk losing this type of revenue (Foxwoods contributed \$9.4 million to the State of Connecticut in the month of December 2013 alone), nor would the tribes be willing to let a poker site located in another state which they are not running, to come into their market. However, since the current interpretation of poker is a Class II game according to NIGC, the state compacts in situations like Connecticut’s would not apply. It is important to note that the NIGC’s interpretation of gaming classifications would not directly have legal authority against any new federal online poker bill, but in case the federal bill

---

<sup>219</sup> Memorandum of Understanding between State of Conn. and Mashantucket Pequot Tribe (Jan. 13, 1993) (on file with author), available at [http://www.ct.gov/dcp/lib/dcp/pdf/gaming/memorandum\\_of\\_understanding\\_foxwoods\[1\].pdf](http://www.ct.gov/dcp/lib/dcp/pdf/gaming/memorandum_of_understanding_foxwoods[1].pdf).



defined poker as a Class II game, this would avoid any problems with existing Native American and state compacts. Thus, any legal challenge by Native American Tribes attempting to claim poker should be considered Class III in order to protect their exclusive rights to offer gaming within certain states, would be required in order to prevent an online poker site outside of the state from being allowed to offer the game to residents within that state.

### **E. Open the Doors to Foreign Business Pursuant to Compliance to the Federal Regulations.**

Because of the issues that were previously outlined concerning the prevention of foreign providers of online poker from entering the U.S. market, any piece of legislation that did not allow them to compete with U.S. providers would be disastrous. Considering the U.S. has already lost WTO decisions and faces losing IP rights because of the decision, any legalization of online poker by Congress that did not allow foreign companies to access the market would likely lead to greater penalties. Thus, any piece of federal legislation legalizing online poker would have to include provisions addressing foreign competition and fair entry into the marketplace.

Thus, this legislation will subject foreign online poker companies to the same federal regulation and approval. Also if they choose to enter the U.S. market, they will be subject to reporting the win/loss statements of American players to the IRS, and make it available to any state tax agency that requests it. The exception to this rule would be that the government reserves the right to exclude any poker site that, in the past has violated United States law in the past. Thus, companies such as PokerStars could still be restricted from entering the market, but the companies that pulled out at the implementation of UIGEA, like PartyPoker, would be permitted to re-enter the market.

## **VI. CONCLUSION**

In January of 2014, the Borgata Hotel Casino and Spa in Atlantic City was in the middle of hosting a tournament with a total prize pool of \$2.4 million when it realized the tournament had been compromised because of cheating.<sup>220</sup> The New Jersey Department of Gaming Enforcement determined that someone had been introducing counterfeit chips into play during the tournament.<sup>221</sup> Because, unlike a cash game, one wins a tournament by obtaining all the chips in play; introducing fake chips would harm the participants instead of the house (since the casino has already collected all the money from the participants at the beginning during registration). Although the casino and the DGE caught the cheating, no one notice until there were only 27 participants remaining.<sup>222</sup> This meant that in a tournament that boasted a field of 4,812 participants, it took the governing parties three days of play before

---

<sup>220</sup> Brett Collson, *Borgata Cancels \$2 Million Guarantee Event; Investigators Confirm Counterfeit Chips*, POKERNEWS.COM (Jan. 18, 2014), <http://www.pokernews.com/news/2014/01/borgata-cancels-2-million-guarantee-event-counterfeit-chips-17281.htm>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

LEGALIZING ONLINE POKER IN THE UNITED STATES

they realized there was a problem.<sup>223</sup> In the end, the cheating may have been detected, but 4,785 people were cheated out of a shot at a first prize of \$372,123, while the remaining 27 participants were also deprived of that opportunity because the Borgata cancelled the tournament.<sup>224</sup> What needs to be taken from the Borgata incident is that poker is legal in a “live” setting in many states in the U.S., but even with all the fancy surveillance systems cheating can occur. When cheating occurs, it does not affect the house, but it can affect thousands of Americans, in some cases costing them hundreds of thousands of dollars. Having a regulated market for online poker by the government will provide the American consumer a safer way to enjoy a game they already have a legal right to play.

All the attempts that have been put forth by Congress and individual states would not be enough to actually create a vibrant and competitive marketplace for the U.S. in the online poker world. Without the ability to create player pools that incorporate more than the residents of just one state, online poker will never truly succeed in the U.S. Furthermore, the current lack of ability to offer international companies access to American markets, and American companies and players access to foreign poker companies, is a ticking time bomb. The WTO decision against the U.S. has not been a major harm at this point, but all it will take is a more powerful trade partner to bring a similar suit to causing real financial harm to the U.S. And without allowing the integration of foreign players and foreign companies, the potential success of U.S. online poker is greatly hindered. Casino gaming is incredibly popular in this country, as it is offered in a majority of the states, but much of the individual revenue is impossible to track and subsequently tax. Moving poker into a digital forum makes tracking winnings and tax income feasible and will generate significant income for state and federal governments.

From a simple monetary perspective there are few if any strong arguments against online poker being offered by U.S. companies across state and international borders. First the U.S. has been missing out on a \$15 billion international business, of which \$6 billion is currently being wagered by Americans.<sup>225</sup> The U.S. is missing out on collecting tax revenue from the corporate and individual participants. Americans are currently risking billions of dollars in an unregulated environment lacking any real government protection. Legalizing online poker would provide American consumers and American money regulatory protection. While some would argue against online poker from a moral standpoint, the reality is that online poker is offering a game that is currently legal in a majority of the states, as long as its played “live” instead of on the Internet.<sup>226</sup> Even more troublesome is that many states that may oppose online poker offer lotteries.<sup>227</sup> A moral argument against online poker from a state that offers lotteries is contradictory; considering poker is a game where you pay a service fee to play, and lotteries, by many, are considered to be a regressive tax on the poor.<sup>228</sup>

---

<sup>223</sup> See *id.*

<sup>224</sup> See *id.*

<sup>225</sup> Finger, *supra* note 45.

<sup>226</sup> See Matt Villano, *All in: Gambling Options Proliferate Across USA*, USATODAY (Jan. 26, 2013, 5:00 PM), <http://www.usatoday.com/story/travel/destinations/2013/01/24/gambling-options-casinos-proliferate-across-usa/1861835/>.

<sup>227</sup> See Isidore *supra* note 211.

<sup>228</sup> Finger, *supra* note 45.

My big gripe against prohibiting any form of online gambling is the boundless hypocrisy of lawmakers. I hang my hat on the example of lotteries happening daily across our nation. Worries of addiction and consumer

This proposal does not advocate for the expansion of gambling where one plays against the house at predetermined losing odds. It advocates for the expansion of access to a game people play for money, where the house is an operator charging a service fee. Americans spend \$70 billion per year on fantasy football, where they pay a fixed amount of money that the operating site takes a small portion of for a service, in order to compete against peers.<sup>229</sup> This proposal for online poker is the same type of system, but just a different type of game.

If a New Yorker wants to play against people from California, Europe or China, he can easily do that by going to Las Vegas during the WSOP, when people travel to play in Vegas from all over the world. If that player sits in a game with such a diverse crowd and makes \$1,000, it is entirely the responsibility of that person to report that income. This proposal for online poker creates a scheme where this New Yorker no longer has to travel to Las Vegas to do something he could easily do from the confines of his own home; except, at the end of the day, the government will know about that extra \$1,000 income and will receive tax revenue from it.

With three states currently operating online poker, and 15 others with some form of proposed legislation regarding online poker (or all gaming), it is time for a real solution.<sup>230</sup> Legalizing this proposal for online poker is no different than putting all your money in before the flop in Texas Hold-em with two aces – it is always the right decision.<sup>231</sup>

---

protection have a hollow sound when advertisements abound enticing the populace to play games that amount to little more than the ultimate form of regressive taxation. Did you know the odds of winning the June 29 “power ball” lottery in California, according to lottery officials are 1 in 175 million? Conversely, according to the National Weather Service your odds of getting killed by a bolt of lightning in a given year are a comfortable 1 in 8.9 million, while your chances of just getting struck by lightning go up to 1 in 700,000.....kinda makes you want to stay indoors.

*Id.*

<sup>229</sup> Brian Goff, *The \$70 Billion Fantasy Football Market*, FORBES (Aug. 20, 2013, 10:01 AM), <http://www.forbes.com/sites/briangoff/2013/08/20/the-70-billion-fantasy-football-market>.

<sup>230</sup> *PPA State Pages*, POKER PLAYERS ALLIANCE, <http://www.theppa.org> (last visited Dec. 22, 2014).

<sup>231</sup> Warren, *supra* note 81, at 101 (explaining that two aces is the best starting hand in Texas Hold ‘Em). Because of this before you put out any community cards (known as “pre-flop”) you have to have the best hand by default, the sole exception would be someone else holding the other two aces. *Id.*