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Internet Gambling: A Sketch of Legislative Proposals in the 108th Congress

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Summary

The last legislative action on Internet gambling in the 108th Congress occurred when the House Committee on Financial Services included a revised version of House passed H.R. 2143 (Representative Bachus) in its report on the 9/11 Recommendation Implementation Act (H.R. 10), H.Rept. 108-724, pt.3 (2004)(§§2131-2135). No further action was taken on the provisions. H.R. 2143, the "Unlawful Internet Gambling Funding Prohibition Act," which passed the House earlier called upon federal regulators to devise and implement a regulatory scheme to identify and block financial transactions related to illegal Internet gambling and that was akin to similar provisions in S. 627 (Senator Kyl), 149 *Cong.Rec.* H5136-153 (daily ed. June 10, 2002). It was a stripped down version of H.R. 21 (introduced by Representative Leach and reported by both House Judiciary and Financial Services Committees, H.Rept. 108-51). Like H.R. 21, S. 627 contained regulatory provisions as well as criminal and civil enforcement mechanisms. Like H.R. 2143, S. 627 exempted financial transactions relating to a gambling business licensed or authorized under state law, like a state lottery or horse racing track, even if the transactions concerned Internet gambling where wagers were placed in states in which the gambling was illegal. This is where the H.R. 10 provisions differed from those of H.R. 2143, for H.R. 10 exempted financial transactions relating to a licensed gambling business only if the gambling were lawful both in the state in which the business operated and the state where the bet initiated. H.R. 21, and with minor exceptions S. 627, were identical to legislation passed by the House during the 107th Congress (H.R. 556). A final proposal, H.R. 1223 (Representative Conyers), established an Internet gambling licensing and regulation study commission.

Related CRS products include CRS Report RS21275, *Internet Gambling: A Sketch of Legislative Proposals in the 107th Congress* (from which much of this report is drawn); CRS Report 97-619, *Internet Gambling: Overview of Federal Criminal Law*; and CRS Report RS20485, *Internet Gambling: A Sketch of Legislative Proposals in the 106th Congress*.

Background. Wagers amounting to an estimated $4.2 billion a year pass through the 1,800 sites available for Internet gambling.[1] Critics contend that gambling on the Internet offers a particularly addictive and child-alluring form of gambling; one that makes personal bankruptcy more likely; one that provides a convenient environment for fraud and money laundering by organized crime and terrorists; one that is beyond the effective reach of state regulators; and one that is frequently operated offshore making it more resistant to law enforcement efforts.[2]

Although state and federal laws prohibit most Internet gambling,[3] enforcement has proven difficult. Our extradition treaties ordinarily cannot reach offshore operators.[4] The federal Wire Act (18 U.S.C. 1081-1084), which features a number of enforcement advantages, also suffers from limitations. It does permit communication service providers to deny service to gamblers at the request of state and federal law enforcement officials, and Internet communications generally rely on wire communications in whole or in part and thus come within the scope of the act. Yet the Wire Act's coverage of anything other than matters involving sports gambling is uncertain. Read literally, the act seems to reach more than sports gambling. The Justice Department, however, has rarely prosecuted a case that did not involve sports and consequently there is little case law on the point.[5]

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[1] *Proposals to Regulate Illegal Internet Gambling: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong., 1st Sess. (2003)(statement of Dep.Ass't Attorney General John G. Malcom).

[2] *Unlawful Internet Gambling Funding Prohibition Act and the Combating Illegal Gambling Reform Act: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 107th Cong., 1st Sess. (2001) (*Judiciary Hearings*); *H.R. 556- The Unlawful Internet Gambling Funding Prohibition Act and Other Internet Gambling Proposals: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the House Comm. on Financial Services*, 107th Cong., 1st Sess. (2001) (*Financial Services Hearings)*; *Proposals to Regulate Illegal Internet Gambling: Hearing Before the Senate Comm. on Banking , Housing, and Urban Affairs*, 108th Cong., 1st Sess. (2003).

[3] *See generally, Internet Gambling: Overview of Federal Criminal Law*, CRS Rept. 97-619A.

[4] Moreover, late in the 108th Congress, a panel of the World Trade Organization concluded that application of U.S. gambling laws to offshore Internet gambling establishments would be contrary to our treaty obligations under the General Agreement on Trade in Services (GATS), World Trade Organization, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Report of the Panel*, WT/DS285/R, at 272 (Nov. 10, 2004).

[5] A few courts have found violations of the Wire Act in cases involving other forms of gambling, *People ex rel. Vacco v. World Interactive Gaming Corporation*, 185 Misc.2d 852, 714 N.Y.S.2d 844 (N.Y.S.Ct. 1999)(Internet casino offering slots, blackjack and roulette); *AT&T Corp. v. Coeur D'Alene Tribe*, 45 F.Supp. 2d 995 (D.Idaho 1998)(on-line lottery), *rev'd on other grounds,* 283 F.3d 1156 (9th Cir. 2002); *United States v. Smith*, 390 F.2d 420 (4th Cir. 1968)(numbers); *United States v. Chase*, 372 F.2d 453 (4th Cir. 1967)(same), *but see, In re MasterCard International, Inc. Internet Gambling Litigation*, 132 F.Supp.2d 468 (E.D.La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002)(in the context of a Racketeer Influenced and Corrupt Organizations (RICO) civil suit, the Wire Act held to apply only to sports gambling).

Internet gambling proposals seeking to overcome these difficulties in one manner or another have been working their way through the Congress since the 105th Congress.[6] The Senate approved an Internet gambling ban as part of the Commerce-Justice-State appropriations bill in 1998, 144 *Cong.Rec.* S8801-803 (daily ed. July 23, 1998), but the provision died in conference. The following year, the Senate passed the Internet Gambling Prohibition Act of 1999 (S. 692)(Senator Kyl), 145 *Cong.Rec.* S14870 (daily ed. November 18, 1999); *see also*, S.Rept. 106-121.[7] In the House, Representative Goodlatte introduced H.R. 3125, a similar bill with the same name. The House Judiciary Committee reported it favorably, H.Rept. 106-655 (2000). It was brought to the floor under suspension of the rules, but failed to secure the necessary two-thirds vote, 145 *Cong.Rec.* H6057 (daily ed. July 17, 2000). These bills outlawed Internet gambling in a separate statute. Other proposals sought (1) to deny Internet gambling entrepreneurs the benefits of access to their customers' checks, credit cards, and electronic fund transfers, H.R. 4419 (Representative Leach), or, (2) at the suggestion of the Justice Department, to clarify the Wire Act's ban on Internet gambling, H.R. 5020 (Representative Conyers). In the 107th Congress, the House Judiciary Committee approved a Wire Act amendment bill that included a credit card ban, H.R. 3215 (Representative Goodlatte) (H.Rept. 107-591), while the House Financial Services and Senate Commerce, Science and Technology Committees endorsed free standing credit card bans, H.R. 556 (Representative Leach)(H.Rept. 107-339); S. 718 (Senator McCain)(S.Rept. 107-16). Other proposals included one to deny the use of credit cards and the like in relation to both legal and illegal Internet gambling (the other proposals address only the financing of *illegal* Internet gambling), H.R. 2579 (Representative LaFalce), and a Senate proposal that featured the credit card ban as part of a Wire Act amendment, S. 3006 (Senator Johnson). The House ultimately passed a compromise version of H.R. 556 (Leach-LaFalce) that added some amendments to the Wire Act to its free standing credit card ban.

The proposal that passed the House in the 107th Congress was essentially reintroduced in 108th Congress, as H.R. 21 (Representative Leach) in the House and S. 627 (Senator Kyl) in the Senate. A related study commission bill, H.R. 1223 (Representative Conyers), also surfaced. H.R. 21 was reported out favorably and without

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[6] *H.R. 4419, The Internet Gambling Funding Prohibition Act: Hearing Before the House Comm. on Banking and Financial Services*, 106th Cong., 2d Sess.(2000); *Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong., 2d Sess. (2000); *H.R. 3125, the Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm. on Telecommunications, Trade & Consumer Protection of the House Comm. on Commerce*, 106th Cong. 2d Sess. (2000); *Internet Gambling: Hearing Before the Subcomm. on Technology, Terrorism, and Government Information of the Senate Comm. on the Judiciary*, 106th Cong., 1st Sess. (1999); *Internet Gambling: Hearing Before the Senate Comm. on Indian Affairs*, 106th Cong., 1st Sess. (1999); *Internet Gambling Prohibition Act of 1997: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998); *Internet Crimes Affecting Consumers: Hearing Before the Subcomm. on Technology, Terrorism, and Government Information of the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997); *The Internet Gambling Act of 1997: Hearing Before the Subcomm. on Technology, Terrorism, and Government Information of the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997).

[7] The same year, the National Gambling Impact Study Commission recommended a ban on internet gambling and related financial transactions, *Final Report*, at 5-12 (1999).

amendment by the House Committee on Financial Services, H.Rept. 108-51, pt.1 (2003); as was H.R. 2143, H.Rept. 108-133 (2003). The House Committee on the Judiciary reported a somewhat different version of H.R. 21, H.Rept. 108-51, pt.2 (2003). The Financial Services Committee version contained an exception for lawful financial transactions involving state licensed or authorized businesses that the Judiciary Committee version did not. H.R. 2143 (Representative Bachus), as ultimately passed by the House, was limited to a demand for regulations that permitted financial transactions involving illegal Internet gambling to be identified and blocked, 149 *Cong.Rec.* H5136-153 (daily ed. June 10, 2003). The Financial Services Committee added the language of H.R. 2143, with a modified version of the exception for state licensees, to its report on the 9/11 Commission implementation legislation (H.R. 10), H.Rept. 108-734, pt.3, at 13-16 (2004). The modification narrowed the exception so that it no longer permitted state licensed gambling businesses to accept bets initiated in states where the gambling is illegal. The Financial Services Committee provisions, however, never appeared in later versions of H.R. 10 or its successor S. 2845.

Issues. Although over the years Congress has enacted a number of statutes designed to protect the states from the unwelcome intrusions of interstate or international gambling, some resist further federal gambling legislation even for this limited purpose.[8] Others clearly favor federal legislation which reenforces the prerogative of the states to effectively determine which forms of gambling, if any, will be permitted within their borders.[9] And some favor additional federal proscriptions of Internet gambling, whether legal or illegal under relevant state laws.[10]

Beyond the question of whether federal legislation is appropriate lies the question of what form any such legislation should take. To compensate for the difficulties involved in prosecuting offshore Internet gambling operations, the proposals in this Congress seek to deny them the benefits of American financial services. In addition to a general prohibition, the proposals generally contain a mechanism enabling state and federal law enforcement officials to secure a court order to deny service to at least certain Internet gambling operations.[11] Critics have argued that this could expose credit card

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[8] E.g., H.Rept. 107-339 at 16 (2001) (Dissenting Views of Rep. Paul)("the Federal Government has no constitutional authority to ban or even discourage any form of gambling"); *Judiciary Hearings*, at 49 (prepared statement of Lisa S. Dean and J.Bradley Jansen, Free Congress Foundation)(Internet gambling proposals "fly in the face of conservative principles of federalism, individual responsibility, and limited government").

Contemporary construction of the Constitution's commerce and necessary and proper clauses seems to recognize Congress's legislative authority over commercial activities and over activities that utilize the instrumentalities of interstate and foreign commerce such as the Internet and other forms of communications, *United States v. Lopez*, 514 U.S. 549, 558-60 (1995); *United States v. Morrison*, 529 U.S. 598, 608-9 (2000).

[9] E.g., H.Rept. 107-591 at 6 (2002)(This legislation "does not, however, supersede the traditional leadership roles of States in enforcing gambling laws within their borders. It addresses a growing problem that no single State, or collection of States, can adequately address. Because of the unique interstate and international nature of the Internet, [this legislation] is necessary").

[10] E.g., Financial Services Hearings, at 10 (comments of Reps. LaFalce and Leach).

[11] Whether because of litigation costs, the perils of collection, or anticipation of federal legislation, some financial institutions have already begun to limit service, *Financial Services*

companies and others to a series of inconsistent and conflicting court orders.[12]

Although it endorsed the approaches taken in the Goodlatte, Leach and McCain bills in the 107th Congress, the Justice Department has consistently urged that Internet gambling be treated the same as gambling accomplished through use of the telephone and prefers amendments to the Wire Act in order to expand or clarify the act's coverage of Internet gambling.[13] Opening the Wire Act for amendment, however, potentially unleashes a number of other issues unrelated to Internet gambling.[14]

H.R. 2143 and S. 627 (but not H.R. 10) exempted from their regulatory scheme financial transactions involving Internet gambling operated by race tracks, state lotteries, Nevada casinos and other state licensed or authorized business (but apparently not Indian tribes) – even if the transactions involve gambling that were illegal in the state where the bettors were located. In doing so, they left enforcement of the underlying illegal Internet gambling to federal and possibly state authorities.

H.R. 21, S. 627, H.R. 2143 and H.R. 1223. Although organized a bit differently and with minor modifications, the Leach (H.R. 21) and Kyl (S. 627) bills were essentially the same. They:

- prohibited anyone engaged in a gambling business ("business of betting or wagering") from accepting credit cards, checks, electronic fund transfers, or the like in connection with illegal Internet gambling;

- subjected offenders to imprisonment for not more than five years and/or a fine under title 18, and possibly to a ban on future illegal Internet gambling;

Hearings, at 25 (statement of Michael L. Farmer, Wachovia Bank Card Services);("Wachovia developed a policy to decline internet gambling charges in order to mitigate our losses"); *Citi to Block Online Gambling Payments, American Banker*, 24 (June 17, 2002)(reporting that Citibank, Bank of America, MBNA Corp., and J.P.Morgan Chase & Co. have begun to block credit card transactions with online gambling operations); *eBay Goals for PayPal, American Banker*, 1 (July 9, 2002 (reporting that eBay plans to close down its PayPal Internet gambling business); *see also, Cheyenne Sales, Ltd. v. Western Union*, 8 F.Supp.2d 469 (E.D.Pa. 1998)(Wire Act precludes customer's suit following Western Union's termination of its electronic fund transfer account used to make payments to offshore Internet gambling operations); *The Enforceability of Internet Gambling Debts: Law, Policies, and Causes of Action,* 6 VIRGINIA JOURNAL OF LAW & TECHNOLOGY 6 (2001); General Accounting Office, *Internet Gambling: An Overview of the Issues*, GAO-03-89 (Dec. 2002)(describing efforts to prevent the use of VISA, MasterCard, Discover, and American Express credit cards to finance internet gambling).

[12] H.Rept. 107-591, at 124 (Dissenting Views of Rep. Conyers, Scott, Watt, and Waters)("Credit card companies such as Visa and MasterCard have raised concerns with the bill because it could subject them to injunctions in numerous jurisdictions that require different – or even conflicting – remedies to prevent the payment of Internet bets or wagers. The result will be a hodge-podge of inconsistent court orders, rather than a cohesive enforcement scheme").

[13] *Judiciary Hearings*, at 8-9 (statement of Rep. Goodlatte); at 48 (prepared statement of Ass't Attorney General Michael Chertoff).

[14] *Financial Services Hearings*, at 11 (testimony of Sen. Kyl).

- excluded lawful transactions with a state licensed or authorized business from the definition of "betting or wagering"(in the Financial Services Committee but not the Judiciary Committee version);

- exempted financial institutions and Internet service providers from the definition of gambling business unless they conduct or control an unlawful Internet gambling site;

- authorized federal courts to enjoin violations at the behest of the Attorney General or state attorneys general;

- listed aggravating factors to be considered before financial institutions are exposed to a corrective court order;

- adjusted the powers given bank regulatory authorities to permit them to require the establishment of policies and practices designed to identify and prevent prohibited transactions, enforceable by both the regulators and the Federal Trade Commission (FTC);

- limited the civil remedies available against Internet service providers for their assistance;

- urged diplomatic action to encourage international cooperation for the enforcement of its provisions and to identify any connection between Internet gambling and money laundering; and

- expanded Wire Act coverage to satellite and microwave transmissions.

House-passed H.R. 2143 essentially contained only the demand for regulations to permit the identification and blocking of financial transactions that involve illegal Internet gambling. It included the exception for lawful business transactions found in S. 627, as well as a rule of construction not found in S. 627 that made it clear that the bill was not intended to change any other gambling-related law.

The Conyers bill (H.R. 1223) outlawed neither Internet gambling nor the acceptance of credit cards or the like in connection with Internet gambling. Instead it established an Internet Gambling Licensing and Regulation Study Commission.