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Internet Gambling: An Abridged Overview of Federal Criminal Law

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Summary

This is examination of some of the federal criminal laws implicated by Internet gambling and of a few of the constitutional questions associated with their application.

It is a federal crime: (1) to use telecommunications to conduct a gambling business; (2) to conduct a gambling business in violation of state law; (3) to travel interstate or overseas, or to use any other facility of interstate or foreign commerce, to facilitate the operation of an illegal gambling business; (4) to systematically commit these crimes in order to acquire or operate a commercial enterprise; (5) to launder the proceeds of an illegal gambling business or to plow them back into the business; (6) to spend or deposit more than $10,000 of the proceeds of illegal gambling in any manner, or (7) since passage of the Unlawful Internet Gambling Enforcement Act, P.L. 109-347 (2006) (31 U.S.C. 5361-5367), for a gambling business to accept payment for illegal Internet gambling. Internet gambling implicates each of these provisions under some circumstances. Although prosecution in some instances may be limited by constitutional provisions relating to the Commerce Clause, Free Speech, and Due Process, in most instances impediments are likely to be practical rather than constitutional.

This is an abridged version (without footnotes, quotations, citations or appendices) of CRS Report 97-619, *Internet Gambling: Overview of Federal Criminal Law*; related reports include CRS Report RS22418, *Internet Gambling: Two Approaches in the 109th Congress*.

Background. American law has always reflected our ambivalence towards gambling. Anti-gambling laws were common in colonial America, yet even in the Northeast where they were perhaps most numerous the lottery was a popular form of public finance. A majority of states continue to outlaw most forms of gambling, but most also continue to employ a lottery as a means of public finance and to allow several other forms of gambling as well.

There are many federal gambling laws, most enacted to prevent unwelcome intrusions of interstate or international gambling into states where the activity in question

has been outlawed. In some cases, Internet gambling is not much different than gambling by telephone — a bettor places his bet with a bookie using his computer and e-mail rather than using just his telephone. Gamblers have introduced features like proxy gambling, gambling for credit, and at least the claim of gambling in a virtual offshore gambling locale to induce bettors to believe they have overcome legal prohibitions. In fact, they have not. Nevertheless, enforcement may be uncertain. Internet gambling cannot be raided in a traditional sense, and gambling is rarely a high law enforcement priority even without the complications that the Internet can bring to the table. However that may be, using the Internet to conduct a gambling business, either involving betting on sporting events or involving a form of gambling illegal under the laws of the state in which any of the players are located, will almost certainly involve the violation of one or more federal criminal laws.

The Wire Act. Commentators most often mention the Wire Act, 18 U.S.C. 1084, when discussing federal criminal laws that outlaw Internet gambling in one form or another. Early federal prosecutions of Internet gambling generally charged violations of the Wire Act. In fact, perhaps the most widely known of federal Internet gambling prosecutions, *United States v. Cohen* involved the conviction, upheld on appeal, of the operator of an offshore, online sports book under the Wire Act.

In general terms, the act outlaws the use of interstate telephone facilities by those in the gambling business to transmit gambling-related information. The elements of section 1084 extend to anyone who: (1) being engaged in the business of betting or wagering (2) knowingly (3) uses a wire communication facility (4)(A) for the transmission in interstate or foreign commerce (i) of bets or wagers or (ii) information assisting in the placing of bets or wagers on any sporting event or contest, or (B) for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or (C) for information assisting in the placing of bets or wagers...18 U.S.C. 1084(a).

The Wire Act has been more sparingly used than some of the other federal gambling statutes, and as a consequence it lacks some of interpretative benefits which a more extensive caselaw might bring. The act is addressed to those "engaged in the business of betting or wagering" and therefore apparently cannot be used to prosecute simple bettors. In a literal sense, the act outlaws (1) the transmission of *any* gambling-related *information* and (2) the transmission of *sports bets*, but the vast majority of prosecutions have involved sports gambling. While cases involving other forms of gambling under section 1084 are not unknown, at least one federal appellate panel has concluded that the Wire Act applies only to sports gambling and information about sports gambling.

An accomplice who aids and abets another in the commission of a federal crime may be treated as if he had committed the crime himself. The classic definition from *Nye & Nissen v. United States* explains that liability for aiding and abetting attaches when one "in some sort associates himself with the venture, participates in it as in something that he wishes to bring about, [and] seeks by his action to make it succeed." With this in mind, the Department of Justice has advised the National Association of Broadcasters that its members risked prosecution for aiding and abetting when they provided advertising for the online gambling operations. In addition to such accomplice liability, a conspirator who contrives with another for the commission of a federal crime is likewise liable for the

underlying crime and for any additional, foreseeable offense committed by a confederate in furtherance of the common scheme.

Illegal Gambling Businesses. On the face of it, an illegal gambling business conducting its activities by way of the Internet seems to come within the reach of 18 U.S.C. 1955. The elements of section 1955 apply to anyone who: (1)(A) conducts, (B) finances, (C) manages, (D) supervises, (E) directs, or (F) owns; (2) all or part of an illegal gambling business that; (3)(A) is a violation of the law of a State or political subdivision in which it is conducted, (B) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business, and (C) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. The section bars only those activities that involve illegal gambling under applicable state law and that meet the statutory definition of a business. The accomplice and conspiratorial provisions attend violations of section 1955 as they do violations of the Wire Act. Section 1955 can only be applied to offshore Internet gambling operations when the gambling in question is illegal under a state law where either the bettor or the gambling operation are located.

Travel Act. The operation of an illegal gambling business using the Internet may easily involve violations of the Travel Act. The courts often abbreviate their statement of the act's elements to the following: "The government must prove (1) interstate travel or use of an interstate facility; (2) with the intent to ... promote ... an unlawful activity and (3) followed by performance or attempted performance of acts in furtherance of the unlawful activity." The Supreme Court determined some time ago that the Travel Act does not apply to the simple customers of an illegal gambling business, although interstate solicitation of those customers may certainly be covered. Accomplice and coconspirator liability provisions, discussed earlier, apply with equal force to the Travel Act.

In the case of Internet gambling, the jurisdictional element of the Travel Act might be established at a minimum either by reference to the telecommunications component of the Internet, to shipments in interstate or foreign commerce (in or from the United States) associated with establishing operations on the Internet, to any interstate or foreign nexus to the payment of the debts resulting from the gambling, or to any interstate or foreign distribution of the proceeds of such gambling.

The act would only apply to "business enterprises" involved in illegal gaming, so that e-mail gambling between individuals would likely not be covered. But an Internet gambling venture that constitutes an illegal gambling business for purposes of section 1955, and is engaged in some form of interstate or foreign commercial activity in furtherance of the business will almost inevitably have included a Travel Act violation.

Racketeer Influenced and Corrupt Organizations (RICO). Illegal gambling may trigger the application of RICO provisions. Section 1955, the Wire Act, the Travel Act, and any state gambling felony are all RICO predicate offenses. To establish the elements of a substantive RICO offense, the government must prove (1) that an enterprise existed; (2) that the enterprise affected interstate or foreign commerce; (3) that the defendant associated with the enterprise; (4) that the defendant participated, directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendant participated in the enterprise through a pattern of racketeering activity by committing at least two racketeering (predicate) acts [e.g., 18 U.S.C. 1084 (Wire Act), 18 U.S.C. 1952

(Travel Act), 18 U.S.C. 1955 (illegal gambling business)]. RICO conspiracies are outlawed in a subsection that imposes no overt act requirement. They are complete upon the agreement to commit a RICO offense.

Money Laundering. Congress has enacted several statutes to deal with money laundering. It would be difficult for an illegal Internet gambling business to avoid either of two of the more prominent, 18 U.S.C. 1956 and 1957, both of which involve financial disposition of the proceeds of various state and federal crimes, including those under 18 U.S.C. 1084 (Wire Act), 18 U.S.C. 1955 (illegal gambling business), 18 U.S.C. 1952 (Travel Act), or any state gambling law (if punishable by imprisonment for more than one year). Section 1956 is really several distinct crimes: (1) laundering with intent to promote an illicit activity such as an unlawful gambling business; (2) laundering to evade taxes; (3) laundering to conceal or disguise; (4) structuring financial transactions (smurfing) to avoid reporting requirements; (5) international laundering; and (6) "laundering" conduct by those caught in a law enforcement sting.

In its most basic form the promotion offense essentially involves plowing the proceeds of crime back into an illegal enterprise. Like most of the crimes under section 1956, the elements of the promotion offense begin with a financial transaction and the knowledge that the proceeds involved flow from a predicate offense like illegal gambling. The "concealment" offense shares several common elements with the other offenses in section 1956. The courts have made it clear that conviction for the concealment offense requires proof of something more than simply spending the proceedings of a predicate offense. The tax evasion and structured transactions ("smurfing") offenses shadow the promotion and concealment offenses. A tax evasion, laundering prosecution requires the government to show that the defendant acted intentionally rather than inadvertently, but not that the defendant knew that his conduct violated the tax laws. Similarly, conviction for the smurfing offense does not require a showing that the defendant knew that his conduct was criminal as long as the government establishes that the defendant acted with the intent to frustrate a reporting requirement. The international laundering crime replicates the elements of the promotion, concealment and smurfing offenses (but not the tax evasion offense) and adds an international transportation element. Of course, proof of the transportation element alone is insufficient without the evidence of an intent to promote, conceal or smurf. The final crime found in section 1956 is a "sting" offense, the proscription drafted to permit the prosecution of money launderers taken in by undercover officers claiming to have proceeds in need of cleansing from illegal gambling or other predicate offenses.

Section 1956 does not make spending tainted money a crime, but section 1957 does. Using most of the same definitions as section 1956, the elements of 1957 cover anyone who: 1. A. in the United States, B. in the special maritime or territorial jurisdiction of the United States, or C. outside the United States if the defendant is an American; 2. knowingly; 3. A. engages or B. attempts to engage in; 4. a monetary transaction; 5. [in or affecting interstate commerce]; 6. in criminally derived property that A. is of a greater value than $10,000 and B. is derived from specified unlawful activity.

Unlawful Internet Gambling Enforcement Act. The proscriptions of the Unlawful Internet Gambling Enforcement Act are simply stated: (1) No person (2) engaged in the business of (3) betting or wagering (4) may knowingly accept (5) in connection with participation of another person (6) in unlawful Internet gambling

(7)(A)(credit ... including ... use of a credit card; or (B) an electronic fund transfer ... or (C) any check ... or (D) the proceeds of any other form of financial transaction, 31 U.S.C. 5363.

The proscription, however, is attended by an exhaustive array of definitions, qualifications and exceptions, that color its construction. The Act uses the definition of "bet or wager" to place beyond the reach of the Act's proscriptions many forms of activity that otherwise fit the definition but which for the most part are not ordinarily considered gambling. It describes "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome," 31 U.S.C.5362(1)(A). The list of common activities exempted from the definition include securities and commodities exchange activities, insurance, Internet games and promotions that do not involve betting, and certain fantasy sporting activities. The definition of what is not "unlawful Internet gambling" for purposes of the Act provides the exemptions for various forms of previously legalized intrastate and tribal gambling, and sets aside the issue of the legality under the Wire Act of various forms of Internet use by the horse racing industry. The definition also exempts certain intrastate and intratribal forms of gambling, like state lotteries and Indian casinos that operate under state regulations or compacts, from the prohibitions of the Act, if certain age and location verification conditions are met. The Act features criminal, civil and regulatory enforcement mechanisms.

Constitutional Questions. There have been suggestions that prosecution of illegal Internet gambling raises various constitutional issues. Principal among these are questions as to legislative power under the Commerce Clause, restrictions imposed by the First Amendment's guarantee of free speech, and due process concerns about the regulation of activities occurring at least in part overseas.

Commerce Clause. Congress possesses no legislative power that cannot be traced to the Constitution. Among its Constitutionally enumerated powers, Congress enjoys the authority to regulate interstate and foreign commerce. Over the years, the Supreme Court regularly confirmed the enormous breath of Congress's legislative prerogatives under the Commerce Clause. Within the last decade, however, it has announced a series of decisions pointing out that Congress's Commerce power is not without limit. These limitations, notwithstanding, the federal appellate courts have concluded, thus far, that the federal gambling statutes, directed as they are against an economic activity, come safely within Congress's legislative authority under the Commerce Clause.

First Amendment. Gambling implicates First Amendment free speech concerns on two levels. Gambling is communicative by nature. Gambling also relies on advertising and a wide range of auxiliary communication services. Historically, gambling itself has been considered a vice and consequently beyond the protection of the First Amendment. There is every reason to believe that illegal gambling remains beyond the shield of the First Amendment. Gone, however, is the notion that the power to outlaw a vice includes the power to outlaw auxiliary speech when the underlying vice remains unregulated. The Supreme Court made this readily apparent when it approved an advertising ban on gambling illegal at the point of broadcast, but invalidated an advertising ban on gambling lawful at the point of broadcast. Although the Court

acknowledges the ambivalence of American gambling policies, it does not appear to threaten the basic premise that the First Amendment permits Congress to outlaw gambling in any form and to ban any speech incidental to illegal gambling.

Due Process. Commentators have suggested two possible due process issues triggered by application of federal criminal law to off shore Internet gambling. They point to the due process limitations on the exercise of personal jurisdiction over the defendant or subject matter jurisdiction over the gambling activity. Questions of personal jurisdiction are the more familiar of the two. They revolve around issues, often addressed in civil cases, concerning the reach of a state's long arm statute. The Supreme Court has explained that "the Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' ... [T]he constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum State." The federal appellate courts, called upon to apply these principles in Internet commercial litigation, have concluded that suing nonresident parties doing business on the Internet where their customers are found does not offend due process requirements. Yet, more than a passive Internet site is required; the critical test is the level of commercial activity associated with the website.

Subject matter jurisdiction, although raised less often, is closely related. It involves the question of when, in fairness, nonresidents can be bound by local law for conduct they committed elsewhere. The authority of Congress to establish extraterritorial jurisdiction is limited by due process, but only a few lower court cases have attempted to explain the boundaries. Those cases suggest that due process insists that the offshore application of federal criminal law be limited to those instances where there is some nexus to the United States, some factor to alert an individual overseas of the need to avoid the conduct condemned in our law.