

POCKET ACE'S

A COMPREHENSIVE LOOK AT THE LEGALITY OF
OFF-SHORE INTERNET GAMBLING WITHIN THE USA

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“If you thought 2004 was a big year for poker on TV sets and at card tables across this great country, you might want to peek into bedrooms and home offices. The number of people playing poker online passed 1.4 million in November and is growing by about 100,000 every month. In the 24 hours prior to my writing these words, online gamblers had wagered \$150,723,693.”¹

I. Introduction

The growth in popularity, ease of use and wide-spread availability of Internet access has contributed to the growth of many new industries and has seen an online incarnation of other businesses develop. The world of Internet gambling² is somewhat of a hybrid between the two. None of the casinos one finds in Las Vegas operate Internet gambling sites, yet all offer traditional gambling experiences, however with Internet access, one need not travel to Las Vegas to play cards, pull the slots or even bet on sports, it can all be done remotely. The advent of the Internet has allowed entrepreneurs to offer gambling and wagering experiences to audiences across the globe with little or no cost (beyond their wagers and casino rakes) to the end user and low set up costs for the owners of such Internet sites.

Turning specifically to gambling in America, it is estimated that Americans spend \$70 billion per year on gambling, approximately three times the amount that is spent on other forms of entertainment (including movies, concerts, sports and theatre) combined.³ Add to those figures the latest reports indicating that nearly 201 million Americans have Internet

¹ ESPN The Magazine – “The Biz” Section – Peter Keating – February 2005

² Internet gambling involves any activity that takes place via the Internet and that includes a bet or wager. The Internet is a complex web of computer networks that allows a person in one place in the world to communicate by computer with another person located in another place in the world. Courts generally have defined a bet or wager as any activity that involves a prize, consideration, and chance. A prize is something of value. Chance is usually determined by assessing whether chance or skill predominates. Consideration is what the person must pay to enter and must be something of value, such as money. – Definition from Internet Gambling Overview – General Accounting Office (GAO) – United States of America – GAO-02-1101R, Sept 23, 2002 (hereinafter GAO Report) at page 1

³ Hannon, Lauren – “Calling the Internet Bluff: The Interplay Between Advertising and Internet Gambling” – 14 Seton Hall J. Sports & Ent. L. 239 (hereinafter Hannon) at page 1

access (a penetration rate of 67.8%), the fact that the growth of Internet usage has been recorded at over 110% for the past five years⁴, and the opportunity to attract United States citizens to gamble online is too large an opportunity to be passed on by Internet gambling entrepreneurs.

This report addresses the legality of Internet gambling in the United States, and that government's ability to enforce its laws upon operators in foreign jurisdictions. Part II of this report traces the history and state of Internet gambling in America today. This also includes discussion on the current state of prosecutorial powers available to both the United States federal and respective state governments. Part III of this report profiles the case of Jay Cohen, former chief executive officer of the World Sports Exchange (WSE) and the only United States citizen to be successfully prosecuted for operating an Internet gambling site in a foreign jurisdiction. In Part IV, two techniques (credit card restrictions and online advertising restrictions) for discouraging Internet gambling are evaluated and critiqued. Part V deals with the current dispute before the World Trade Organization (WTO), in which Antigua and Barbuda have argued that "in legislating transactions between US financial institutions and Antigua and Barbuda-based Internet gaming companies, (the United States government) was acting in breach of its obligations under the General Agreement on Trade in Services (GATS)."⁵ Finally in Part VI, the author will conclude with some views on the challenges facing the United States government in its battle against Internet gambling.

⁴ These stats current as of April 2005 – Available online at <http://www.internetworldstats.com/stats2.htm#north> – site last checked on April 6, 2005

⁵ Press release from Antigua and Barbuda government issued March 25, 2004 – Available online at http://www.antigua-barbuda.com/business_politics/wto/wto_index.asp - site last checked on April 6, 2005

Policy questions of whether countries should have control the rights of their citizens to gamble as well as morality issues surrounding gambling and gambling addiction are outside the scope of this paper.

II. The History & Current State of Internet Gambling in America

Given American's penchant for gambling in general and with over 200 million Americans having Internet access - making up over 90.7% of all North American Internet users⁶ - it is no wonder that the topic of Internet gambling has become a large issue for the United States government.

According to the United States General Accounting Office (GAO), "since the mid-1990's, Internet gambling operators have established approximately 1,800 e-gaming Web sites in locations outside the United States, and global revenues from Internet gaming (from US citizens) in 2003 are projected to be \$5 billion dollars."⁷ Christiansen Capital Partners estimated that the growth in Internet gambling revenues from United States citizens between 2002 and 2003 was over 42%. During the same time period, the overall gambling industry experienced only a 6% overall rise in revenues.

In 1996, the United States government, under directions from Congress, created the National Gambling Impact Study Commission to "examine the social and economic impacts of gambling."⁸ For the first time ever, this study included Internet gambling as one of the gambling venues available to Americans. Though the study took three years to complete, in 1999 when the report was issued, the commission recommended that "the federal

⁶ Canada ranks second with 9.2% access - These stats current as of April 2005 - Available online at <http://www.internetworldstats.com/stats2.htm#north> - site last checked on April 6, 2005

⁷ GAO Report at page 1

⁸ GAO Report at page 1

government prohibit any Internet gambling not already authorized and encourage foreign governments not to harbor Internet gambling organizations.” The study’s commission went on to further recommend that “Congress pass legislation prohibiting the collection of credit card debt for Internet gambling.”⁹

The belief of the commission that, at the time, (and still presently) no one codified law sufficiently covered the legislation regarding Internet gambling, leads to the question of what laws currently in place have been or could be used in the prosecution of Internet gambling sites available to Americans but operating in foreign jurisdictions. This discussion is specifically limited to Internet gambling sites operated in foreign jurisdictions, as the laws surrounding Internet gambling sites operated within America clearly point to state legislation, and as such, limited or no confusion exists.

When someone logs onto the Internet they have the ability to instantaneously cross virtual borders and enter into sites hosted in foreign jurisdictions, and thus has caused the US Government to recognize that “Internet gambling is an essentially borderless activity that poses regulatory and enforcement challenges.”¹⁰ In fact, as recently as 1996, Department of Justice spokesmen John Russell was quoted as saying, “so far, federal officials have taken little interest in restricting internet gambling. While there are federal laws in place that cover domestic on line gambling, we have yet to prosecute anyone, as to on line gamers, we can't touch them.”¹¹

9 National Gambling Impact Study Commission, “Final Report” (June 1999) – Cited from GAO Report footnote 2

10 GAO Report at page 3

11 Sentencing Transcript of Jay Cohen at page 41 (hereinafter WSE Sentencing) – Available online at <http://www.freejaycohen.com> – Site last checked April 6, 2005

The way in which Internet gambling is regulated is multifarious to say the least. The regulations which can apply to Internet gambling include both federal and state statutes. For the most part, states have always been able to regulate gambling within their own borders at the state legislature level. Each state is able to make its own regulations and restrictions regarding gambling operations and whether (as well as how) they may or may not be set up. Federal laws that can have effect on Internet gambling include the Wire Act, the Travel Act and the Illegal Gambling Business Act. Further, with the United States attempting to assert jurisdiction over operations in foreign jurisdictions, constitutional and jurisdictional issues also must be considered.

In order to make sense of the differences between the various regulations at both the state and federal level, each is now considered as it relates to Internet Gambling.

*State Regulations*¹²

The GOA reports that as of 2004, five states (Illinois, Louisiana, Nevada, Oregon and South Dakota) had “enacted laws that specifically prohibited certain aspects of Internet gambling, but laws in other states that prohibit some types of gambling activities generally apply to Internet gaming as well.”¹³ However, in contrast to this well crafted statement, the same GOA report shows an extremely confusing picture in states which have not clearly defined their intent with respect to Internet gambling.

For example, Nevada, which is well known for its Las Vegas strip and the millions of visitors who gamble there each year, has to this point noted that Internet gaming shall be

¹² The regulations discussed in this section are credited to GAO report at page 17 -18

¹³ GAO Report at page 3

illegal within its borders. However, the state has also covered the other side of the coin by giving the Nevada Gaming Commission the ability to “adopt regulations governing the licensing and operation of Internet gambling if the Commission determines that interactive gaming can be operated in compliance with all applicable laws.” In Utah, all gambling is prohibited and state officials have noted they believe this would include Internet gaming. Finally, although New York has authorized “certain lotteries, certain types of pari-mutuel betting on horse races and bingo, lotto games and local games of chance that operate under specific conditions”, the attorney general has launched investigations into entities that ‘engage in or facilitate Internet gambling businesses.’

Though the GAO has reported that current state regulations should be sufficient to operate against Internet gambling, the intricacy of levels of legislation and multitude of potential regulations within each state make this a daunting task.

As noted *supra*, state regulations are only one piece of the regulatory puzzle, and in order to understand the entire picture, the various federal legislations potentially covering Internet gambling are examined.

Federal Regulations – The Wire Act (1961)

The Wire Act of 1961¹⁴ provides the following:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than

¹⁴ Available online at <http://www.gambling-law-us.com/Federal-Laws/wire-act.htm> · Site last checked on April 6, 2005

two years, or both

Though the Act was clearly written with the intent of stopping bookmaking through the telephone and as such the scope of an entity like the Internet was not conceived at its conception, the Wire Act is the only federal law which has been employed in the successful conviction of a foreign Internet gambling website proprietor (see section on Jay Cohen).

Therefore, although one may be hesitant to try and transpose the wording of an Act written in 1961 to the “wire” technology available in 2005, as this is the only successful regulation to be used by the US government, its wording does indeed require further examination.

The Act specifically makes it a crime for an individual or corporation to be involved in the “transmission...of information assisting in the placing of bets or wagers on any sporting event or contest.”¹⁵ When applied to the context of Internet gambling, such wording leaves much room for interpretation. The specific reference in the Act to sporting events raises the question of whether the Act should be confined in its jurisdiction to just those acts involving sports. As well, the wording in the Act which states, “information assisting in the placing of bets or wagers”, leaves open the question of whether Internet sites which link to gambling sites or those which provide the current sporting lines are providing such information and are therefore leaving themselves open to prosecution.

Further, as the Act only covers “transmissions of wire communication”, this leaves it potentially vulnerable to attack by counsel with respect to the Internet. Not all Internet communications are conducted through wired communication (wireless connections continue to grow) and further, as noted by the GAO itself, the phrase may be “ambiguous as

¹⁵ IBID – emphasis added by author

it applies to the Internet.”¹⁶ This is because some courts have interpreted “transmission” as meaning receiving information, while others have held it implies sending information and yet others have noted that it implies both the sending and receiving of information.¹⁷

Though the Wire Act has been shown to be subject to attack, the two other federal statutes which have been considered as potentially having impact on Internet gambling (the Travel Act and the Illegal Gambling Business Act) have never been successfully used in any Internet gambling case. Nonetheless, these two Acts warrant commentary.

Federal Regulations – The Illegal Gambling Business Act (1970)

As part of its effort to curb organized crime and specifically racketeering, in 1970, as part of the Organized Crime Act, the United States passed the Illegal Gambling Business Act. It was believed by Congress that “large-scale, illegal gambling operations financed organized crime, which, in turn, has a significant impact on interstate commerce.”¹⁸

Rodefer notes that in order to prove a “prima facie case under this statute, the government must establish that there is a gambling operation which (1) is in violation of state or local law where it is conducted, (2) involves five or more persons (not necessarily the same five people) and (3) remains in substantially continuous operation for more than thirty days or has a gross revenue of \$2,000 in any given day.”¹⁹

¹⁶ GAO Report at page 13

¹⁷ *United States v. Reeder*, 614 F. 2d 1179 (8th Cir. 1980); *United States v. Stonehouse*, 452 F.2d 455 (7th Cir. 1971); *Telephone News Sys. V. Illinois Bell Tel. Co.*, 220 F. Supp 621 (N.D. Ill. 1963), *aff'd*, 376 U.S. 782 (1964)

¹⁸ Rodefer, Jefferey – “*Illegal Gambling Business Act of 1970*” – Available online at <http://www.gambling-law-us.com/Federal-Laws/illegal-gambling.htm> - Site last checked on April 6, 2005

¹⁹ IBID

When applied to the Internet Gambling industry, it would seem as though this Act has limited to no potential for applicability and prosecutorial success. Although legal scholars have commented that the five members of the operation need only be “necessary and helpful” to the organization and thus could consist of web site technicians, operators and even accounting personnel,²⁰ the fact that the gambling activity must violate the law of the state where it takes place, combined with the fact that all Internet gambling websites are located in foreign locales, (where the activity is generally legal) makes it unlikely that many courts would conceive this to be a law which is able to counter Internet gambling.

Federal Regulations – The Travel Act (1961)

As with the Illegal Gambling Business Act, the Travel Act can be classified as less than optimal in dealing with Internet Gambling. The Act makes it a criminal activity for one to use “interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity.”²¹ As noted by the GAO, under the Act, “unlawful activity includes any business enterprise involving gambling in violation of the laws of the state where the gambling takes place or of the Unities States.”²² Though such an interpretation could be used to construe that “gambling over the Internet generally would violate the Travel Act because an interstate facility, the Internet, is used to conduct gambling,”²³ to date such an argument has not been made with any success and therefore one can fairly conclude that the Travel Act is not a suitable vehicle with which to prosecute Internet gambling.

²⁰Gorman, Seth and Loo, Anthony, “*Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*” at 676. - 16 Loy. L.A. Ent. L.J. 667, 671 (1996)

²¹ Rodefer, Jefferey – “*Federal Travel Act Scope and Predicates*” – Available online at <http://www.gambling-law-us.com/Federal-Laws/travel-act.htm> - Site last checked on April 6, 2005

²² GAO Report at page 14

²³ IBID

Finally, in investigating the federal powers available to the United States government in the pursuit of prosecuting foreign entities, the constitutional and jurisdictional issues are investigated.

Federal Regulations – Personal Jurisdictional Issues

Due to the fact that all the Internet gambling sites identified by the GAO report are located in foreign jurisdictions, the United States government faces jurisdictional obstacles it must satisfy before it is able to prosecute any of the proprietors of these sites. Although the law in the United States concerning Internet gambling is less than explicit, even if it were explicitly forbidden in the United States, the federal government must be able to assert jurisdictional validity over the subject they wish to charge.

The right to ‘due process’ created by the Fifth and Fourteen Amendments to the United States Constitution does not only extend to citizens of the USA, the rights apply to foreigners as well. In order for the United States to be able to extend its reach into foreign jurisdictions, the government must first pass a test of “personal jurisdiction”. As noted in *International Shoe Co. v. Washington*, there has to be a minimum number of contacts with the United States so that the action will not “offend traditional notions of fair play and substantial justice.”²⁴ This means that the court must look at both the “nature and quality” as well as the “sufficiency” of the contacts to the US forum attempting to apply jurisdiction. In investigating the legal realities of personal jurisdiction as it relates to the Internet we are able to extrapolate from the findings in such cases as *CompuServe Inc.*,²⁵ *Bensusan*

²⁴ *International Shoe Co. v. Washington*, 326 U.S. 310, 316, (1945) as cited in Hannon at note 95

²⁵ *CompuServe Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996) - hereinafter *CompuServe*

Restaurant,²⁶ *Granite Gate Resorts*,²⁷ and *Yahoo!*²⁸ in order to learn how the court has previously treated jurisdictional issues related to the Internet.

In *CompuServe*, the US Court of Appeals (6th Circuit) found that personal jurisdiction could exist in Ohio over an Internet user in Texas. In that case, the defendant was a registered subscriber of the CompuServe Internet service and was conducting electronic commerce transactions and advertising for such services on the CompuServe site. When he alleged that CompuServe Inc. had violated his trademarks, the company moved for a judgment (in Ohio) that it had not done so. In order to assert jurisdiction, the court in Ohio had to satisfy its jurisdictional requirements. In noting that the defendant's relationship with CompuServe was not a "one-shot affair" the court held that it was certainly within the jurisdiction of the state of Ohio and that in transmitting 32 master software files to CompuServe to be sold online, he "purposely transacted business in Ohio," and "should have reasonably foreseen that doing so would have consequences in Ohio."²⁹

Turning attention to *Bensusan* where the defendant's activities were less involved than in *CompuServe*, the US District Court of New York distinguished between the two cases. In *Bensusan* as opposed to *CompuServe*, the defendant had simply created a promotional Internet site that did not offer any direct sales. In this case, the defendant (King) operated a jazz club in Missouri known as "The Blue Note" and was informed by the plaintiff that such a name was "registered as a federal trademark for cabaret services on May 14, 1985"

²⁶ *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (1996), *aff'd*, 126 F. 3d 25 (2d Cir. N.Y. 1997) - hereinafter *Bensusan*

²⁷ *State v. Granite Gate Resorts Inc.*, 568 N.W. 2d 715, 721 (Minn. 1997) as cited by Hannon at note 129 - hereinafter *Granite Gates*

²⁸ *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 145 F.Supp.2d 1168 (N.D.Cal2001) as cited by in Radin, Margaret Jane, Rothchild, John A., & Silverman, Gregory M. - Internet Commerce: The Emerging Legal Framework - Foundation Press, New York, NY (2002) at pages 498-500 - hereinafter "*Yahoo!*"

²⁹ *CompuServe* - As cited in Internet Commerce at page 503

and as such the defendant's Internet promotion site available to world-wide-web users in New York was in violation of plaintiff's trademark. In noting the key distinction between this case and *CompuServe*, the court noted that "creating a site, like placing a product into the steam of commerce, may be felt nationwide – or even worldwide – but, without more, it is not an act purposefully directed to the forum state."³⁰ It would seem therefore that a key distinction is whether or not the defendant was engaged in sales activities (in *Bensusan* he was not) or simply promotional activities.

After considering the cases above to understand the way in which courts have applied the test of personal jurisdiction as it applies to a state's ability to extend its court forum, it is now worthwhile to also concentrate on two specific cases (*Granite Gates* and *Yahoo!*) that deal specifically with Internet gambling and seeking jurisdiction in a foreign country.

In *Granite Gates*, the defendants were utilizing the Internet to promote a forthcoming Internet site that was to offer online gambling. The site (WageNet) was owned and operated by a parent company (On Ramp) in Nevada however due to the nature of the Internet was available to residents of Minnesota. The site's operators had not indicated anywhere on the website that users in the United States might be breaking state laws by wagering on the site and as such the Attorney General of Minnesota brought forth a suit against the companies for "deceptive trade practices and consumer fraud due to falsely advertising in Minnesota."³¹ Counsel for the defendants argued that jurisdiction in the Minnesota forum was not warranted as the defendant's had "only placed information on the Internet and did

³⁰ *Bensusan* as cited in Hannon at note 112

³¹ *Granite Gates* as cited in Hannon at note 131

not purposefully avail itself of the privileges of conducting business within the state.”³²

However the court did not concur and found that advertising with direct links to Internet gambling – the court noting that Minnesota had a substantial interest in regulating advertising as it related to gambling – sites was an intent to market within the state and that in doing so the company was “seeking profits from Minnesota consumers which established sufficient minimum contacts.”³³

Finally, in turning attention to foreign jurisdiction within the United States, in *Yahoo!* the defendant, LICRA, had sued Yahoo! in a French court and obtained an order which forced Yahoo! to restrict residents of France from being able to view and access portions of the Yahoo! system which contained Nazi-related materials. Yahoo! brought a motion against LICRA in the federal district court in which its headquarters are located seeking to have the court issue a judgment noting that the order of the French court was unenforceable against the Californian based corporation. Yahoo! argued that in order to practically prevent French Internet users from viewing such content on its site would be functionally impossible without removing the content altogether and therefore depriving the American corporation of its constitutionally protected right to free speech and free expression. In accepting the claim of Yahoo! and thus rejecting the jurisdictional validity of the French court, the United States district court noted that “a plaintiff seeking to haul a foreign defendant into court in the United States must meet a ‘higher jurisdictional threshold than is required when a defendant is a United States resident.’”³⁴ However, the court also noted

³² Ibid at note 132

³³ Ibid at note 135

³⁴ *Yahoo!*

that this factor is “by no means controlling otherwise it would always prevent suit against a foreign national in a United States court.”³⁵

Though the court in *Granite Gates* was able to distinguish that case from *Bensusan* and extend the jurisdiction of the state of Minnesota based on the substantial state interest in regulating advertising as it related to gambling, in *Yahoo!*, the United States court systems rejection of the ability of the courts of France to extend their forum to California and Yahoo’s headquarters leaves one wondering just how much jurisdictional authority the United States will be able to hold over sovereign foreign nations in the wake of refusing to uphold the decision of the French Court.

Federal Regulations – Subject Matter Jurisdictional Issues

A court only has subject-matter jurisdiction over a case if the substance of a case brings it within the court’s adjudicatory authority.³⁶ As articulated first in *United States v. Aluminium Company of America*,³⁷ the “substantial effects” test states that subject matter jurisdiction will exist where a particular act of the defendant has a “substantial” effect in the United States or on United States citizens. However, the court added further refinements to this test in 1993 by way of *Hartford Fire Insurance Company v. California*.³⁸ In that case, the court noted that jurisdiction could be extended upon the finding of a ‘substantial effect’ that resulted from “the conduct of a foreign corporation engaged in activity to affect the United States market and in such a way that there was no “true conflict” between the law of the United States and that of the foreign country. This last point has caused Internet gambling proprietors to argue that the United States cannot

³⁵ IBID

³⁶ Internet Commerce at page 543

³⁷ *United States v. Aluminium Company of America*, 148 F.2d 416 (2d Cir. 1945) cited in Hannon at note 149

³⁸ *Hartford Fire Insurance Company v. California*, 509 U.S. 764 (1993) cited in Hannon at note 151

satisfy subject-matter jurisdiction because the act of gambling happens in a foreign jurisdiction in which such activities are legal. However, such an issue was raised and found to satisfy subject-matter jurisdiction in the Wire Act prosecution of Jay Cohen and as such there is reason to believe that this is the precedence in the United States.

In order to better understand the only prosecutorial success of an offshore Internet gambling proprietor, Part III of this report investigates the prosecution of Jay Cohen, former Chief Executive Officer of the World Sports Exchange.

III. Prosecution of Jay Cohen – Former CEO World Sports Exchange (WSE)

“Mary Jo White, the United States Attorney for the Southern District of New York, is pleased to announce that Jay Cohen was convicted today in Manhattan federal court after a two week trial of operating a sports betting business that illegally accepted bets and wagers on sporting events from Americans over the Internet and telephones. Cohen was convicted of conspiracy to violate the Wire Wager Act and seven substantive violations of the Wire Wager Act in connection with his operation of World Sports Exchange ("WSE").”³⁹

Background⁴⁰

In 1996, Jay Cohen was a derivatives and options trader at Group One in San Francisco. After spending years working at the company, Cohen decided to pursue his own entrepreneurial venture by leaving Group One, while lining up investors for his new bookmaking venture in Antigua. Cohen was to be the president of the new company and though he and the company would be housed in Antigua where bookmaking was legal, all

³⁹ United States Department of Justice Press Release – February 28, 2000 – Available online at <http://www.usdoj.gov/criminal/cybercrime/cohen.htm> - Last checked on April 6, 2005

⁴⁰ The case facts in this section can be found in *United States v. Cohen* 260 F.3d 68 (2nd Cir. 2001) – hereinafter “*Cohen – WSE Appeal*”

the investors would remain in the United States. The venture was known as the World Sports Exchange (WSE) and its sole business was to process bets on sporting events and act as the bookmaker (i.e. taking a percentage 'rake') in accepting, collecting and paying out on wagers. Cohen and his partners patterned their business after New York's Off Track Betting Corporation and although the business was physically located in Antigua, its accountants, lawyers and some support staff were located in the USA. Further, the WSE advertised on radio, newspapers, television and online all located within the United States and aimed directly at its residents. Its advertisements invited customers to bet with WSE either by toll-free telephone or by internet. "WSE operated an "account-wagering" system. It required that its new customers first open an account with WSE and wire at least \$300 into that account in Antigua. A customer seeking to bet would then contact WSE either by telephone or internet to request a particular bet. WSE would issue an immediate, automatic acceptance and confirmation of that bet, and would maintain the bet from that customer's account. In one fifteen-month period, WSE collected approximately \$5.3 million in funds wired from customers in the United States. In addition, WSE would typically retain a 'rake' or commission of 10% on each bet. Cohen boasted that in its first year of operation, WSE had already attracted nearly 1,600 customers. By November 1998, WSE had received 60,000 phone calls from customers in the United States, including over 6,100 from New York. In the course of an FBI investigation of offshore bookmakers, FBI agents in New York contacted WSE by telephone and Internet numerous times between October 1997 and March 1998 to open accounts and place bets. Cohen was arrested in March 1998 under an eight-count indictment charging him with conspiracy and substantive offences in violation of 18 U.S.C. § 1084 ("The Wire Act"). After a ten-day jury trial, Mr. Cohen was convicted on all eight counts on February 28, 2000. Cohen was sentenced on August 10, 2000 to a term of twenty-one months' imprisonment.

The Appeal & Denial

“On appeal, Cohen asks this Court to consider the following six issues: (1) whether the Government was required to prove a “corrupt motive” in connection with the conspiracy in this case; (2) whether the district court properly instructed the jury to disregard the safe-harbor provision contained in § 1084(b); (3) whether Cohen “knowingly” violated § 1084; (4) whether the rule of lenity requires a reversal of Cohen's convictions; (5) whether the district court constructively amended Cohen's indictment in giving its jury instructions; and (6) whether the district court abused its discretion by denying Cohen's request to depose a foreign witness.”

For the purposes of this report, the most important questions from Cohen’s appeal and those which are discussed herein are (1) whether the Government was required to prove a “corrupt motive”, (2) whether or not the safe-harbor provision applied to Mr. Cohen’s case, (3) whether Cohen knew and had the requisite *mens rea* to be convicted of violating § 1084, and (4) whether the rule of lenity would allow call for a reversal of the convictions.

Corrupt Motive

On appeal, Mr. Cohen argued that in order to be convicted under the conspiracy aspects of the charges against him, based on the facts of *People v. Powell*⁴¹, it was the responsibility of the Government to not only prove that a conspiracy had taken place, but that more importantly, the Government needed to prove that Cohen had a corrupt motive in committing such a conspiracy. The trial court as well as appellate division rejected Cohen’s argument by noting that the doctrine of *Powell* was no longer the correct precedent for the court to follow in its deliberations. In rejecting Cohen’s appeal, the Second Circuit court

⁴¹ *People v. Powell* – 63 N.Y. 38 (1875)

noted that they could no longer follow a doctrine that the American Law Institute had “expressly rejected” and had further noted that the “melodramatic and sinister view of conspiracy” upon which Powell was premised was no longer valid.⁴² Therefore, after rejecting this notion, the court moved to the question of whether the “safe-harbor” provision of the Wire Act would work in Mr. Cohen’s favor upon appeal.

Safe-Harbour

As noted *supra*, the Wire Act contains a subsection which “provides a safe harbor for transmissions that occur under both of the following two conditions: (1) betting is legal in both the place of origin and the destination of the transmission; and (2) the transmission is limited to mere information that assists in the placing of bets, as opposed to including the bets themselves.”⁴³ Also as noted *supra*, due to the lack of a clear definition of how the Wire Act was to be construed in an Internet era Mr. Cohen was confident in his ability to seek a reversal of his conviction based on the safe harbor subsection due to fact that either (1) gambling was legal in both Antigua and New York, and/or (2) due to the structure of WSE’s “account wagering system”⁴⁴ all WSE telephone (“wired”) actions should be construed as merely information assisting in the transmission of bets and not placing the bets themselves.

(1) Gambling’s Dual Legality – Both the Government and the court readily accept the fact that Internet gambling is legal in Antigua and therefore at issue in Mr. Cohen’s argument was the legality of such gambling in the state of New York. At the appellate level, Mr.

⁴² *Cohen – WSE Appeal* at page 72

⁴³ *IBID* at page 73

⁴⁴ Under WSE’s “Account Wagering System” a customer was required to deposit at least \$300 US into an account in Antigua held by WSE. The customer would then contact WSE either by telephone or Internet to request a particular bet. WSE would issue an immediate, automatic acceptance and confirmation of that bet, and would process the bet from the particular customer’s account.

Cohen argued that either (1) gambling was legal in New York, and/or (2) that even though an act may be deemed illegal, so long as it is not covered under criminal law (as Mr. Cohen contended gambling was not in New York) it could still qualify under the safe harbor subsection of the Wire Act. The district court had ruled that although Mr. Cohen was correct in his belief of the way the safe-harbor protection was supposed to work, he was incorrect on both his assumptions that gambling was either legal in New York State and/or that an act had to be covered under criminal law for it not to qualify for safe-harbor status.

Although the laws of individual states with respect to gambling can seem ambiguous, the court found that “there can be no dispute that betting is illegal in New York”⁴⁵ and as such the first portion of Mr. Cohen’s safe-harbor argument was instantaneously shot down.

Further, the court noted that although Cohen contended that because the placing of bets is not a crime (punishable by sanctions or jail) in New York, it shall be deemed ‘legal’ for the purposes of safeguard under the safe-harbor status of the Wire Act. Again the district and appellate courts disagreed and in their reasons stated that “by its plain terms, the safe-harbor provision requires that betting be “legal,” i.e. permitted by law, in both jurisdictions.”⁴⁶

Therefore, as the court had rejected the first two of Mr. Cohen’s attempts to fall under the safe-harbor of the Wire Act due to gambling’s potential dual legality, his attempt to classify his actions as providing informational assistance to gamblers (and as such not be considered as placing bets) is discussed and analyzed.

⁴⁵ *Cohen – WSE Appeal* at page 73

⁴⁶ IBID

(2) Provision of Informational Assistance Only – As noted *supra*, the World Sports Exchange was set up in such a way so that bettors would deposit money into a trading account and then either place wagers themselves via the Internet or use the telephone to have a WSE representative place the wager for them. It was Mr. Cohen’s contentions that “under WSE’s account-wagering system, the transmissions between WSE and its customers contained only information that enabled WSE itself to place bets entirely from customer accounts located in Antigua.”⁴⁷ Although the appellate court noted that Mr. Cohen’s attempt to fall under the safe-harbor and already been ruled futile by its finding that gambling was strictly illegal in New York, the court pointed to a telephone call⁴⁸ entered into the record which it noted could only be construed as WSE placing bets and not simply providing informational assistance.

Therefore, Mr. Cohen’s safe-harbor request was denied at both the division and appellate level due to the fact that the court found no dual legality between New York State and Antigua with respect to gambling and further due to the fact that based on FBI telephone conversations entered into the record, there could be no misconception that the WSE was indeed placing bets on account holder’s behalf, not simply providing them with information that would aid in their placing their own wagers.

⁴⁷ IBID at page 74

⁴⁸ The telephone call between a New York based undercover FBI agent occurred as follows:

Agent: Can I place a bet right now?

WSE: You can place a bet right now

Agent: Alright, can you give me the line on the Penn State/Georgia Tech game, it’s the NIT game tonight

WSE: Its Georgia Tech minus 7 ½ , total is 147

Agent: Georgia Tech minus 7 ½ , umm I wanna take Georgia Tech. Can I take'em for \$50

WSE: Sure

Cohen's Mens Rea

As the Wire Act specifically prohibits the “knowing” transmission of bets or information assisting in the placing of wagers, the district court had charged the jury that in order to convict Mr. Cohen the level of fault necessary was only that he “knew the deeds described in the statute as being prohibited were being done and that misinterpretation of the law, like ignorance of the law, is no excuse.”⁴⁹

At his appeal, Mr. Cohen put forth as part of his reasons for appeal the fact that in his mind the charge to the jury was unfair as he lacked the requisite *mens rea* to be convicted due to the fact that (1) “he did not knowingly transmit bets”, and (2) “he did not transmit information assisting in the placing of bets or wagers to or from a jurisdiction in which he ‘knew’ betting was illegal.”⁵⁰

Again such arguments were ultimately rejected at the appellate level with the court noting that “Cohen is culpable under §1084(a) by admitting that he knowingly transmitted information assisting in the placing of bets. His beliefs regarding the legality of betting in New York are immaterial...Cohen’s own interpretation of what constituted a bet was irrelevant to the issue of his *mens rea* under the Wire Act.”⁵¹ Therefore, Mr. Cohen was left with what would seem his only defence at the appellate level, to appeal to the rule of lenity by arguing that the Wire Act and its application to Internet offshore gambling is too ambiguous for him to serve jail time over.

⁴⁹ IBID at page 76

⁵⁰ IBID

⁵¹ IBID at page 76

Rule of Lenity

As noted in *Smith v United States*, the rule of lenity can be defined as a “rule requiring that ambiguity in a criminal statute relating to prohibitions and penalties be resolved in favor of the defendant when doing so is not contrary to the legislative intent.”⁵² In the case at bar, Mr. Cohen argued that the Wire Act was “too unclear to provide fair warning of what conduct it prohibits. In particular the statute does not provide fair warning with respect to (1) whether the phrase “bet or wager” includes account wagering, (2) whether “transmission” includes the receiving of information as well as the sending of it, and (3) whether betting must be legal or merely non-criminal in a particular jurisdiction to be considered “legal” in that jurisdiction.”⁵³

The appellate court again rejected Mr. Cohen’s claims, taking them in order and summarily noting that “none of these contentions has any merit.”⁵⁴ On the question of whether the phrase bet or wager would include account wagering, the court was unwavering and chastised Cohen’s argument by remarking, “we need not guess whether the provisions of the Wire Act apply to Cohen’s conduct because it is clear that they do...First, account-wagering is wagering nonetheless; a customer requests a particular bet and WSE accepts the bet...the requirement that customers maintain fully-funded accounts does not obscure that fact.”⁵⁵ On the second claim, that the word ‘transmission’ was ambiguous and could be interpreted in several different ways, the court was again unforgiving to Cohen. In simply breaking down the actions of Cohen’s WSE representatives, the court noted that they “received such transmissions from customers, and, in turn, sent such transmissions back to

⁵² *Smith v United States* (1993) 508 U.S. 223 available online at <http://home.uchicago.edu/~rmenary/briefs/elements/Smith/> last checked on April 10, 2005

⁵³ *Cohen – WSE Appeal* at page 76

⁵⁴ IBID

⁵⁵ IBID

those customers in various forms, including in the form of acceptances and confirmations...No matter what spin he puts on ‘transmission,’ his conduct violated the statute.”⁵⁶ Finally, in addressing Cohen’s contention that the law was unclear about whether an act had to be criminal to be considered illegal (identical to his argument about dual legality *supra*), the court delivered its final blow to Cohen’s case by holding, “it is clear to lawyer and layman alike that an act must be permitted by law in order for it to be legal...the safe harbor provision is unambiguous and is not applicable in Cohen’s case.”⁵⁷

Jay Cohen Concluding Thoughts

To this day, Mr. Cohen remains the only offshore Internet gambling operator to be successfully prosecuted under the United States Wire Act. Although Mr. Cohen could have remained in Antigua as a fugitive from United States law enforcement, he chose to face his accusers and avail himself of what he believed to be a strong legal defence to the charges against him. Although Mr. Cohen’s strongest argument comes from the rule of lenity and the fact that many construe the Wire Act to be an outdated and non applicable law to Internet (offshore) gambling, both the District Court of New York (a jury trial) and the Appeals Court felt that the law was clear enough to warrant a conviction. Although it is the author’s contention that due to the relative ambiguity of the Wire Act as applied to the Internet, Mr. Cohen’s lenity arguments have more merit than they were given at the appellate level, this case nonetheless stands as the strongest precedent in the United States Government’s arsenal against offshore Internet gambling.

One would be remiss to only speak of the government’s prosecutorial measures to curb Internet gambling without discussing and critiquing two of the preventative tactics the

⁵⁶ IBID at page 76

⁵⁷ IBID at page 77

government is pursuing. In section IV, credit card restrictions and online advertising restrictions are analyzed as two possible ways to slow the growth of Americans using the Internet for offshore gambling.

IV. Techniques To Curb American's Internet Gambling

In order to attempt to curb the ease and accessibility of Internet gambling sites for US citizens, several technical methods have been attempted or are under development. For the purposes of this report, the two most widely discussed techniques; credit card authorization codes and a potential ban on Internet gambling advertising on websites hosted within the United States are discussed. Although both of these techniques do offer possibilities of restricting American's accessibility to Internet gambling sites, the reasons both fall well short of being able to significantly restrict access to such web sites is discussed *infra*.

Credit Card Deposit Restrictions

For one to understand the way in which credit card deposit restrictions are deployed to curb Internet gambling and the reasons for their limited success, they must first understand the difference between a full service credit card company such as American Express and Discover and credit card associations such as Visa and MasterCard.

While American Express and Discover operate a "closed loop" system whereby they issue merchant licenses and credit cards directly, Visa and MasterCard work on a system where they license out their brand and services by way of credit card associations to member financial institutions across the globe. Due to the nature of the American Express and Discovery card systems; these companies have been able to issue companywide directives and policies that restrict the use of their cards for any transactions involving Internet gambling. Alternatively, due to the nature of their corporate set up, Visa and MasterCard

are not able to issue such directives and as such have had to come up with alternative ways in which to safeguard against their cards being used for Internet gambling. With over 250 million Visa cards and approximately 225 million MasterCard credit cards issued worldwide, versus Discover and American Express reaching less than 100 million together⁵⁸ (as well as maintaining a closed loop system), the rest of this section will discuss the efforts of MasterCard and Visa and their attempts to curb Internet gambling deposits by US citizens.

Visa & MasterCard Policies

As noted *supra*, due to the nature of the MasterCard and Visa credit card associations, neither company has issued directives to its merchant members about the use of their credit cards for Internet gambling purposes. However, in order to allow merchants within their associations to restrict or block Internet gambling transactions, both companies have developed systems which would allow merchants to utilize a “coding system” which could block certain transactions. As described by the United States General Accounting Office, “Internet gambling merchants that accept Visa or MasterCard payments are required to use a combination of a gaming merchant category code and a electronic commerce indicator code...These two codes, which are transmitted through the credit card network to the card issuer as part of the requested authorization message, inform the card issuer that the transaction is an Internet gambling transaction...The issuer can then deny the transaction.”⁵⁹

Though the effort by Visa and MasterCard to allow their merchant’s to retain their own autonomy and determine themselves whether they will block certain transactions is a valiant one, the system is easily sidestepped and moreover the lucrative transaction fees

⁵⁸ GAO Report at page 9

⁵⁹ GAO Report at page 22 – See Appendix for diagram of the process

associated with a large volume of Internet gambling transactions has proven to be more attractive to card issuers than the possibility that they are aiding in a transaction that could be construed as illegal. In a 2002 survey by the GAO of over 1800 Internet gambling sites, 85% advertised MasterCard as a form of payment with over 80% advertising that they could accept Visa payments.⁶⁰ In order to understand why the system put in place by Visa and MasterCard is not an effective deterrent, two Internet gambling operator tactics to circumvent the system are explored.

Merchant Transaction Codes Disguised/Factoring

Due to the fact that there are almost 500 million Visa and MasterCard's issued worldwide, there is a direct incentive for Internet gambling operators to make it as convenient as possible for potential gamblers to deposit money offshore by use of one of these cards. As noted *supra*, many card issuers have chosen to deny these transactions when they receive the transaction code and note that the exchange of funds will take place at an online gambling site. Therefore, there is a monetary motivation for many Internet gambling sites to try and avoid being recognized as such when processing credit card payments. Therefore, those sites which wish to avoid having transactions denied have either chosen to miscode their transactions or utilize other merchant accounts to process cards for their Internet site. By circumventing the coding system, "issuers have no control over the merchants and no way to immediately identify and block all such transactions...disguised Internet gambling transactions are identified only by chance, if at all."⁶¹

Two other popular methods employed by Internet gambling sites are utilizing alternative merchant accounts and a scheme known as "factoring." Under the first scenario, a

⁶⁰ GAO Report at page 24

⁶¹ GAO Report at page 26

merchant would apply for the ability to accept credit cards for a legitimate business and then use that account for both the legitimate business as well as processing credit card transactions on its online site (thus avoiding the coding system). In the “factoring” situation, a merchant would submit credit card transactions through a 3rd party who had a merchant account and would pay that merchant a percentage of all transactions, again avoiding detection as online gambling site.

Finally, as online merchants can collect payments through a variety of e-cash and wire type services, many offer their consumers the ability to deposit money in an e-wallet (thus not being coded as an Internet gambling transaction) or to wire money directly through Western Union. In both of these cases, the consumer is using their credit card at a legitimate (non-gambling) locale and then transferring funds they purchase to the offshore Internet site directly.

Though the actions of Visa and MasterCard would indicate that they view Internet gambling as a potential liability by way of fraud and are interested in maintaining the appearance of attempting to control Americans gambling online, the fact that the system is so easy to circumvent has ultimately contributed to its lack of effectiveness.

This lack of effectiveness has led some to call for much heavier restrictions on Internet gambling advertising to curb the growth within the USA, as shown *infra*; this as well is a system full of holes and may encroach on the free speech rights of United States citizens.

Restrictions on Internet Gambling Advertising

In October, 2003, Raymond W. Gruender, Assistant United States Attorney General for the Eastern District of Missouri launched an investigation into gaming portals and those who allow gambling advertising on their Internet sites. In an open letter to the National Association of Broadcasters, Mr. Gruender warned that “the practice of accepting gambling advertising may constitute aiding and abetting illegal conduct under federal law...state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States, whether or not such operators are based offshore.”⁶² The issuance of Mr. Gruender’s letter and the arguments put forth by Hannon in her report on the “interplay between advertising and Internet gambling”⁶³ have sparked much discussion on whether putting restrictions on the way in which Internet gambling sites are able to advertise would be a fair and effective deterrent to Americans wagering online. In this section such potential restrictions are analyzed and their difficulty in passing the Central Hudson⁶⁴ test is ultimately shown.

In evaluating whether or not a restriction on commercial speech is able to withstand a First Amendment challenge, Courts in the United States rely on the four prong test first used in *Central Hudson Gas & Electric Corp v. Public Service Commission of New York*.⁶⁵ The Central Hudson test evaluates the restriction of commercial speech on four grounds: (1) the speech must concern lawful activity and not be misleading; (2) there is an asserted governmental interest that is substantial; (3) the regulation directly advances asserted

⁶² Walters, Lawrence G. – “*Advertising Liability in the Online Gambling Industry*” – available online at www.gameattorneys.com – Site last checked on April 10, 2005

⁶³ Hannon, Lauren – “*Calling the Internet Bluff: The Interplay Between Advertising and Internet Gambling*” – 14 Seton Hall J. Sports & Ent. L. 239

⁶⁴ The Central Hudson Test is commonly used to evaluate First Amendment challenges to restrictions on commercial speech.

⁶⁵ *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* – 447 U.S. 557, 556 (1980)

governmental interest; and (4) the restriction is not more extensive than would be necessary to serve that interest.⁶⁶

With the Central Hudson test in mind, the question of whether a ban or restrictions on Internet gambling advertising would meet such a test can be evaluated.

(1) The Speech Must Concern Lawful Activity – With the trial of Jay Cohen leaving courts to find that there is not enough haziness in the Wire Act to say that one can avail themselves of the defence of ambiguity, it is fair to submit that the speech being questioned in this scenario (i.e. that of Internet gambling advertising for offshore websites) may be deemed to be unlawful or at least misleading in that none of the advertisements note a restriction for US citizens. Therefore, it is believed that a restriction on Internet advertising could pass this stage of the Central Hudson test.

(2) The Governmental Interest Is Substantial – In *Greater New Orleans Broadcasting Association v. United States*, the Supreme Court found that a restriction on gambling advertisements was in violation of the First Amendment due to the fact that “even if the conduct was illegal in the states that received broadcasts, the ‘societal ills’ of gambling could be offset by countervailing policy considerations, namely the economic advantages achieved through taxes on legal gambling activity.”⁶⁷ To counter this argument, Hannon notes in her research, in the case of Internet gambling, “for the United States, there are no similar economic advantages provided by the current Internet gambling industry...instead, this industry is taking large sums of money outside the U.S. borders and giving tax benefits

⁶⁶ Hannon at note 171

⁶⁷ *Greater New Orleans Broadcasting Association v. U.S.* – 527 U.S. 173 (1999) as cited by Hannon at note 167

to countries that are licensing the online gambling sites.”⁶⁸ Hannon argues that States do not achieve the economic benefits noted in *Greater New Orleans*, however she also fails to clarify that her point is predicated on the fact that Internet gambling is and shall always remain illegal in the United States. However, as the government of individual states could make Internet gambling legal and therefore collect on the economic advantages achieved through taxation and licensing, Hannon’s argument is weakened. For instance, under the state of Nevada’s proposed licensing of online casinos, licensees would pay an initial licensing fee of \$500,000, followed by an annual renewal fee of \$250,000 with an additional 6.25% tax on gross gaming revenues.

(3) Advancing The Government’s Interest – The question of whether restrictions or a ban on Internet related gambling advertising would advance the governments interest is difficult to answer. In all practicality, directing a complete ban on Internet gambling advertising would work to curb the amount of users directed to these sites, however the relative cost of enforcement of such a condition (with millions of web sites in the Unites States alone) makes the chances that this would advance the government’s interest in any substantial way minimal at best.

(4) Is The Restriction To Tough? – Although it would seem the policy of the United States federal government that Internet gambling by its citizens is an illegal venture, to ban all gambling related advertising on US based web sites would be far to restrictive an action and would not be the most effective way for the government to attack Internet gambling. In her piece, Ms. Hannon suggests that in addition to an Internet advertising ban, such a restriction would include prohibiting ads “placed on television, in newspapers, on

⁶⁸ Hannon at note 195

billboards, in event sponsorships, and those promoted by radio hosts. Ms. Hannon's point is well taken, however the prohibition of such advertising simply goes too far given the lack of concrete codified laws on Internet gambling within the United States. Although the government successfully used the Wire Act to prosecute Jay Cohen, Ms. Hannon's argument is defeated by her own words when she notes that in order to allow such a ban to pass this prong of the Central Hudson Test, she is "**assuming** Congress passes the bill that would ban Internet gambling entirely."⁶⁹ As no such bill has been passed, Ms. Hannon's argument and proposed ban on Internet gambling advertising simply cannot pass this phase of the Central Hudson Test and as such is inherently in contradiction to the First Amendment of the US Constitution which promises the right to freedom of speech and expression.

The United States government's increasing efforts to curb Internet gambling within its borders has not gone unnoticed by other countries. The sovereign nation of Antigua and Barbuda have recently appealed to the World Trade Organization (WTO) to determine whether the practices of the United States are in violation of their WTO agreements which is now discussed in the section V of this report.

V. World Trade Organization Dispute

Although it may have a population of only 67,000 citizens and it cannot even afford to maintain an official presence at the World Trade Organization (WTO) in Geneva, the small country of Antigua has raised a stir at the WTO by arguing that the rules of that

⁶⁹ Hannon at note 203 – emphasis added by author

organization require the United States to allow foreign gambling companies access to its market.⁷⁰

In order to fully understand and comment on the dispute, the cases of the government's of Antigua and the United States are summarized herein.

The Government of Antigua's Position

In its executive submission to the WTO, the Government of Antigua submits:

The United States is “the world’s largest consumer of gambling and betting services, with a massive domestic industry responsible for generating gross revenues of approximately US \$68.7 billion in 2002...the basis of Antigua’s claim is simple. In its Schedule of Specific Commitments adopted under the General Agreement on Trade in Services (the “GATS”) the United States has made a full commitment to market access and national treatment for gambling and betting services supplied on a cross-border basis. The United States allows numerous operators of domestic origin to offer such services throughout its territory. Simultaneously, it prohibits all cross-border supply of gambling and betting services. In doing so it violates its obligations under the GATS.”⁷¹

The government of Antigua further submitted to the WTO that even if the United States had legitimate concerns about the regulation of the gaming industry in Antigua, those were ill founded due to its regulatory framework. The government of Antigua writes that their framework adopted on May 22, 2001 requires all operators to have valid licenses which are subject to “rigorous scrutiny” by the Gaming Directorate. Further, the regulations imposed on operators (i) forbid underage gaming; (ii) contain provisions at promoting responsible gaming; (iii) oblige operators to conduct identity checks on prospective players; (iv) prohibit

70 Miller, Scott – “Does U.S. Ban On E-Gambling Violate WTO?” – Wall Street Journal Marketplace – January 28, 2004 (hereinafter *Wall Street Marketplace*)

71 First Submission of Antigua and Barbuda – Executive Summary – United States Measures Affecting The Cross-Border Supply of Gambling and Betting Services – WT/DS285 – October 8, 2003 – hereinafter “*Antigua Executive Summary*”

the receiving of payments in cash; and (v) provide that funds can only come from properly verified accounts in regulated financial institutions.⁷²

In summarizing its losses and the actions it requested at the WTO level, it was submitted that from a high of 119 licensed Antiguan operators, employing approximately 3,000 Antiguan and responsible for 10% of Gross Domestic Product (GDP) in 1999, by 2003 the number of operators had declined to 28 with fewer than 500 Antiguan employed in the industry. As a result, the government of Antigua submitted that the United State's use of (or threatened use of) the Wire Act, the Travel Act and the Illegal Gambling Business Act in the prosecution of offshore Internet gambling operators was a violation of the United State's commitments under the GATS to allow for the cross-border supply of services under Sub-sector 10.D⁷³, the section the Antiguan government believes Internet gaming should fall.⁷⁴

Though the United States government advanced an argument in response to the charge of the Antiguan government, as shown *infra*, their defence was far too broad and condescending to win the support of the WTO panel.

The Government of The United States of America's Position

In its brief to the WTO, the United States government responded to the allegations made by the Antiguan government with unusual contempt and virtually 'scoffed' at the claims put forth.

⁷² IBID

⁷³ Included in this section is the heading "Sporting and other recreational services" and lists #964 as the corresponding central product classification of the United Nations. These services include - #96492 *Gambling and betting services*

⁷⁴ *Antigua Executive Summary*

In the introduction of their counter argument, the government of the United States wrote that it was their submission the government of Antigua “fails to establish anything approaching a prima facie case...Antigua bears the burden of proving, through evidence and argumentation...by flatly refusing to sustain its burden, it leaves the Panel with no choice but to reject Antigua’s claims in their entirety.”⁷⁵ The government went on to belittle the Antiguan argument and documentation by noting “the United States goes on to show, in as much detail as Antigua’s vague allegations allow....that Antigua’s ill-conceived strategy of asking the Panel to ignore the actual content of U.S. law should prevent the Panel from reaching such issues.”⁷⁶

Finally, under its own statement of facts, the United States government submitted as one of its facts simply the following:

Antigua’s statement of facts contains misleading statements, inaccuracies, and irrelevant material. The statement of facts provided in Antigua’s first submission is misleading, inaccurate, or irrelevant in numerous respects. Many of the disputable facts appear to have little bearing on the substance of this proceeding. For the sake of brevity and clarity, the United States focuses on the most broadly misleading elements of Antigua’s statement.⁷⁷

Although the United States government may have been able to establish a defence if it had truly put forth a document which addressed the concerns of the Antiguan government, it instead rebutted the arguments with brush off remarks and a David versus Goliath attitude. In reading the ruling of the WTO released April of 2005, perhaps the United States government wishes it had put forward a more fact oriented defence.

⁷⁵ First Submission of The United States of America – Executive Summary – United States Measures Affecting The Cross-Border Supply of Gambling and Betting Services – WT/DS285 – November 14, 2003 – *hereinafter* “USA Executive Summary” – Emphasis added by author

⁷⁶ IBID – Emphasis added by author

⁷⁷ IBID – Emphasis **not** added by author

The WTO's Final Ruling

On April 7th, 2005, the World Trade Organization's Appellate body ruled in favor of Antigua making it the smallest country to ever defeat the United States in a WTO dispute.⁷⁸

Though the ruling was indeed a victory for the country of Antigua and virtually all offshore casino operators, it is important to establish exactly what the ruling set forth.

The ruling noted that the United States had indeed made a commitment to the free passage of betting and gambling services as per its schedule of commitments under subsection 10.D of the GATS. The ruling further went on to say that the three federal measures of the Wire Act, the Travel Act and the Illegal Gambling Business Act were to be considered "measures" taken by the United States which interfered with its commitments at the WTO under the GATS. Finally, the appellate body went on to note that although the United States did establish that country can violate the GATS if it does so in a moral defence, the USA could not satisfy the balancing requirement determined to satisfy whether the measures taken are necessary to "protect public morals or maintain public order."⁷⁹

In determining that the United States could not pass the balancing threshold of a morality argument (referred to as the "chapeau"), the appellate body noted that the US either sanctioned or allowed several types of "remote gambling" within its borders. Specifically the panel noted that in several states the advertising and acceptance of Internet and telephone based off-track horse wagering was permitted and as such the government of the United

⁷⁸ Press release available at www.freejaycohen.com – Site last checked April 11, 2005

⁷⁹ Final Report of the World Trade Organization WT/DS285/AB/R – Issued April 7, 2005 – hereinafter "*WTO Final Report*"

States was not justified in prohibiting virtually the same activities operated from foreign destinations.

WTO Concluding Thoughts

In a press release issued the same day as the WTO's ruling, counsel for the Antiguan government was quite optimistic when he noted "at the end of the day, we expect that major internet search engines, including Google and Yahoo, financial institutions and credit card service providers will be required to accept advertising from Antiguan internet gaming sites as they do currently with US gaming interests, including hundreds of American casinos and state lotteries."⁸⁰ Although it remains to be seen how this ruling will affect the ability of the United States government to restrict offshore Internet gambling sites from advertising to and subscribing American citizens as customers, it is interesting to note that the government of Antigua's case was not so very much different than the one advanced by the counsel for Jay Cohen (*supra*). This leads one to wonder how his case may have been decided had it been brought before an impartial international body and not one which had a vested interest in seeing a conviction in the first test case for offshore Internet gambling operators.

VI. Conclusion

As early as 1995, the United States government became interested in Internet gambling and the way it would affect its citizens. Initial statements by the Justice Department noted "while there are federal laws in place that cover domestic on line gambling, we have yet to prosecute anyone, as to on line gamers, we can't touch them",⁸¹ and as such, there has been much by way of Governmental restrictive actions (on Internet gambling) from that initial

⁸⁰ Press release available at www.freejaycohen.com – Site last checked April 11, 2005

⁸¹ IBID at note 17

statement through the prosecution of Mr. Jay Cohen and finally concluding most recently with the decision against the United States at the World Trade Organization. Though the United States was able to successfully prosecute Mr. Cohen under the Wire Act, there have been no other such convictions and the government of the US has begun using more deterrent methods (e.g. pressuring credit card companies to ban Internet gambling transactions and refusing to make gambling debts on credit cards recoverable in court) as opposed to prosecutorial ones, in order to “protect” its citizens from the dangers of online gambling.

While the United States has turned the question of whether gambling online should be made available to its citizens into a matter of protection and couches its restrictions under a morality light. In light of the recent decision of the World Trade Organization and the numerous levels of taxation and registration fees proposed by the State of Nevada (see *supra*), it becomes much harder to buy into the United State’s morality arguments.

As pointed out by the WTO, the government of the USA already allows licensed gambling in many states through the form of lotteries, but more importantly allows off-track horse betting via telephone and the Internet with few restrictions. Although off shore Internet gambling sites fall under the regulations of foreign jurisdictions, the submissions of the Government of Antigua show that these foreign governments recognize the revenue opportunities with having a properly regulated industry. The ruling of the WTO only spoke directly to Antigua and therefore there is nothing in it to say that the United States could not restrict (or attempt to restrict) Internet gambling from countries without such a regulatory system. This would allow the USA to stay in line with its commitments under the GATS and would further ensure that certain regulatory structures were followed.

The second area which makes it harder to buy into the US government's morality argument is the way in which a state such as Nevada has already set up regulations for in-state Internet gambling operators to be licensed.⁸² While the proposals speak little about the way in which an operation must be set up and insured, they are sure to point out that \$750,000 would be due simply to be licensed (with \$250,000 paid annually) as well as a 6.25% tax on all gambling revenues. If the government of the United States was really concerned with morality rather than tax revenue, would they not have spelled out the regulations more thoroughly before announcing the cost of licenses and the tax rate? It certainly leaves one to wonder about whether the true motive in curbing offshore Internet gambling is based in morality or perhaps more simply in dollars and cents lost to foreign governments by way of taxes and licensing revenues.

Regardless of the United State's government's motive in curbing the Internet gambling activities of its citizens, it is certainly fighting a losing and uphill battle. Despite the decision reached in the case of Jay Cohen, the laws trying to deal with Internet gambling are antiquated and none covers the new technology without a substantial stretch from the courts. With so much money to be made in this arena, foreign governments are opening their doors to more and more gaming sites. Rather than continue to fight this losing battle, perhaps the US government would be best to realize the market is not going away and true to the American saying, if you can't beat'em...join'em. With legalized gambling in Nevada and Atlantic City as well as lotteries, sports lotteries and office pools across America, the United States government would be better off to allocate its resources to setting up an infrastructure for licensed Internet gambling in the United States and reaping the revenue

⁸² Not available as of the writing of this paper

rewards that come with such. If morality is truly the issue, then such revenues can easily be funnelled into anti-gambling programs, gambling addiction programs and other “moral” causes. Just as the United States decided that it could not properly address liquor laws with prohibition and instead built a system of regulation and taxation, so should they with Internet gambling.