



State of Connecticut

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TO: State Senator Joan Hartley, Public Safety Committee, Co-Chair
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FROM: State Senator John McKinney, Senate Minority Leader

RE: Internet Gambling

In the wake of the recent U.S. Department of Justice Opinion (the "Opinion") regarding the application of the federal Wire Act to state online lotteries, many who have a self interest in promoting Internet gambling, including major gambling businesses and public officials desperate for new sources of revenue, have vastly overstated the legal and practical impact of the Opinion in an attempt to railroad the legalization of online gambling in states throughout the country. Because I believe public policy should be based on facts and not hyperbole, and because I believe Internet gambling poses unique regulatory, social and public health challenges, I think it is important to understand the Opinion and its implications.

1. The Opinion, which was in response to proposals by the States of New York and Illinois to offer lottery tickets over the Internet to residents of their own states, merely enables states, should they choose, to legalize certain online gambling activities within their own borders.
2. The Opinion does NOT change current Connecticut law prohibiting online gambling or require the legalization of online gambling.
3. The Opinion does NOT: (a) allow one state, say New Jersey, to authorize online gambling directed at residents of another state, such as Connecticut, where online gambling is contrary to that state's law, (b) allow any business entity, including one legally licensed in another state, to solicit bets from residents of a state where online gambling is illegal, or (c) otherwise authorize inter-state online gambling.
4. The Opinion does NOT alter other federal criminal laws which make it a crime to engage in gambling activities, including Internet gambling, where such activity violates the law of the state in which it occurs.

The truly limited scope of the Opinion was summarized best by Assistant U.S. Attorney General Ronald Weich in a letter to Senate Majority Leader Harry Reid dated December 23, 2011. Emphasizing the permissive nature of the Opinion, Attorney Weich stated that the Opinion “provides much needed clarity to those state governments that *would like to permit wholly in-state, non-sports Internet gambling, including Internet lotteries.*” However, for those states that choose NOT to authorize Internet gambling, Attorney Weich affirmed that the federal government stands ready, willing and able to prosecute businesses that offer Internet gambling in such a state.

I. States Retain Their Historic Jurisdiction Over Gambling Activities

In determining that the Wire Act does not prevent a state from using the Internet to sell lottery tickets to its own residents, the Opinion merely gives states the option of authorizing another form of in-state gambling. Thus, the opinion reaffirmed over 100 years of American legal precedent – individual states have the authority to both prohibit and regulate gambling within their borders. The ultimate policy decision regarding what, if any, gambling activity to allow lies with each state’s legislative body, and the same is now true for Internet gambling. Because Connecticut statutes broadly prohibit any form of gambling except those limited forms specifically authorized by law, *Internet gambling is currently illegal in Connecticut.*¹ Therefore, the question for this legislature is – *is legalizing Internet gambling in Connecticut in the best interests of our citizens?*

For more than 100 years Connecticut has had a strong public policy against gambling. Both former Attorney General Richard Blumenthal and our State Supreme Court have recognized the legitimacy and enforceability of Connecticut’s anti-gambling policy. As Attorney General Blumenthal stated “[t]hat Connecticut may prohibit gambling within its borders as a valid exercise of its police powers is beyond cavil. Through most of the 19th and the first half of the 20th centuries, this nation has adhered to a policy of discouraging, if not forbidding, the operation of gambling enterprises.” (AG Opinion 2003-018)

The state Supreme Court has also long recognized Connecticut’s “ancient and deep-rooted” public policy against gambling. Ciampittiello v. Campitello, 134 Conn. 51, 56, 54 A.2d 669 (1947). The court has cited this legitimate and long standing public policy against gambling as a basis for refusing to enforce a gambling contract even though the contract was valid in

¹ Under Section 53-278b, “gambling” (which is broadly defined as risking any money, credit or thing of value based in whole or in part on lot or chance) is a class B misdemeanor and “professional gambling” (which is defined as accepting or offering to accept any credit, money, or thing of value risked in gambling) is a class A misdemeanor.

Under Section 53-278d, the transmission of “gambling information”, which is any information used in professional gambling, by telephone, telegraph, radio or **any other means** is a class A misdemeanor.

So, the Internet gambling business is guilty of two class A misdemeanors while the individual bettor a class B misdemeanor.

the state or country where the gambling occurred. The court has also declared gambling on credit a "vice" which state statutes forbid. Casanova Club v. Bishart, 189 Conn. 591, 598, 458 A.2d 1, 4 (1983).

Federal law has been carefully crafted to respect and incorporate individual state laws. As the U.S. Attorney for the Southern District of New York noted recently in a legal brief supporting the indictments of 11 defendants on various federal charges relating to Internet gambling operations that violated New York state law:

Historically, states legislatures enacted laws that have either prohibited the operation of gambling businesses outright or subjected them to significant regulation ... Federal regulation of gambling is more recent, and has been explicitly crafted to build upon – not replace or alter – pre-existing state law.

(See United States v. Elie et.al. 10 Cr. 336 (LAK), Government's Response To Defendants' Pre-Trial Motions, pg. 1-2) Thus, while the Opinion opens the door to the possibility of intra-state online gambling, the final decision lies with each individual state. We continue to have both the legal authority and the moral responsibility to carefully determine whether online gambling is in the best interests of Connecticut residents.

II. Connecticut's Prohibition Of Online Gambling Is Legally Enforceable Under Both State and Federal Law

A. State Bans On Internet Gambling Are Enforceable In State Courts

State bans on Internet gambling are legally enforceable regardless of where the Internet transmissions originate. In People of New York v. World Interactive Gaming Corp., 185 Misc. 2d 852, 714 N.Y.S.2d 844 (N.Y. County Sup. Ct. 1999), the New York State Attorney General sought an injunction, fines and penalties against the operators of an online casino legally licensed in Antigua and offering gambling over the Internet to New York residents. The court framed the question as follows:

The central issue here is whether the State of New York can enjoin a foreign corporation legally licensed to operate a casino offshore from offering gambling to Internet users in New York. Id. at 854.

In holding in the affirmative, the court stated:

It is irrelevant that Internet gambling is legal in Antigua. The act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within New York State. Id. at 859-860.

The court rejected the argument that merely transmitting information over the Internet was insufficient to give the court jurisdiction:

Not only would such an approach severely undermine the state's deep rooted policy against unauthorized gambling, it would also immunize from liability anyone who engages in any activity over the Internet which is otherwise illegal in this state. ***A computer server cannot be permitted to function as a shield against liability.*** (emphasis added) Id. at 860.

The court granted the injunction ordering the defendant companies to cease offering gambling over the Internet to New York residents, required the defendants to post a bond to insure their compliance and granted the Attorney General's request for restitution, costs and fines against the individual principals, officers and directors of the defendant companies.

More recently, a court in Washington State upheld the constitutionality and enforceability of that state's Internet gambling prohibition. The law imposed criminal liability on out of state Internet gambling businesses even if they did not actively solicit bets from Washington residents. The mere transmission of gambling information to or from a Washington resident was sufficient under the law to trigger criminal liability. The plaintiff was a Washington state resident and amateur poker player who used the website "Pokerstars." He challenged the constitutionality of the state's anti-gambling law as applied to Internet gambling on the grounds that it interfered with interstate commerce.

The court first took judicial notice of the state's well established policy against gambling:

Washington has a longstanding and legitimate interest in tightly controlling gambling. That interest is a pure exercise of the traditional police power, and is justified by the State's desire to safeguard its citizens from both the harms of gambling itself and from professional gambling's historically close relationship with organized crime.

Rousso v. State of Washington, 204 P.3d 243, 251 (2009). It then determined that the state's legitimate interest in regulating gambling activity outweighed the relatively small burden the Internet gambling ban imposed on Internet gambling businesses.

In ruling that the state's Internet gambling ban was constitutional, the court specifically rejected the argument that the Internet was somehow a unique medium incapable of state regulation. It found that this was an overly "simplistic understanding of the technology." Instead, the court took notice of "the relative ease by which an Internet business can determine the geographical location from which online wagers are placed based on the Internet protocol (IP) address of the computer used to place them" and pointed out that businesses commonly incur costs as a result of complying with the many different regulations of the various states in which they operate. Id. at 253.

Indeed, the court's assessment of the ease with which Internet gambling companies could accommodate the state's prohibition turned out to be prescient. Within days of the ruling both Pokerstars and Full Tilt Poker, the two major online poker providers, withdrew from Washington State. Pokerstars issued the following statement:

In light of this decision, following extensive consultation with our legal advisors, we believe that the right course of action is to now block real money play by Washington residents on the PokerStars.com site. This policy will remain in effect until the law changes or subsequent legal challenges succeed.

(ESPN, "A Decision Between Career and Home", Nov. 15, 2010)

Based on this precedent, it is clear that states have the legal authority to ban Internet gambling within their borders and the legal tools, including criminal charges, fines and penalties to enforce such a ban.

B. State Bans On Internet Gambling Are Enforceable Under Federal Criminal Statutes

The Opinion was based on specific language in the federal Wire Act limiting its reach to sports betting. However, there are numerous other federal statutes which make it a federal crime to engage in gambling activities that violate state law. In a letter to Senate Majority Leader Harry Reid explaining the limited scope of the Opinion, Assistant U.S. Attorney General Ronald Weich reaffirmed the federal government's legal authority and commitment to enforcing state anti-gambling laws. Specifically, he explained that the federal government has many "powerful tools, such as the federal statutes prohibiting organized crime, racketeering and money laundering, to prosecute" Internet gambling and ***"in states that ban various forms of gambling – including Internet poker – the Department will be able to investigate and prosecute those gambling businesses under the Unlawful Internet Gambling Enforcement Act and other sections of the criminal code."*** (emphasis added)

In particular, there are two federal criminal statutes that can and have been used by the federal government to prosecute gambling businesses that operate in violation of any applicable state law. The Illegal Gambling Business Act ("IGBA"), 18 U.S.C. Sec. 1955, applies to anyone who operates a gambling business that violates the law of any state or political subdivision in which it is conducted. As courts have noted, the IGBA was specifically "designed to aid the enforcement of state law" and provide for federal enforcement and prosecution of gambling activities that operate in violation of any state law. United States v. Farris, 624 F.2d 890, 892 (9th Cir. 1980). The IGBA has been used to prosecute offshore gambling businesses that accept bets over the phone in violation of state law (See United States v. Atiyeh, 402 F.3d 354 (3rd Cir. 2005)) and is being used to prosecute Internet gambling activities.

In addition, in 2006 Congress adopted the Unlawful Internet Gambling Enforcement Act ("UIGEA") 31 U.S.C Sec. 5361 et. seq. which prohibits the acceptance of certain payments in connection with unlawful Internet gambling. Like the IGBA, it defines unlawful gambling by reference to state law. Thus, it would be a violation of the UIGEA for any person to accept a payment in connection with Internet gambling activity if that activity occurred in a state where it is illegal to gamble on the Internet.

Both the IGBA and the UIGEA have been used recently to prosecute Internet gambling businesses based on state gambling law violations. In Boston, two individuals were recently

convicted of IGBA and UIGEA violations as well as racketeering, money laundering, and tax fraud. The two operated a massive Internet gambling ring using an Internet site based in Antigua and accepted bets from individuals across the eastern United States. (See *U.S. Dept. of Justice Press Release*, Dec. 5, 2011)

Also, right here in the Second Circuit in the Southern District of New York, the U.S. Attorneys Office has indicted 11 individuals associated with major international Internet gambling sites, including Pokerstars and Full Tilt Poker. (See Elie) None of the defendants are New York residents, yet each is charged with violating New York state anti-gambling statutes and, therefore, the IGBA and UIGEA because they allowed New York residents to gamble on their websites. According to news reports, Federal District Judge Louis Kaplan noted at the hearing on the defendants' motion to dismiss that "the whole point of the [UIGEA] was to wipe out Internet gambling in the U.S." This case is expected to go to trial in the spring.

In light of the above, it is clear that the federal government has both the legal resources and the intent to continue to prosecute Internet gambling businesses that operate in violation of state law.

III. Connecticut's Prohibition Of Online Gambling Can Be Practicably Enforced

Perhaps the crassest argument in favor of Internet gambling is that there will be no way to stop it so we might as well profit from it. First, the idea that the Internet is some kind of wild frontier that cannot be regulated is simply not true. As the court in Rouso found, the technological tools to identify the location of an Internet user and stop certain transactions already exists. The prompt withdrawal of the major Internet poker sites from the State of Washington following that court's decision proved this to be true.

Moreover, with the passage of the UIGEA, a regulatory structure was developed to enable financial transaction providers to identify and block gambling transactions. As a result, most major credit card companies and banks have been blocking Internet gambling transactions. In fact, it was the success of these efforts that led to the detection and ultimate indictment of the defendants in the pending Elie case in New York. Finding themselves unable to process credit card transactions, the defendants resorted to bribing bank officials at small regional banks in order to disguise and process their transactions.

Second, it is entirely inconsistent for those who support Internet gambling to argue that, on the one hand, it cannot be stopped or regulated, but on the other hand, the state can profit from it. The only way for the state to profit is if it can, in fact, limit the market players through licensing and monitor the transactions in order to tax them. If Internet gambling is one big free for all incapable of government or business control, than there would be no reason for businesses to pay the state for a license to operate and no way for the state to collect taxes.

Third, the fact that some Internet gambling activity will occur no matter what the state does, is not a justification for giving state approval and sanction to an activity that creates no added value to our economy and causes untold human suffering in the form of economic loss, social

isolation and family stress. It is an unfortunate reality that all criminal laws will be violated by some people. Yet, we would never consider living in a lawless society. Perhaps the most disturbing and stark example is child pornography. While it is true that child pornography can be found on the Internet, no one would consider legalizing its production or possession. Protecting public safety and welfare is a fundamental role of government - profiting from an activity that causes economic and social harm is not.

IV. Limiting Internet Gambling To The Indian Tribes Would Likely Be Unconstitutional

A neutral ban on all private Internet gambling is constitutionally permissible under the Commerce Clause because it applies equally to businesses operating both in and outside the state. (See Rousso at 249 - finding Washington's Internet gambling prohibition to be facially neutral) However, any scheme to allow only the two Indian tribes to offer and profit from Internet gambling in Connecticut would likely be unconstitutional. Under the Commerce Clause, any law that economically discriminates against out of state businesses or is designed to favor in state interests over out of state competitors is impermissible. Laws motivated by simple economic protectionism are virtually per se invalid. (See Wyoming v. Oklahoma, 502 U.S. 437, 112 S.Ct. 789 (1992); Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531 (1978))

The Governor has already stated that the intended purpose of allowing the Indian tribes to engage in Internet gambling would be both to protect the tribes from competition and to maximize the state's revenue stream. Thus, there is no legitimate neutral purpose for the state to limit Internet gambling to only the two tribes. It certainly would not take long for such a scheme to be challenged by out of state gambling companies and most likely struck down by the courts. At that point, Connecticut would find itself in the worst of all possible positions, i.e. with unlimited Internet gambling that would take business away from our existing gambling outlets, further erode the revenue stream they create and cause significant social and human harm.

For all of the above reasons, I strongly urge the legislature and the Governor to oppose the legalization of Internet gambling in Connecticut. Instead, we should focus our resources on measures that will promote positive economic growth and opportunity for all Connecticut residents.

cc: Governor Dannel P. Malloy
Attorney General George Jepsen
Senator Donald E. Williams, Jr., Senate President Pro Tempore
Senator Martin M. Looney, Senate Majority Leader
Representative Christopher G. Donovan, Speaker of House of Representatives
Representative Brendan Sharkey, House Majority Leader
Representative Larry Cafero, House Republican Leader