

Since 1995, Senator Jon Kyl (R.Az) has been introducing anti-internet gambling bills into the U.S. Senate. Congressmen, such as Rep. Jim Leach (R.Io) and Rep. Robert Goodlatte (R.Va) have introduced similar legislation into the House of Representatives. Occasionally an anti-internet gambling bill will pass either the House or the Senate but not both within the two year session.

In the 109<sup>th</sup> Congress (January 2005 – January 2007), anti-internet gambling supporters were optimistic because one House bill (the Leach/Goodlatte bill, HR 4411) passed the House (317-93) overwhelmingly on July 11, 2006 and was immediately sent to the Senate. It is one of 18 bills in the Republican conference briefing book to be placed on the calendar of the U.S. Senate. Nobody would dispute the fact that the U.S. Senate would overwhelmingly pass the bill if it was voted on by the Senate and that President Bush would quickly sign the legislation.

HR4411 combines elements of both the Leach (HR4411) and the Goodlatte Bill (HR4777). Three particular provisions are of special interest. First the bill would amend the Wire Act (18 U.S.C.1081 Sec. 3) to include all forms of gambling such as lotteries, gaming, and wagering aside from sports betting.

“The term ‘bets or wagers’---

Means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game predominately subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;” (Title 1 – Modernization of the Wire Act of 1961)

Second, the bill attempts to avoid the controversial issue of whether state-licensed interstate interactive horseracing became legal as a result of the December 2000 amendment to the Interstate Horseracing Act of 1978. The Justice Department concluded

the amendment did not legalize Internet online horseracing. The World Trade Organization (GATS), however, concluded this amendment violated GATS in that it legalized only U.S. interstate interactive horseracing while excluding interactive foreign licensed horseracing. The matter was resolved in an unusual provision in HR 4411 which refused to address the issue

**Sec. 105. Rules of Construction.**

(a) Nothing in this Act may be construed to prohibit any activity that is allowed under Public Law 95-515 as amended (15 U.S.C. 3001 et seq.).

(b) Nothing in this Act may be construed to preempt State law prohibiting gambling.

**Sec. 106. Sense of Congress.**

It is the sense of Congress that this Act does not change which activities related to horse racing may or may not be allowed under Federal Law. Section 105 is intended to address concerns that this Act could have the effect of changing the existing relationship between the Interstate Horseracing Act (15 U.S.C. 3001 et seq.), and other Federal statutes that were in effect at the time of this Act's consideration; this Act is not intended to change that relationship; and this Act is not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes.

Third, HR 4411 prohibits unlawful gambling businesses from accepting credit, checks, and electronic fund transfers but not cash. (Sec. 5362). Much of the burden for enforcing the prohibition is placed on financial transaction providers such as banks / financial institutions (Sec. 5363, Sec. 5361).

There is however serious doubt as to whether the bill will be voted on by the Senate. First, there are only about 15 working days left in the Senate for the 109<sup>th</sup> Congress. It is doubtful whether Senate leaders would find time for this measure since it has important matters to consider such as estate tax reform, national security measures, the issue of minimum wage and

defence appropriations. Senator Kyl had twice tried to attach an anti-internet gambling bill to some non-controversial measure. When these attempts failed, he chose not to introduce his bill into the Senate.

Second, even if there was time, Kyl could be stopped by a powerful Senator who could place a “hold” on the bill. In the 108<sup>th</sup> Congress (January 2003 – January 2005), Senator Kyl’s anti-internet gambling bill was not voted on because Sen. Harry Reid (D.Nev) did not like the exemption or carve out for interactive lotteries. At least two to six Republican Senators have placed a hold on HR 4411.

Third, various special interests have indicated opposition to the proposed legislation. The influential U.S. Chamber of Congress on July 28, 2006 in a letter to key Senators voiced its opposition to HR 4411 because it would place an undue burden on U.S. banks.

“Our concerns with the current bills focus on the regulatory burden they could impose on financial institutions. We understand that requiring credit card companies and banks to block Internet gambling transactions that are coded as such poses no particular regulatory burden. However, we believe the bill would probably result in financial institutions being subject to regulations which would require them to scrutinize non-coded transactions as well, with substantial compliance costs.”

The Independent Community Bankers of America, in a July 28, 2006 letter also informed Senators:

1. The bill would create an impossible compliance burden for “uncoded” transactions. Unlike credit card transactions, which include a code that identifies the type of business – including gambling – that is receiving payment, uncoded transactions do not provide a bank with this information. So, while it is possible to monitor and block credit card transactions, a bank cannot do this with uncoded transactions.

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2. The bill threatens to subject banks and electronic processors to potential criminal liability for pursuing their core business operations of merely processing financial transactions.

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3. The bill could subject banks to inconsistent State and National standards.

Most Senators do not care about Internet gambling. They may not want, however, to antagonize the influential Chamber of Commerce and Community Banks of America. At least two other influential Republican Senators have indicated opposition as a result of the aforementioned letters.

Fourth, influential and respected newspapers expressed concern about anti-internet gambling bills. The Providence Journal editorial (August 3, 2006) headline stated “House Bets Badly on Bill” and concluded “the House bill is ridiculous, and the Senate should deep six it.” The Chicago Sun Times (July 19, 2006) headline editorial stated “Ban on Online Gambling isn’t Net Gain for Anyone.” It opposed the Bill” because “ it’s unnecessary government intrusion.” The Los Angeles Times editorial (June 9, 2006) stated:

“Congress should be clarifying the law in the opposite direction. Legalizing online **gambling** and regulating the industry – as Britain has done – is the best way to toughen protections against **gambling** by minors, identify problem gamblers and ensure that online sites are more scrupulous than the back-alley bookie. Wouldn’t it be preferable to have bettors deal with the sports book at Caesars Palace or the MGM Grand – heavily regulated Las Vegas casinos that are part of publicly traded companies – rather than with some fly-by-night offshore player?

Fifth, the bill might not be supported by the powerful horseracing industry. The bill deliberately avoids taking a stand on the December 2000 Amendment to the Interstate Horseracing Act of 1978. Publicly the National Thoroughbred Racing Association strongly

supported the bill because it believed the language preserved an exemption for interstate interactive horseracing. A reading of HR 4411 might interpret the bill as being of no assistance to the horseracing industry because of the language that takes no position on the 2000 Amendment. According to Reuters, July 20, 2006, "the horse racing industry has some concerns" with the bill.

Sixth, the recent arrest of David Carruthers and the virtual implosion of BetOnSports as a result of the U.S. Justice Department indictments, issued on June 1, 2006 and unsealed on July 17, 2006 may convince Senators that no new legislation is necessary. The Justice Department has not been supportive or enthusiastic about anti-internet gambling legislation, primarily because of a fear that the bills might actually expand Internet gambling given the potential recognition of an exemption for state licensed interactive interstate horseracing. Bruce Ohr of the Justice Department testified on April 5, 2006 about Justice's concerns about an expansion of gambling resulting from the bill.

"The Department of Justice also has some drafting concerns with the legislation, including several of the definitions slated to be added to Section 1081. For example, since the definition of the term "bet or wager" requires that the activity be "predominately subject to chance," we are concerned whether this definition is sufficient to cover card games, such as poker..."(emphasis added)

As a result of the Carruthers/BetOnSports indictment, it could be argued that no new legislation is needed. Bodog, which accepts sports bets from the U.S., cancelled its July "Marketing "2006 Conference which was to take place in Las Vegas. Playtech, an Internet gaming software company, decided to focus on Europe and Asia and not the U.S. Fidelity an American fund- management group unloaded its Internet gaming stocks. The British-based Gala Coral announced on July 21, 2006 it had blocked all U.S. customers from its sites.

A more cynical analysis would indicate that the U.S. Justice Department has only prosecuted online individuals or entities that accepted sports bets from the U.S, such as Jay Cohen, William Scott and David Carruthers. An online gaming operator who accepts non-sports gambling customers from the U.S. is operating in a gray area of law. The Justice Department, however, insists the operator is in violation of U.S. law along with state-licensed interstate interactive horseracing U.S. companies. No offshore non-sports gaming operator has been prosecuted because of the legal uncertainty.

Finally, there may not be any legislation passed in the 109<sup>th</sup> Congress because of a bill (HR 5474) that would create a 9 person federal commission to study and make recommendations concerning legal online gambling. The bill, introduced in May 24, 2006 by Rep. Jon Porter (R.Va) has 49 co-sponsors. While the bill will not be enacted into law in the 109<sup>th</sup> congress, it has the support of the influential American Gaming Association which generally had been sceptical as to whether Internet gambling could be effectively regulated. It could be argued that it would make more sense to first study the issue before deciding to prohibit interactive gambling.