

On Dangerous Ground: Passive Personality Jurisdiction and the Prohibition of Internet Gambling^ψ

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I. INTRODUCTION

Never before have people been able to communicate worldwide with such ease and rapidity. The Internet has given the world community the ability to exchange ideas, business transactions, information, and immeasurable other ingredients to help make our world a better place. Unfortunately, with the good comes the bad. The Internet has also been used to distribute ideas such as Holocaust denial and other anti-Semitic literature, pornography, and even bomb-making information. In the middle of the spectrum is Internet gambling. Legal in some parts of the world, permitted but regulated in others, and banned in others; Internet gambling has become a multi-billion dollar industry with over 700 Websites currently on-line worldwide.¹ Congressman Bob Goodlatte of Virginia is on a mission to prohibit Internet gambling in order to save the citizens of America, adults, and children from the “negative consequences of on-line

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¹ See Congressman Bob Goodlatte On the Web, Internet Gambling Prohibition Act of 1999 (H.R. 3125), Talking Points, available at <http://www.house.gov/goodlatte/hr3125talk.htm>, (last modified Apr. 9, 2001) [hereinafter Goodlatte On the Web].

gambling”² including addiction, financial ruin, and destruction of the family.

For the first time in two-hundred years, Congress is contemplating enacting a law that will reach extraterritorially, founded solely on passive personality jurisdiction.³ Since the first Congress in 1889, both Congress and the executive branch have adamantly opposed passive personality jurisdiction.⁴ While the United States has in recent years developed a narrowly tailored exception blending protective jurisdiction⁵ and passive personality in order to react to the current rise in terrorist activity targeting United States citizens around the world,⁶ passive personality jurisdiction has never been asserted by the United States outside the context of terrorism.

This article examines Representative Goodlatte’s bill and the effect it may have on the foreign relations law of the United States. Part II provides

² *Id.*

³ The basis of passive personality jurisdiction is that the state of nationality of the victim of a crime would have jurisdiction over the crimes committed by foreign citizens on foreign soil. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402 cmt. g & reporter’s note 3 (1987).

⁴ See Mason H. Drake, Note: *United States v. Yunis: The D.C. Circuit’s Dubious Approval of U.S. Long-Arm Jurisdiction Over Extraterritorial Crimes*, 87 N.W. U. L. REV. 697, 705 (1993); Joshua Robinson, Note: *United States Practice Penalizing International Terrorists Needlessly Undercuts its Opposition to the Passive Personality Principle*, 16 B.U. INT’L L.J. 487, 488 (1998).

⁵ Protective jurisdiction can be exercised when the national interests of a nation have been injured by the crime. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402 (3) (1987); Mason H. Drake, Note: *United States v. Yunis: The D.C. Circuit’s Dubious Approval of U.S. Long-Arm Jurisdiction Over Extraterritorial Crimes*, 87 N.W. U. L. REV. 697, 704 (1993).

⁶ See 18 U.S.C. § 2331 *et seq.* (as amended is known as the “terrorist long arm statute,” and allows the United States to exercise jurisdiction over terrorists who “kill, assault, or make any violent attack against United States nationals abroad.”). The legislative history indicates that the statute was passed specifically for the purpose of reaching terrorism and that the Senate did not intend that the statute reach non-terrorist violence against a United States citizen abroad. See JORDAN J. PAUST, M. CHERIF BASSIOUNI, MICHAEL P. SCHARF, JIMMY GURULÉ, LEILA SADAT, BRUCE ZAGARIS & SHARON A. WILLIAMS, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 1018-1019 (Carolina Academic Press 2d ed. 2000).

background information regarding the hazards of Internet gambling, the extent of existing federal and state regulation of Internet gambling, and the legislative history of the proposed Internet Gambling Prohibition Act. Part III examines the forms of jurisdiction recognized under international law as potentially applied to the prohibition of Internet Gambling. Part IV further examines the United States' historic opposition to passive personality jurisdiction and analyzes the Internet Gambling Prohibition Act within these terms.

II. BACKGROUND

A. The Hazards of Internet Gambling

Before gambling on the Internet, a bettor must open an account with the Website operator, usually by giving a credit card number, sending a check, or sometimes even giving a social security number.⁷ Once the account is open, the individual is free to play anything from computer-generated roulette to betting on sports events.⁸ Typically, the Website provider will provide some cautionary legal language, which will advise the user to consult local law before signing up.⁹ Winnings are presented to the bettor through a credit to their account for use in future wagering, or a check or money order sent to their address.¹⁰

In 1994 there were no gambling sites on the Internet. Currently, there are more than 700 around the world, with sixty percent of bets and wagers being placed by Americans.¹¹ According to the Federal Bureau of Investigation, the Internet gaming industry made \$300 million in revenue in 1998, \$651 million in 1999, \$1.2 billion in 2000, and an estimated \$3 billion by the end of 2002.¹² The over 700 gambling Websites are currently

⁷ See Michael P. Kailus, Note, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U. ILL. L. REV. 1045, 1049 (1999).

⁸ See *id.* at 1049.

⁹ See John Edmund Hogan, Comment, *World Wide Wager: The Feasibility of Internet Gambling Regulation*, 8 SETON HALL CONST. L.J. 815, 822 (1998).

¹⁰ See *id.* at 822.

¹¹ See Scott Olson, *Betting No End to Internet Gambling*, 4 J.TECH.L. & POL'Y 2 (1999).

¹² See *id.*

unlicensed, untaxed, and unregulated by the Federal Government or any of the fifty states.¹³

The Internet provides unprecedented access to gambling as it can be accessed from anywhere in the world at any time, twenty-four hours a day, three-hundred and sixty-five days a year. Unlike casinos, most Internet gambling sites do not require a minimum bet, allowing the bettor to bet any sum on the game.¹⁴ Further, the Internet comes straight into millions of homes every day allowing gamblers to avoid an expensive vacation to a state or country in which gambling is legal. It can be done from the comfort and anonymity of the family study, perhaps providing a safe haven for pathological gamblers and addicts where they do not have to be under the constant view and scrutiny of others.

Internet gambling may be especially enticing to pathological gamblers and youth because of the Internet's easy access and could very possibly lead to addiction, bankruptcy and crime.¹⁵ Further, proponents of the prohibition of on-line gambling argue that children will have full access to the sites in question and will therefore gamble away the family fortune.¹⁶ However, those who take this position largely overlook the reality that the gambler must first have access to a credit card, or send in a check or money order. The ability of a minor to obtain any of these forms of deposit is very difficult. Therefore, unless minors steal credit card numbers or checks from their parents, it is unlikely that they are going to be able to gamble.¹⁷

The extent of the problem that Internet gambling potentially presents is large. Americans spent more money gambling in 1994 than they did on toys for their children;¹⁸ there is even a Website that is offering odds on whether

¹³ See Goodlatte On the Web, *supra* note 1.

¹⁴ See Kailus *supra* note 7, at 1071.

¹⁵ Studies have shown that there is a considerable increase in the number of addicted gamblers after gambling has been legalized in the community. Further, one of the reasons bankruptcy filing have soared in the United States has been attributed to gambling. See Laura H. Bak-Boychuk, Note, *Internet Gambling: Is Avoiding Prosecution in the United States as Easy as Moving the Business Operations Offshore?*, 6 SW. J. OF L. & TRADE AM. 363, 370 (1999).

¹⁶ See *id.*

¹⁷ See Kailus *supra* note 7, at 1072 (1999).

¹⁸ See Nelson Rose, *Gambling and the Law: the Future of Internet Gambling*, 7 VILL. SPORTS & ENT. L. J. 29, 42 (2000).

a bill to make cyberspace betting illegal will pass in Congress.¹⁹ Dr. Howard Shaffer, director of Addiction Studies at Harvard has said: “As smoking crack cocaine changed the cocaine experience, I think electronics is going to change the way gambling is experienced.”²⁰ While this may very well be the case, the United States simply may not be able to make gambling Websites on the Internet illegal while remaining consistent with international law and long standing legislative policy disfavoring passive personality jurisdiction.

There is no federal law specifically prohibiting gambling on the Internet at the current time.²¹ The Federal Wire and Communication Interruption Act (the Wire Act)²² prohibits gambling on sports games over telephone wires, but it does not provide a basis for the complete prohibition of Internet gambling. First, the Internet does not always travel via telephone wires, and use of wireless computer technology is rapidly expanding. Second, Internet gambling is inclusive of virtual casinos involving non-sports betting, which are not covered by the plain language of the Wire Act.²³

While the Federal Wire Act is of limited applicability, ten states—Arizona, Illinois, Indiana, Louisiana, Michigan, Nebraska, Nevada, New York, Pennsylvania and South Dakota—have passed laws specifically making it illegal to accept wagers from persons located in those states over the Internet.²⁴ In addition, Attorney Generals in Kansas, Texas, and Utah have all issued opinions stating that Internet gambling is illegal under their existing gambling laws.²⁵

In *Nixon v. Interactive Gaming & Communications Corp.* (IGC), the first state prosecution of Internet gambling—a Missouri grand jury issued an

¹⁹ See Kailus, *supra* note 7, at 1046.

²⁰ See Goodlatte On the Web, *supra* note 1.

²¹ See Kailus, *supra* note 7, at 1057.

²² 18 U.S.C. §§ 2510-2522 (originally codified by Title 3 of the Omnibus Control and Safe Street Act of 1969 and amended by the Federal Wire and Electronic Communications Act commonly referred to as the Wire Act).

²³ The Wire Act prohibits “anyone engaged in the business of betting or wagering from using a wire communication facility to place bets or wagers on any sporting event or contest.” Scott Olson, Article: *Betting No End to Internet Gambling*, 4 J. TECH. L. & POL’Y 2 (1999).

²⁴ See *id.* at ¶13.

²⁵ See *id.*

indictment against a Delaware corporation and its President who operated a gambling Website through a wholly owned subsidiary incorporated in Grenada.²⁶ A Missouri court granted a permanent injunction against IGC from using its Internet gambling site to receive bets from residents of Missouri. Further, the corporation was fined \$67,050 to be paid to the state.²⁷ The decision also added that any violation of the injunction would subject IGC to a \$5000 fine for each infraction.²⁸ The IGC President, Michael Simone, plead guilty to criminal charges of brokering wagers over IGC’s Website and was ordered to pay \$20,000 to reimburse Missouri for prosecution expenses and a \$5000 fine.²⁹

A look at the cumulative laws of the other thirty-six states, however, shows a permissive attitude toward gambling in general, including via the Internet.³⁰ While analysts report that over ninety percent of Americans live within a four-hour drive of a casino,³¹ this cannot be correlated with the ease and convenience of having gambling in your own home. There is an immense difference between getting in a car or any other form of transportation and traveling for four hours to a casino and sitting at a home computer and gambling at a cyber-casino.

B. The Proposed Internet Gambling Prohibition Act

Since 1997, several members of Congress have been attempting to prohibit Internet gambling. In March of that year, Senator Kyl of Arizona introduced the Internet Gambling Prohibition Act of 1997.³² The Act, Senate Bill 474 (S. 474), was meant to amend the Wire Act to criminalize the operation of Internet gambling sites accessible to United States citizens; the sponsors felt that mere regulation would not suffice in curbing the

²⁶ See Kailus, *supra* note 7, at 1051.

²⁷ See *Nixon v. Interactive Gaming & Communications Corp.*, No. CV97-7808 (Cir. Ct., Jackson County, Missouri, May 22, 1997).

²⁸ See Kailus, *supra* note 7, at 1051.

²⁹ See *id.* at 1053.

³⁰ See *id.* at 1050.

³¹ See *id.*

³² See John Edmund Hogan, Comment, *World Wide Wager: The Feasibility of Internet Gambling Regulation*, 8 SETON HALL CONST. L.J. 815, 849, (1998).

growing problem.³³ During that same year, Representative Bob Goodlatte introduced a similar bill in the House of Representatives, also designed to prohibit Internet gambling.³⁴ Both bills were considered “short and sweet” and were meant only to amend the Wire Act to include Internet gambling and to add a definition of the phrase “bet or wager” as the risking of anything of value “with the understanding that a person will receive something of value based on an outcome which is predominately subject to pure chance.”³⁵ The bill’s language would have taken care of the loophole in the Wire Act because it is inclusive of all gambling rather than simply sports wagering. The two primary policy reasons for introducing the bills were to prevent children from gambling and to make it more difficult for addicted gamblers to have access to gambling opportunities.³⁶

Both bills failed in 1997; however, after much discussion, a revision, and re-introduction—during the same session—the Senate bill passed 90-10, while Goodlatte’s House bill withered in committee.³⁷ In the 106th Congress, both bills were reintroduced in the House (H.R. 3125) and Senate (S. 692) by the same sponsors, but they were no longer the short and sweet prohibitions they were in 1997. To attract wider support the legislation was transformed into lengthy and verbose documents with a host of exceptions, exemptions, immunities, loopholes, definitions, and clarifying clauses.³⁸

As it currently stands, H.R. 3125 targets only operators, not gamblers, or Internet providers. The bill was originally intended to protect Internet users (children and pathological gamblers) from the evils of Internet gambling; however, now it is supported by established gambling interests and governments to limit competition from new entrants into the gambling world.³⁹ The reason governments and established gambling interests are in

³³ See *id.* at 850.

³⁴ Congressman Goodlatte’s bill did go one step further in that it also prohibits a gambling facility from using the internet to disseminate information which is necessary for the user to place a bet or wager using a communication device. See Olson at 9, 10.

³⁵ *Id.* at 10.

³⁶ See *id.* at 9.

³⁷ See Tech Law Journal, *Summary of bills pertaining to Internet Gambling in the 106th Congress* at <http://www.techlawjournal.com/cong106/gambling/Default.htm> (last visited Apr. 9, 2001).

³⁸ See *id.*

³⁹ See *id.*

support of the bill is, simply stated, money. Established casinos fear the loss of revenue that gamblers bring to the casino. As discussed above, gambling on the Internet is easier, more convenient, and anonymous, making the process much more attractive to consumers. Further, the start-up costs of a cyber-casino are much smaller than for a traditional casino, permitting operators with little start-up capital to enter the market.⁴⁰ State governments are concerned about the impact Internet gambling will have on revenue from taxes for legal gambling operations like riverboat casinos and from state sponsored gambling like lotteries.⁴¹

III. JURISDICTIONAL PROBLEMS WITH THE PROHIBITION OF INTERNET GAMBLING

A. Extraterritorial Jurisdiction: A Primer

One of the attributes of the Internet is that it is a worldwide tool that any person with access to a computer can use at any time.⁴² The problem with this is that Internet Websites may be established all over the world as well. If the United States were to enact a law-making Internet gambling illegal, enforcement would lead to conflicts with foreign nations, since many gambling Websites are operated outside the country⁴³ and the United States

⁴⁰ Curt Dalton is the prime example of a new entrant into the field. At twenty-three Dalton borrowed \$450,000 in start up money and started a cyber-casino, including computers, satellite hookups, and employee salaries, in the Netherlands Antilles. When compared to the estimated \$1.8 billion cost of construction of the Venetian in Las Vegas starting an offshore cyber-casino is very attractive. See Kailus, *supra* note 7, at 1067.

⁴¹ See *id.* at 1068.

⁴² “A distinguishing feature of the Internet is that protocol addresses do not necessarily correlate with physical location. This means that persons transacting in cyberspace sometimes cannot know each other’s physical location and cannot control the geographical flow of content [and] information mediated ... can appear simultaneously in all jurisdictions around the world ... easily flow[ing] across national borders without detection.” Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 *IND. J. GLOBAL LEGAL. STUD.* 475, 477 (1998).

⁴³ Twenty-four countries have already enacted laws allowing or tolerating Internet gambling. Australia has even gone as far as promulgating codes to regulate the industry. Further, if the United States completely prohibits Internet gambling, with the design of the Internet, it will still come in from other nations. This will cause one of two types of

cannot force other countries to make Internet gambling illegal within their borders.

It is unclear where the physical act of placing an Internet bet takes place—where the Internet gambler is located or where the Internet site is based. If someone can fly to Las Vegas and place a bet, is a virtual visit that much different? The critical issue is whether the state where the on-line bettor places a bet can enforce its gaming laws against the Internet casino operator in a country in which such wagering is legal. Those who believe that Internet gambling should be legal would argue that the United States has absolutely no jurisdiction to prohibit Internet gambling at foreign Websites. Further, and most importantly, H.R. 1325 is the first bill in United States history to use a pure form of passive personality jurisdiction, a basis that the United States has considered anathema for over two hundred years.⁴⁴

The framers of the United States Constitution foresaw the possibility that crimes might be committed outside the union of states, as they provided that the trial of crimes “not committed within any State... shall be at such a place as the Congress may by law have directed.”⁴⁵

There are six bases of jurisdiction recognized under international law. These are: (1) the subjective territorial principle, (2) the objective territorial principle, (3) the nationality principle, (4) the protective principle, (5) the universal principle, and (6) the passive personality principle. All six principles will be described below; however, the focus of this article will be on passive personality as it is the principle used to exercise jurisdiction under the Internet Gambling Prohibition Act.

Internet gambling sites (1) those regulated by other countries, and (2) those that are not regulated at all. The drawbacks of this are obvious, not only will the United States lose out on taxable revenue, but there is the chance that a number of people using the offshore sites will use fraudulent, unregulated ones and be harmed to a much greater degree. See Kailus, 1999 U. ILL. L. REV. at 1076.

⁴⁴ In the past, the United States has repeatedly frowned upon the use of passive personality jurisdiction. It has consistently opposed the idea of foreign governments' attempts to assert jurisdiction based on the principle. See Patrick L. Donnelly, Note: *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 603 (1987).

⁴⁵ See Drake, *supra* note 4, at 701.

The subjective territorial principle of jurisdiction applies to the exercise of jurisdiction in the state in which the act occurs.⁴⁶ This basis of jurisdiction would apply only to Internet gambling operators located within the United States. By its express terms, however, the Internet Gambling Prohibition Act would apply to service providers outside, as well as within the United States.⁴⁷

Objective territorial jurisdiction is exercised by the state in which the economic effect of the crime is felt; examples of this would be illegal narcotics trafficking, antitrust violations, and securities fraud.⁴⁸ There is no question that there is an economic effect felt in the United States due to Internet gambling as Americans spent more money in the last year on Internet gambling, \$54 billion, than they did on spectator events, movies, concerts, and recorded music combined.⁴⁹ However, so long as no fraud is involved, the economic expenditure related to a victimless crime like gambling does not come within the objective territorial principle. Notably, the rationale for the Act cited by its sponsors is the need to prevent the hazards of use by children and pathological gamblers, not the concern that Internet gambling will channel income away from established casinos and state lotteries.

The nationality principle of jurisdiction is based on the nationality of the person who commits the criminal act. A state may exercise jurisdiction over one of its nationals for a crime committed outside its borders.⁵⁰ This

⁴⁶ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402 (1)(a)(b) (1987); see Drake, *supra* note 4, at 703.

⁴⁷ The Internet Gambling Prohibition Act (H.R. 3125) states in pertinent part “it shall be unlawful for a person engaged in a gambling business knowingly to use the Internet or any other interactive computer service - - to place, receive, or otherwise make a bet or wager; or to send, receive, or invite information in the placing of a bet or wager.” See Internet Gambling Protection Act of 1999, H.R. 1325, 106th Cong. §2(b)(1)(A)(B) (1999).

⁴⁸ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402 (1)(c) (1987). In order for a state to exercise objective territorial jurisdiction at least two of three factors must have occurred, these factors are (1) a criminal act or acts, (2) intent, and (3) effects within the United States. See PAUST, BASSIOUNI, ETAL., *supra* note 6, at 181.

⁴⁹ See *supra* note 18, at 42 (2000).

⁵⁰ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402 (2) (1987); Donnelly, *supra* note 44, at 601.

will obviously work as a method of jurisdiction if the operator of the Website is an American citizen, or the company that operates the Website is incorporated in the United States, but the Internet Gambling Act is designed also to apply to non-citizens and foreign corporations.

The protective principle can be exercised by a state when conduct has, or potentially has, an adverse affect on a state's national security or essential governmental functions.⁵¹ The protective principle is applicable to situations involving national security and self-defense, or the sanctity of government documents.⁵² This type of jurisdiction could possibly be used against hackers who intrude in or endanger national security data systems, but this is not something that would apply to gambling Websites as they do not threaten national security in any way.

The universal principle is applied when a crime is so heinous that the actor should be punished wherever the crime was committed.⁵³ Universal jurisdiction has generally been used for crimes such as piracy, slave trade, attacks on or hijacking aircraft, genocide, and war crimes.⁵⁴ The universal principal could potentially be used in all states for certain types of universally condemned Internet crimes such as incitement to commit genocide via the Internet, but universal jurisdiction does not provide a basis for the Internet Gambling Prohibition Act, as the majority of nations do not see gambling as a universally condemning or heinous crime.

The final basis of jurisdiction is passive personality. Passive personality jurisdiction is the concept that a state has jurisdiction over offenses

⁵¹See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402 (3) (1987).

⁵²See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402 (3) (1987). This would include terrorist attacks, espionage, and visa fraud. See PAUST, ET AL., supra note 6, at 187.

⁵³See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 404 (1987). These crimes are recognized as being "universal in concern, regardless of the site of the offense and the nationalities of the offender and the offended." PAUST, BASSIOUNI, ET AL., supra note 6, at 998. See also Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 368 (2001).

⁵⁴See *Demjanjuk v. Petrovsky*, 766 F.2d 571 (6th Cir. 1985), reproduced in PAUST, ET AL., supra note 6, at 159, 160.

committed against its nationals, wherever they may be.⁵⁵ In the *Lotus* case, the Permanent Court of International Justice stated that this was the most controversial and least recognized basis of jurisdiction.⁵⁶ The United States has repeatedly refused to enact legislation applying this basis of jurisdiction due to the concern that, if liberally applied, it would impose "unforeseen and unduly burdensome responsibilities on citizens of foreign states."⁵⁷ Therefore, the question is whether the United States should turn its back on hundreds of years of policy and precedent in enacting the Internet Gambling Prohibition Act.

B. Historic United States Opposition to Passive Personality Jurisdiction

Historically, the United States has opposed the use of passive personality jurisdiction.⁵⁸ The first case dealing with passive personality was the *Cutting's* case in 1887. A Mexican court convicted a United States national of libel for allegations appearing in a United States newspaper that allegedly harmed a Mexican national.⁵⁹ The United States diplomatic response was quick and scathing, declaring that a citizen of the United States cannot be "held under rules of international law to answer in Mexico for an offense committed in the United States, simply because the object of that offense happens to be a Mexican national."⁶⁰ The United States further argued that if that were the case, people acting within their own countries would be exposed to infinite responsibility under the penal laws of every nation in the

⁵⁵See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402 cmt. g (1987); see also Peter D. Trooboff, Decision: *Aircraft Piracy – Federal Jurisdiction – Nonresident Alien on Foreign Soil*, 83 AM.J.INT'L.L. 94, 95 (1989).

⁵⁶In 1926, Turkey brought manslaughter charges against an officer of the French vessel, the *Lotus*. The Permanent Court of International Justice allowed jurisdiction based on the objective territorial rather than the passive personality principle. See Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L.L.J. 1, 7 (1993).

⁵⁷Brandon S. Chabner, Comment, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas*, 37 UCLA L. REV. 985, 995 (1990).

⁵⁸See Joshua Robinson, Note, *United States Practice Penalizing International Terrorists Needlessly Undercuts its Opposition to the Passive Personality Principle*, 16 B.U. INT'L.L.J. 487, 489 (1998).

⁵⁹See generally Watson, supra note 56, at 5.

⁶⁰*Id.*

world.⁶¹ This principle would go against the fundamental notion that one must have fair notice that an act one is committing may, in fact, be a crime. Mexico promptly released the United States national under the onslaught of United States diplomatic pressure.

The idea of punishing anyone anywhere in the world for harming a nation's citizen goes against a principle held dear to all nations—sovereignty. If other nations were allowed to hold all world citizens accountable for their idiosyncratic offenses committed against their citizens outside their territory they would, in essence, be prescribing their laws to all, flying directly in the face of national sovereignty. The United States recognized this fact early on and has traditionally refrained from prosecuting non-nationals for conduct occurring outside of the United States, but harming American citizens.⁶²

The *Cutting Case* may be the first recorded incidence when the United States stood in strong opposition to the passive personality principle, but it is certainly not the last. Eight years after the *Lotus* case,⁶³ Harvard published an influential study concerning the state of international jurisdictional principles that omitted passive personality as a legitimate basis because it was so controversial and “the most difficult to justify in theory.”⁶⁴ Further, the first RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES refused to recognize passive personality all together, much like the Harvard study, stating that customary international law did not permit the use of passive personality jurisdiction.⁶⁵ The United States continued opposition to passive personality jurisdiction led the drafters of THE RESTATEMENT (SECOND) OF FOREIGN RELATIONS to explicitly reject the principle as a valid basis of jurisdiction.⁶⁶

⁶¹ See *id.*

⁶² See Robinson, *supra* note 58, at 490.

⁶³ See Watson, *supra* note 56, at 14.

⁶⁴ *Id.* at 8.

⁶⁵ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 25 (1949).

⁶⁶ “A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to the conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 30(2) (1965).

After the drafting of RESTATEMENT (SECOND), the United States executive branch continued its staunch rejection of the passive personality principle in a number of instances. In the 1970s, United States officials spoke out against use of the principle when there were Greek attempts to assume jurisdiction over United States nationals who injured Greek citizens in automobile accidents occurring in the United States.⁶⁷ Later, in 1989, the executive branch again reiterated its position, opposing legislation to permit United States prosecution for the murder of a United States citizen in Korea.⁶⁸

United States courts have also expressed disdain for the passive personality principle. In the leading case, *United States v. Columba-Colella*,⁶⁹ a British national was convicted of purchasing a car in Mexico that he was aware was stolen in the United States and transported by others across the border.⁷⁰ In refusing to apply a federal statute extraterritorially based on the passive personality principle, the Fifth Circuit overturned the conviction, stating: “that an act affects the citizen of a state is not a sufficient basis for that state to assert jurisdiction over that act.”⁷¹ Following the *Columba-Colella* precedent, a federal court is likely to uphold the Internet Gambling Prohibition Act only to the extent it is applied to gambling Websites located in the United States or run by United States citizens or corporations.

The only other area in which the United States Congress has enacted legislation arguably based on passive personality jurisdiction is in the area

⁶⁷ See Watson, *supra* note 56, at 9.

⁶⁸ See *id.*

⁶⁹ *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979).

⁷⁰ *Columba-Colella* was convicted under 18 U.S.C. § 2313 for the offense of receiving a stolen vehicle in foreign commerce. At the time the statute read “[w]hoever receives, conceals, stores, barter[s], sell[s], or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to be stolen, shall be fined not more than \$5,000 or imprisoned not more than five years or both.” *Id.* Following the *Columba-Colella* decision, Congress amended the statute by replacing the phrase “moving as, or which is a part of, or which constitutes, interstate or foreign commerce,” with “which has crossed a State or United States boundary after being stolen.” *Id.* The courts have not applied the law to foreign defendants acting abroad. See *id.* at 358.

⁷¹ *Id.* at 360.

of terrorist offenses against United States citizens abroad. However, these laws may be concurrently justified based on the protective principle and the universality principle. Indeed, the sponsor of the “terrorism long arm statute,”⁷² (18 U.S.C. § 2331) Senator Arlan Specter, expressly told Congress that the Act was based on the protective principle because terrorist attacks against United States nationals usually seek to punish the United States for its policies or coerce it to change its policies.⁷³ The adoption of 18 U.S.C. § 2331 prompted the RESTATEMENT (THIRD) OF FOREIGN RELATIONS Law to modify its section on passive personality jurisdiction to remove the language explicitly rejecting the principle, at least with respect to terrorism.⁷⁴ Although 18 U.S.C. § 2331 applies also to terrorist attacks resulting in injury to a United States national that are aimed at a third state rather than the United States, this constitutes a narrow acceptance of passive personality jurisdiction. It certainly does not warrant expansion to Internet

⁷² See *supra* note 6 and accompanying text (discussing the terrorism long-arm statute).

⁷³ “International law also recognizes broad criminal jurisdiction. If an alleged crime occurs in a foreign country, a nation may still exercise jurisdiction over the defendant if the crime has a potential adverse effect upon its security or the operation of its governmental functions. This basis for jurisdiction for crime committed outside the United States has been applied by the Federal courts in contexts ranging from drug smuggling to perjury. Clearly, then, the exercise of U.S. criminal jurisdiction is also justified to prosecute the terrorist who assaults or murders American nationals abroad as a means of affecting U.S. policy. Such attacks undoubtedly have an adverse effect upon the conduct of our Government’s [sic] foreign affairs, and potentially threaten the security interests of the United States as well.” *Statement of Senator Specter*, CONGRESSIONAL RECORD, July 22, 1985, reprinted in PAUST, ET AL., *supra* note 6, at 487, n. 16.

⁷⁴ “[S]ubject to [certain limitations] a state has jurisdiction to prescribe law with respect to certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402(3) (1987). The comments to this section acknowledge that passive personality has increasingly been accepted as a form of battling terrorist activity or to the assassination of a state’s diplomatic representatives or other officials. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 402 cmt. g (1987). See also Robinson, *supra* note 57, at 487, n. 16.

gambling, which unlike terrorism, is not universally condemned as a threat to international peace and security.⁷⁵

C. The Internet Gambling Prohibition Act

The provisions of the proposed Internet Gambling Prohibition Act prohibit Internet gambling unless it is closed-loop, closed-circuit, horse or dog racing, *jai alai*, or state lotteries.⁷⁶ The law would apply to *all* Internet gambling businesses, presumably including those located offshore and run by foreign citizens. This language gives Congress three options with respect to the problem of passive personality jurisdiction.

First, Congress might avoid any explicit statements in its committee reports and floor debate suggesting an unmistakable intent that the Act is to apply to gambling Websites located abroad run by foreign citizens. In the absence of a manifest and unmistakable intent on the part of Congress to apply the Act extraterritorially based on the passive personality principle, United States courts will decline to do so⁷⁷ taking a page from the Fifth Circuit’s decision in the *Columba-Colella* case.⁷⁸

Second, in committee reports and floor debate, Congress might make the case that the Act is based on the objective territorial (effects) principle of jurisdiction, rather than the controversial passive personality principle. To

⁷⁵ Article 1 of the United Nations General Assembly’s anti-terrorism resolution “unequivocally condemns, as criminal and unjustifiable, all acts, methods, and practices of terrorism wherever and by whoever committed.” G.A. Res. 46/51, U.N. GAOR, 46th Sess., U.N. Doc. A/46/654 (1991). The Security Council recently reiterated its condemnation of terrorism as a threat to international peace and security in the context of the September 11, 2001 attacks against the World Trade Center and Pentagon. See S/RES/1333 (Dec. 19, 2001).

⁷⁶ See Internet Gambling Prohibition Act of 1999 (H.R. 3125) §§ 2(b), (d), (f).

⁷⁷ See Justice Scalia, in his dissenting opinion in *Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993) reproduced in BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 725, 727 (Aspen Publishers Aspen Law & Business Education Division 3d ed. 1999) (stating that there is a presumption against the extraterritorial reach of United States laws unless explicitly authorized by Congress. He stated that there is a “long standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”).

⁷⁸ *Columba-Colella*, *supra* note 69, at 17, 18.

do this, Congress must stress that avoiding economic loss to established casinos and to state lotteries is the primary justification for the Act, not protecting Americans from the evils of gambling in their own homes. The closest analogy, then, would be the Sherman Act, whose extraterritorial application has been upheld by the courts on this basis.⁷⁹

Third, Congress might enact the Internet Gambling Prohibition Act based on the passive personality principle, inviting friction with foreign states and establishing a precedent that United States citizens reciprocally might be subject to vague application of foreign law where their acts “injure” a foreign national within United States territory. The friction would come from a number of areas—from freedom of expression to sovereignty. For example, in 1998, Germany in an effort to rid the Internet of hate speech—including Holocaust denial—cut-off Germans’ access to more than 1500 Websites operated by American providers.⁸⁰ German authorities also notified America Online and CompuServe that they would possibly be prosecuted if they continued to provide access to Websites disseminating Holocaust denial.⁸¹ The warning did not work and, in protest, American students from Carnegie Mellon University posted sites that mirrored those that Germany blocked.⁸² In the face of United States diplomatic pressure, Germany decided not to pursue criminal proceedings against the United States Internet providers. Had the Internet Gambling Prohibition Act been on the books, the United States would not have been in a position to object to Germany’s exercise of passive personality jurisdiction over America Online and CompuServe.

⁷⁹ In *United States v. Aluminum Co. of America et al.*, the Second Circuit upheld the application of the Sherman Act to foreign anti-competitive practices. See *United States v. Aluminum Co. of America et al.*, 148 F.2d 416, 442 (2nd Cir. 1945). See also *Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993) reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* (3rd ed. 2000).

⁸⁰ In Germany freedom of speech is a much different right than its counterpart in the United States. Holocaust denial is a criminal offense. “Online providers who knowingly offer content illegal in Germany can be prosecuted if there is some ‘technically possible and reasonable way’ to prevent its dissemination.” Credence Fogo-Schensul, *More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms*, 33 GONZ. L. REV. 241, 254, 268 (1997/1998).

⁸¹ See *id.* at 269.

⁸² See *id.*

IV. CONCLUSION

To date, the legislative debate on the Internet Gambling Prohibition Act has not included the thorny issue of passive personality jurisdiction. Congress is on dangerous ground here. Before it sets a legislative precedent opening the door to passive personality jurisdiction-based legislation, it should consider the consequences. In light of years of legislative, executive, and judicial opposition to this basis of jurisdiction, this should not be a path taken without serious reflection.