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Gambling and the Law®: DoJ Goes All-In with a Very Weak Hand

The U.S. Department of Justice recently made an astonishingly bad \$34 million bet.

The size of the cash isn't the issue – \$34 million is peanuts for the federal government.

The DoJ is betting that it can scare Americans out of playing poker online.

But prosecutors don't seem to realize that they will probably lose this bet. And when they do, the decision will be read that Internet poker is legal.

The action was brought by the U.S. Attorney for the Southern District of New York – New York City. Rumors in the legal community say the DoJ in Washington D.C. did not approve, or even know, this was going to happen. Perhaps even the U.S. Attorney himself did not realize the significance of what an assistant in his office was about to do. That seems logical, since the legal theories behind the action are so weak, and the Obama Administration has a lot more important legal concerns than going after online poker players.

For that is exactly what the DoJ has done: It got a court order seizing more than \$34 million of payments belonging to about 27,000 poker players held at banks like Citygroup and Wells Fargo.

It's important to understand just how horribly weak the DoJ's case is. The legal authority cited for the seizure is 18 U.S.C. section 1955, the Illegal Gambling Business Act, added as part of the Organized Crime Control Act. Just looking at the names of the statutes gives you an idea of the problem.

Every federal anti-gambling law is limited on its face to people who are in the business of gambling. There is no federal law making it a crime to merely make bets.

Some states do outlaw betting. But half the states do not. In New York itself, for example, a person can make a bet by phone with an illegal bookie in that state or another and would not be breaking the law. The bookie would be, of course. But here it was the players' money that was seized.

So, exactly what law justifies the federal government seizing money from people

who are not violating any federal or state law?

Perhaps the prosecutors have some theory that they are somehow actually going after the operators. But even here, the DoJ is going to run into problems.

The major federal statute used against online betting operators is the Wire Act. The DoJ believes it covers all forms of gambling. But some courts have held that the Wire Act only applies to bets on sports events and races. Which means the government could lose big if courts in New York rule that poker does not fall under the Wire Act.

Perhaps the DoJ thinks it can use state anti-gambling laws against these overseas operators. But every state law has problems, ranging from presumptions that they do not reach beyond the borders of the state to the fundamental question of whether poker is predominantly skill and not gambling at all.

So why go after the one group involved in Internet gambling this is not violating any law – poker players in New York? Perhaps it was just a rogue prosecutor. Or maybe the New York office wanted to send a message, to counter rumors that it had disbanded its Internet gambling task-force.

It is even remotely possible that the DoJ knew how silly it was to seize the money of poker players. And it wanted to send the message to Congress to pass the pending bills that would set up a federal licensing system for Internet poker.

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