Bancroft PLLC

October 31, 2012

The Honorable Jon Kyl
United States Senate
730 Hart Senate Building
Washington, D.C. 20510

Dear Senator:

I have enclosed a memorandum which I prepared at the request of the Poker Players Alliance which addresses some constitutional concerns with legislation that may be introduced in the Senate. If you or any member of your staff would like to discuss any of this, I would be delighted to do so.

I hope all is well.

Sincerely,

Paul D. Clement

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Bancroft PLLC

October 31, 2012

To: The Honorable Jon Kyl

From: Paul D. Clement

Re: The Constitutionality of Pending Internet Poker Legislation

On February 3, 2012 I sent you a memorandum that I drafted at the request of the Poker Players Alliance analyzing the constitutionality of portions of the proposed Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2010 (the "2010 Act"). *See* February 3, 2012 Memorandum (Attachment A). That memorandum concluded that the 2010 Act's proposed treatment of prior Internet poker providers suffered from several constitutional infirmities. The 2010 Act specifically prohibited providers that previously served the U.S. market, or any entity that purchased certain assets from such providers, from obtaining licenses during the 540-day period following the issuance of the first license under the 2010 Act. As discussed in detail in the earlier memorandum, those market-exclusion and property-restriction provisions would have severely damaged the economic value of much of the former Internet poker providers' assets in a manner that would likely prompt a court to find that the 2010 Act accomplished an unconstitutional taking. The memorandum also concluded that it was difficult to view the 2010 Act's exclusion of those who previously provided Internet poker services as anything other than punitive, and thus the legislation may have amounted to an unconstitutional bill of attainder. Finally, the memorandum concluded that the 2010 Act's retroactive impact on settled expectations raised serious due process concerns.

The Poker Players Alliance has now asked me to assess whether a revamped version of the 2010 proposal—the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2012 (the "2012 Act")—suffers from similar constitutional problems as the 2010 Act. My understanding is that the 2012 Act has not yet been introduced and is not pending in either house of Congress but may be introduced in the Senate. In my view, based on a review of the proposed text, the 2012 Act suffers from the exact same problems as the 2010 Act, and, in some instances, the 2012 Act's constitutional infirmities are even more pronounced.

Under the 2012 Act, prior providers that "accepted bets or wagers from persons located in the United States after December 31, 2006" with "knowledge of the fact that such bets or wagers involved persons located in the United States" are presumptively ineligible for a license until "5 years after the date of the enactment of" the 2012 Act. 2012 Act § 114(c)(1) & (g)(2)(A)(i)-(ii). That prohibition also applies to any entity that attempts to utilize the prior provider's "covered assets," including "[a]ny trademark, trade name, service mark, or similar intellectual property" or "[s]oftware or hardware" used to provide and manage play. 2012 Act § 114(g)(1). If a prior provider (or an entity utilizing a prior provider's assets) wishes to participate in the newly regulated market in the first five years, it must prove to the "Office of Online Poker Oversight" or an approved "benchmark qualified body by a preponderance of the evidence" that it did not "violate, directly or indirectly, any provision of Federal or State law in connection with the operation or provision of services to an Internet gambling facility that made available bets or wagers to persons located in the United States after December 31, 2006." 2012 Act § 114(e)(1)(A). That determination is made "without regard to whether the conduct of the" prior provider "was ever the subject of a criminal proceeding for violation of a provision of Federal or State law," including whether any such "prosecution terminated in a manner other than with a conviction." 2012 Act § 114(e)(3).

The 2012 Act's market-exclusion and property-restriction provisions suffer from the same takings, bill of attainder, and due process problems as their 2010 predecessors. Indeed, increasing the initial market exclusion and property restrictions from 540-days to five years only magnifies the adverse economic impact of the market-exclusion and property-restriction provisions, and thus the resulting takings problems. *See* Attachment A at 3-6. That the 2012 Act allows prior providers to have the prohibition on market participation and property alienability eliminated through an administrative hearing does not ameliorate these takings concerns. In any other context, if the government deprived an individual of a property right and then put the burden on that individual to establish that he or she was wrongly deprived of that right, there would be no question that a taking (and a due process violation) had occurred.

Moreover, while the 2010 Act's market-exclusion and property-restriction provisions raised serious concerns that they amounted to an unconstitutional bill of attainder, *see* Attachment A at 5-7, the 2012 Act's embodiment of those provisions makes matters worse. The 2012 Act effectively creates a rebuttable presumption that prior providers operated in violation of state and federal laws and, as a result, denies them the opportunity to obtain a license and participate in the new regulated market unless they can overcome the statutory presumption of guilt. Defining past conduct as wrongdoing and then imposing punishment for that conduct is exactly what the Constitution's prohibition on bills of attainder forbids.[1] *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 472-73 (1977); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866). Furthermore, the 2012 Act doubles the punishment contemplated by the 2010 Act for operating without a license—a license that the 2012 Act forbids prior providers from obtaining. Compare 2012 Act § 103(b) (10 years' imprisonment) with Attachment A at 2 (5 years' imprisonment).

The 2012 Act also runs afoul of the Due Process Clause in the same manner as the 2010 proposal. Cutting off prior providers from the newly regulated market deprives them of the expectation that they would have been able to participate in that market, raising serious due process concerns. *See* Attachment A at 7. Prior providers surely did not make significant investments in their businesses with the understanding that they would need to prove that they

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[1] In addition to being constitutionally problematic, a legislative conclusion that prior Internet poker providers operated illegally is difficult to square with the relevant judicial precedent. *See United States v. Dicristina*, 2012 WL 3573895, at *54, *60 (E.D.N.Y. Aug. 21, 2012) (concluding that because poker "is not predominately a game of chance, it is not gambling as defined by the" Illegal Gambling Business Act, that "[n]either poker nor any other game of skill is explicitly included under the purview of . . . federal laws criminalizing gambling" such as UIGEA, and not distinguishing between poker providers that operated pre- and post-UIGEA). Indeed, the 2012 Act expressly recognizes that poker is defined, at least in part, by the fact that "success over the long run is influenced by the skill of the player," distinguishing it from other proscribed games where chance is the predominate factor. 2012 Act § 102(16)(A)(i).

were innocent of a crime for which they were never convicted in order to participate in the new regulated market.

The 2012 Act may also fall short of what due process requires for two reasons not discussed in the prior memorandum. First, the 2012 Act appears to arbitrarily—and thus unconstitutionally—disfavor certain prior Internet poker providers. The Act taints only the assets of providers that operated after December 31, 2006. There is, however, no obvious reason that this particular date should separate those who are excluded from the new regulated market from those who are not. The federal law referenced in the 2012 Act's name—the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361—was passed in October 2006 and not fully implemented until years later. Other relevant federal laws, the Illegal Gambling Business Act, 18 U.S.C. § 1955, and the Wire Act, 18 U.S.C § 1084, were enacted in 1970 and 1961 respectively.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Meachum v. Fano*, 427 U.S. 215, 226 (1976); *see Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *County of Sacramento v. Lewis*, 523 U.S. 833, 845-846 (1998). The selection of a truly arbitrary date as a basis for presumptively excluding entities from a market and impairing the value of their assets raises serious due process concerns. And to the extent that the December 31st date is not arbitrary, but rather meant to exclude only specific entities from the new regulated market, that would only emphasize the 2012 Act's bill of attainder problems.

Second, as already noted, the 2012 Act deprives former Internet poker providers of a significant property interest. No notice or hearing is required to accomplish that deprivation—the 2012 Act's passage completes the task. In all other contexts, some sort of process would be required in order to deprive the prior providers of their property interests.

Case law addressing the process due in the civil forfeiture context helps to illustrate the point. As a general rule, an individual must "be given an opportunity for a hearing before he is deprived of any significant property interest." *Bode v. Connecticut*, 401 U.S. 371, 378 (1972); *see United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process."). "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . ." *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). The Supreme Court has recognized "some exceptions to the general rule requiring predeprivation notice and hearing." *Good*, 510 U.S. at 53. For example, relying on the fact that it was the "sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given," the Court has held that a yacht subject to civil forfeiture could be seized without prior notice and hearing. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). But the Court has never held that property like that addressed by the 2012 Act can be subjected to civil forfeiture without any sort of pre-deprivation process.

The 2012 Act can be appropriately viewed as a legislative determination that the prior providers' assets were employed in criminal activity and thus can be treated as forfeited, all without any prior process. No precedent supports such a law. In discussing the deprivation of property at issue in *James Daniel Good Real Property*, the Court relied in part on the fact that the government seizure deprived Good of "the right to unrestricted use and enjoyment" of his property, and adversely impacted "a significant portion of the exploitable economic value" of that property. *Good*, 510 U.S. at 54. And the *Good* Court held that notice and a meaningful opportunity to be heard were required before that deprivation could be executed. The prior providers' due process rights likely require the same here. Indeed, the lack of due process may be more problematic here than in the civil forfeiture context. Civil forfeiture proceedings regularly follow on the heels of related criminal proceedings. *See Good*, 510 U.S. at 46-48; *United States v. $8,850 in U.S. Currency*, 461 U.S. 555, 558-61 (1983). The 2012 Act does not require such proceedings before cordoning the prior providers and their assets off from the new regulated market. And to the extent advocates of the 2012 Act would contend that the passage of the legislation itself serves the same end as a prior criminal adjudication in the civil forfeiture context, that would again only underscore the Act's bill of attainder problems.

Moreover, the nature of the showing required by the 2012 Act to obtain a post-deprivation waiver strengthens the inference that the Act operates as a forfeiture law, but with the burden resting squarely on disfavored prior providers. The Due Process Clause does not permit the government to treat a class of assets as presumptively forfeited because of their alleged use in criminal activity and then place the burden on the individual to demonstrate that he operated in conformity with state and federal law. While forfeiture law generally does not provide robust protection, that is because the due process in the prior conviction goes a long way to providing the process due. *Cf. Bennis v. Michigan*, 516 U.S. 442, 446 (1996). The 2012 Act's effort to impose the burden on the prior provider to demonstrate factual innocence in the absence of a prior conviction—a burden which reverses the bedrock assumptions of our criminal system and may prove impossible to meet—raises serious due process concerns.[2]

The 2012 Act may suffer from one additional constitutional problem not flowing directly from the Act's treatment of prior Internet poker providers. Past bills purporting to authorize Internet poker, such as the 2010 Act addressed in the prior memorandum, have provided that States may opt in or out of the federal law (based on the legal status of poker in the state) through written notice to the federal government given "pursuant to a duly enacted law of the State." *See* 2010 Act, § 108(b)(1). The 2012 Act curiously provides that a State can opt in or out through action supported by "a majority of a quorum of each chamber of the legislature." 2012 Act § 108(b)(1)(A) & (2)(A). While allowing a State to decide to participate in the federal licensing

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[2] These forfeiture-related due process concerns are exacerbated by the fact that some prior Internet poker providers have already forfeited significant assets to the United States. For example, Full Tilt Poker forfeited substantially all of its assets as part of the settlement agreement in the forfeiture case brought against it by the U.S. government, *see* Stipulation and Order of Settlement Regarding Full Tilt Poker, *United States v. PokerStars, at al.*, No. 11-cv.-2564 (S.D.N.Y. July 30, 2012), and PokerStars agreed to forfeit $731 million to settle the same case (and acquire the assets that Full Tilt forfeited to the government), *see* Stipulation and Order of Settlement Regarding PokerStars, *United States v. PokerStars, at al.*, No. 11-cv.-2564 (S.D.N.Y. July 31, 2012). It is also worth noting that these settlement agreements seem to contemplate that prior providers will be able to participate in a formally legalized U.S. Internet poker market if and when one is created. *See, e.g.*, *id.* at 10, ¶ 16 ("Nothing in this Stipulation and Order of Settlement is intended to or shall limit the PokerStars Companies and their present or future affiliates from offering real-money online poker to individuals within the United States . . . if and when it becomes permissible to do so under relevant law.").

scheme through the State's normal legislative process respects State sovereignty and longstanding principles of federalism, mandating that "a majority of a quorum of each chamber of the legislature" is all that is required to opt in or out disregards both. State constitutions—not federal legislation—should dictate the process by which laws are enacted at the state level. To the extent the 2012 Act disregards the States' own constitutional processes, it raises a distinct concern that the Courts would invalidate it on federalism grounds.

Bancroft PLLC

February 3, 2012

To: The Honorable Jon Kyl

From: Paul D. Clement

Subj: The Constitutionality of Pending Internet Poker Legislation

In recent years, Congress has considered legislation that would regulate Internet poker through licensing. The Poker Players Alliance asked me to assess the constitutionality of such legislation as applied to entities that previously provided Internet poker services in the United States, specifically the portions of the un-enacted Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2010 (the "Act") that might appear in any newly introduced legislation. The Act contains provisions specifically prohibiting Internet poker providers that previously served the U.S. market, or any entity that purchases certain assets from such providers, from obtaining licenses for the 540-day period following the issuance of the first license under the Act. In my estimation, courts would likely find that these provisions pose serious constitutional difficulties. The market-exclusion and property-restriction provisions severely damage the economic value of much of the former Internet poker providers' assets in a manner that would likely prompt a court to find that it constitutes a taking in violation of the Fifth Amendment. In any other industry, a congressional prohibition from operating in a lawful market or having one's assets used in such operations, would clearly be seen as a taking. Furthermore, it is hard to view the Act's unique and hostile treatment of those who previously provided Internet poker services as anything other than punitive, and thus the legislation may amount to a constitutionally proscribed bill of attainder. The market-exclusion and property-restriction provisions also raise serious due process concerns.

A. A Brief Overview of the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2010.

The Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2010 sets up a licensing regime for Internet poker. In what would be the first explicit reference to poker in the United States Code, the Act recognizes that "[p]oker has long been a part of the cultural and recreational fabric of the United States," and that while online poker play should be allowed, it "should be controlled by a strict licensing and regulatory framework." § 101(7), (10). Accordingly, the Act sets up a system for issuing licenses to Internet poker providers. To obtain a license, an applicant must submit an application to a "qualified body," such as the "State agency or regulatory body of an Indian tribe that" typically handles gambling licensing. §§ 104(c)(1)(A), 105(B). The application must include information such as a complete financial profile of the applicant, documentation showing the organization of the applicant and all related business affiliates, and the criminal history of the applicant and its senior executives and directors. § 104(c)(2). In addition to these more objective factors, whether a license should be granted also requires consideration of the applicant's "good character, honesty, and integrity." § 104(d)(2). Certain attributes render an applicant ineligible for a

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license. For example, an applicant who has a conviction that was punishable by imprisonment for more than 1 year may not obtain a license under the Act. § 104(d)(3)(C).

In tandem with authorizing the licensed operation of Internet poker, the Act outlaws the unlicensed operation of poker sites and creates stiff penalties for operating such sites without a license. Doing so can result in up to 5 years' imprisonment and massive fines of up to $1,000,000 per day of illegal operation. §§ 103(b), 104(m)(d)(ii). The administration of these penalties, and the licensing regime as a whole, is entrusted to a newly created Office of Internet Poker Oversight situated within the Department of Commerce. § 106.

The Act contains several provisions singling out and disfavoring Internet poker providers that knowingly "accepted bets and wagers from persons located in the United States" before the Act's passage. § 104(c)(1)(B)(ii)(I)(aa). The Act's market-exclusion provision states that these Internet poker providers "shall not be eligible for a license" until "540 days after the date that the first license is issued." § 118(f). The Act also contains a property-restriction provision stating that "covered assets" of a former provider "may not be used to operate any Internet poker facility." *Ibid*. "Covered assets" include any "trademark, trade name, service mark, or similar intellectual property" and "database[s] of customer information or customer lists of" U.S. customers. § 118(f)(2). In short, these provisions prohibit former Internet poker providers from entering the newly regulated market until their competitors have a full year-and-a-half head start, and effectively prohibit former providers from selling their most valuable assets to entities that are permitted to obtain a license and compete.

B. The Act's Constitutional Infirmities.

1. The Takings Clause

Courts will likely find the Act's treatment of former Internet poker providers to be constitutionally suspect on a number of levels. First, the courts will likely find that the market-exclusion and property-restriction provisions effect an unconstitutional taking of former poker providers' property. The Takings Clause of the Fifth Amendment states that "private property" shall not "be taken for a public use without just compensation." U.S. Const. amend. V. Government takings are usually categorized as either physical or regulatory. A physical taking occurs when the Government completely dispossesses an owner of his property or the exclusive right to use that property. *See Lorreto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A regulatory taking occurs when the Government leaves a property owner in exclusive possession of his property, but restricts how that property may be used. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). A government prohibition on the use or transfer of quickly depreciating assets blurs the line between these two categories. But even if viewed as a regulatory taking, such a prohibition is highly suspect. Whether a government action accomplishes a regulatory taking requires consideration of (1) the economic impact of the regulation on the property owner, (2) whether the government action interferes with "the reasonable investment-backed expectation[s]" of the owner, and (3) the character of the government action at issue. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Considering these factors, former Internet poker providers would be on strong constitutional footing if they chose to challenge the market-exclusion and property-restriction provisions—or enacted provisions imposing similar property restrictions—as effecting an uncompensated regulatory taking of their property.

The law regarding whether a government action has an economic impact for purposes of takings analysis is fairly straightforward: a regulation has an economic impact if it "impair[s] the value of or use of [the] property." *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 83 (1980). The proposed market-exclusion and property-restriction provisions clearly do so. Former Internet poker providers are kept out of the newly regulated market and denied the opportunity to put their accumulated assets to their intended and best use. § 118(f). That exclusion may destroy the economic value of the former providers' assets altogether. It is no answer that, under the market-exclusion provision, former providers are allowed to enter the market eventually. At that point, it may well be too late. The market could have changed such that the property restrained has become valueless. Indeed, the market-exclusion provision itself seems to be premised on the notion that a head start in the market is a significant competitive advantage. The statute cannot embrace that assumption to exclude the former providers and then dismiss their exclusion from the market and inability to transfer assets as merely "temporary." Former providers may be so crippled by the initial delay that they can never recover. When a regulation denies all economically beneficial or productive use of an individual's property—as may be the case here—it constitutes a taking. *Lucas*, 505 U.S. at 1015.

Even the market-exclusion provision considered alone would raise constitutional concerns, but its combination with an effective prohibition on the alienability of former Internet poker providers' valuable assets may create even more serious concerns under the Takings Clause. Those two provisions working together effectively destroy the value of many of the former Internet poker providers' assets. "Covered assets"—such as the providers' intellectual property and information that the providers possess about their clientele—cannot be used by *any* firm that seeks to obtain a license under the new regime for a specified period. § 118(f). The Supreme Court has recognized that intangible property such as the trade names that the property-restriction provision constrains can be the object of a regulatory taking. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1004-06 (1984). Former Internet poker providers have made substantial investments in advancing their brands, and the value of those investments is reflected in the name recognition, consumer credibility, and financial success that those sites have built over time. The Act appears to want to prevent the use of those assets precisely because they are valuable. Preventing former Internet poker providers from using that property themselves, or transferring it to another for continued beneficial use, has a dramatic economic impact on those providers.

The other factors courts consider when faced with a regulatory takings claim highlight the problems with the market-exclusion and property-restriction provisions. Those provisions obviously interfere with "the reasonable investment-backed expectation[s]" of former Internet poker providers. *Penn Central Transp. Co.*, 438 U.S. at 124. As just discussed, online poker sites have invested significant resources in building up their business. These sites obviously would not have done so if they thought they would be boxed out of the market and wholly deprived of the value of their investments. The character of the government action dictates that the market-exclusion and property-restriction provisions effect a regulatory taking as well. Under those provisions, former Internet poker providers are forced to sit on the sidelines while the new regulated market develops, and their most valuable assets are rendered at best inalienable, and at worst valueless. There are no exceptions or qualifications. Such an absolute deprivation of property rights is a quintessential regulatory taking.

The fact that the market-exclusion and property-restriction provisions are not permanent does not save them. As already discussed, it may be the case that excluding existing providers from licensing at the outset destroys the value of their stranded assets and makes it financially impossible for them to enter the regulated market when they are allowed. A year-and-a-half in an emerging Internet-based industry is a long time. Moreover, even if the impact of the market-exclusion and property-restriction provisions is limited in time, those provisions still accomplish a taking. The Supreme Court has recognized that takings that are temporally limited can be just as unconstitutional as permanent property divestments. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 342 (2002) (discussing a 32-month restriction on property use). The relevant length of time would obviously be much shorter for assets like those at issue here—Internet-based services that are constantly changing and evolving, customer lists, which lose their value rapidly, and brand names that often must maintain their position in the public eye to maintain their value—as opposed to the real property at issue in *Tahoe-Sierra.* Here, the Act prevents certain Internet poker providers from doing what they were designed to do and profiting from the assets they have built over time, but which will depreciate rapidly. That raises takings concerns of the first order, which would seem to be obvious were this any other industry.

Nor is it clear that the taking the market-exclusion and property-restriction provisions accomplish qualifies as a "public use." First of all, the taking here cannot be justified by a desire to benefit those who are allowed to enter the regulated Internet poker market once licenses become available. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and thus be void."). And a decision concluding that transferring a lucrative business opportunity from one private individual to another in the name of benefiting consumers would certainly require an expansion of the deeply unpopular decision *Kelo v. City of New London*, 545 U.S. 469 (2005), and bring in sharp focus the objections Justice O'Connor raised in her dissent in that case. As far as I am aware, no court has yet stretched *Kelo* so far. In all events, to the extent that taking the property of former Internet poker providers does serve a public interest, that fact only underscores that the market-exclusion and property-restriction provisions effect a taking that must be compensated to be constitutional. If, for example, the taking of a dominant incumbent's assets and opening the market to would-be competitors could be deemed a pro-competitive public use, it would in no way obviate the need to compensate the incumbent. To the contrary, just compensation would be necessary to put a check on this extraordinary power to determine one party's assets could be more efficiently used by another. As unpopular as *Kelo* was, there was never any question but that the taking would need to be compensated.

An analogy to the telecommunications industry demonstrates these points. If Congress passed a law requiring telecommunications providers to acquire a new license to lawfully operate, and then determined that certain former providers could not apply because their former dominance could skew competition, it would raise serious takings concerns. If Congress went further and expressed concern that allowing the sale of the incumbent's network would allow the buyer to dominate the new market, and so barred anyone who purchased the assets from the new market (essentially rendering those assets useless), one of two results seem likely. First, the courts may determine that this robbing Peter to pay Paul scheme of essentially transferring the business opportunity from one private entity to another failed to establish a public use. But if not, the courts would certainly conclude that barring the incumbent and precluding the sale of its assets was a compensable taking. Without that requirement, the potential for politically well-connected businesses to exclude would-be competitors and their valuable assets from the market would be intolerable. Indeed, if such provisions were applied to any industry other than Internet poker, it seems clear that takings concerns would be broadly recognized. But there is no Internet poker exception to the Takings Clause. Indeed, to the extent this draconian approach to former Internet poker providers reflects hostility or a belief that they have operated illegally and should be punished, that only highlights the bill of attainder concerns addressed next.

2. Prohibitions on Bills of Attainder

As the telecommunications example illustrates, the fact the market-exclusion and property-restriction provisions effect a taking would be obvious in the non-poker context. That it is not obvious to Congress here may stem from some notion that former providers operated before the proposed legislation expressly addressed and removed all doubt about the legality of Internet poker. Indeed, some in Congress may have determined that former providers operated unlawfully. But that would only underscore the concerns that underlay the Bill of Attainder Clause. A party challenging the law can credibly argue that the Act treats Internet poker fundamentally differently from any other industry because it seeks to punish certain Internet poker sites for providing online poker services in the past. Consistent with our Constitution, any such punishment for past conduct is for judges and juries to decide in a court of law. Article 1, Section 9 of the United States Constitution forbids Congress from passing bills of attainder—laws that legislatively determine guilt and inflict punishment upon an identifiable individual without provision of the protections of a trial. U.S. Const. art. I, § 9; *see Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 846-47 (1984). This protection was so central to the framing generation that the prohibition on bills of attainder is one of the very few individual rights enshrined in the unamended Constitution. The defining characteristic of a bill of attainder is that it defines past conduct as wrongdoing and then imposes punishment for that past conduct. *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 472-73 (1977); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866). The Supreme Court has held that a legislative act constitutes an unconstitutional bill of attainder when (1) it "determines guilt and inflicts punishment," (2) "upon an identifiable individual," and (3) "without provision of the protections of a judicial trial." *Nixon*, 433 U.S. at 468. Companies are protected from bills of attainder the same as individuals. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995); *Consolidated Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 349 (2002).

First off, one need go no further than the Act's text to discover that it has punishment in mind. If a former Internet poker provider attempts to operate without a license—a license the Act's market-exclusion provision prohibits the provider from obtaining—the provider is punished. §§ 103(b), 104(m)(d)(ii). That the entities that have made the greatest investment in the provision of Internet poker services and built the most consumer credibility are excluded from the newly regulated market is extraordinary enough. That this exclusion is backed with criminal sanctions makes a punitive intent palpable.

When the question of whether a legislative act imposes a forbidden legislative punishment is closer, courts look to several factors, none of which is singularly dispositive. Courts often begin with an inquiry into whether the "challenged statute falls within the historical meaning of legislative punishment." *Selective Serv. Sys.*, 468 U.S. at 852. Imprisonment and confiscation of property are two classic examples of the punishments imposed by bills of attainder and bills of pains and penalties in pre-revolutionary America. *See Selective Serv. Sys.*, 468 U.S. at 852; *Nixon*, 433 U.S. at 473-74. The Act features both. The Act's market-exclusion provision banishes former poker providers from the market, and, as already explained, imposes criminal punishment if they reenter. In addition, the market-exclusion and property-restriction provisions work together to effectively confiscate the property of former providers by rendering their valuable assets unusable, inalienable, and therefore worthless.

Furthermore, there is no valid end served by simply keeping a specific group of Internet poker providers—those who provided Internet poker services before the Act—out of the regulated market. The Act allows their participation after what can only be thought of as a punitive suspension. And the Act already has built-in mechanisms for keeping certain bad actors out of the regulated market; applicants undergo thorough review to ascertain "suitability" and individuals with certain criminal histories are ineligible. § 104(d)(3)(C).

Courts also look to whether there is any indication that the legislature intended to impose punishment when conducting bill of attainder analysis. *See Selective Serv. Sys.*, 486 U.S. at 852. The severity of the punishment and the selection of unusual disabilities raise these concerns. What is more, the harsh treatment of former Internet poker providers, while the market is opened to others, suggests that Congress has effectively made a judgment about propriety of past conduct without the due process required of such determinations.

The Act indisputably meets the other two requirements for a legislative act to count as a bill of attainder. It clearly singles out Internet poker providers that previously served the U.S. market. The "singling out of an individual for legislatively prescribed punishments constitutes an attainder whether the individual is called by name or described in terms of conduct which, because of its past conduct, operates only as a designation of particular persons." *Selective Servs. Sys.*, 468 U.S. at 847. The Act does not call out former Internet poker providers by name, but it might as well do so. The market-exclusion and property-restriction provisions lump all persons and entities that provided online poker services before the Act into a group, the members of which are initially ineligible for licenses in the new regime, and whose assets are made inalienable by statute. The Act does not require a trial to force former Internet poker providers to sit out of the Internet poker market for nearly a year and a half.

The Second Circuit's decision in *Consolidated Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338 (2002), is instructive. In the aftermath of a power plant shut down caused by Consolidated Edison's ("Con Ed") failure to conduct required maintenance, New York enacted a law prohibiting the utility from passing the costs of the necessary repairs onto consumers. Consolidated Edison filed suit, asserting that the legislation constituted an unlawful bill of attainder. The Second Circuit agreed. The Court held that because it could "discern no wholly non-punitive purpose to justify the entire cost-pass-through prohibition in" the New York statute, the statute imposed an unconstitutional legislative punishment. *Id.* at 351. The Court recognized that "part of the statute's cost-pass-through prohibition has an arguably non-punitive purpose" in that it "enhance[s] economic efficiency rather than punish[es] Con Ed for wrongdoing." *Id.* at 352. But a significant portion of the costs that Con Ed was prohibited from passing to consumers could have been passed through even in the absence of the utility's failure to maintain its equipment. So there was no conceivable basis for the whole of the State's prohibition, other than punishment. *Id.* at 353-54. The Court further recognized that there were less burdensome alternatives that the State could have pursued. *Id.* at 354.

Although not on all fours, the Second Circuit's *Consolidated Edison* opinion provides strong support for the contention that the market-exclusion and property-restriction provisions—and any other provisions similarly crafted—constitute an unlawful bill of attainder. Both the New York law at issue in *Consolidated Edison* and the market-exclusion and property-restriction provisions target the conduct of specific corporate entities predating the relevant legislative action. Both laws do economic harm to their objects. Both laws seek justification in notions of economic efficiency. Both laws lack a "wholly non-punitive purpose" to justify the extremeness and totality of their prohibitions and restrictions. And both laws could likely accomplish whatever legitimate ends they might serve through non-punitive measures. In fact, the Act's provisions are substantially *more* punitive than the law held invalid in *Consolidated Edison*. The New York law forced Con Ed to bear costs that it wanted consumers to pay, a far less severe sanction than forcing the utility to sit out of the market entirely and effectively preventing it from selling its assets to others.

3. The Due Process Clause

In addition to its Takings Clause and bill of attainder problems, the Act's provisions may also run afoul of the Due Process Clause. In *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), four Justices concluded that a federal law's effect of assigning pension premiums to a company constituted a taking. Justice Kennedy concurred in the judgment in part, but wrote separately to express his view that the federal law was unconstitutional because it ran afoul of due process principles. Justice Kennedy stated that "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." *Id*. at 549 (Kennedy, J. concurring in part and dissenting in part). "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). So it is here. Former Internet poker providers have made significant investments in their business and acquired significant brand recognition and customer goodwill as a result. Cutting off these entities from the newly regulated market surely deprives those providers of the expectation that they would be able to participate in this market.

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In sum, courts will likely conclude that the Act's treatment of Internet poker providers that previously provided services to the U.S.—particularly that of its market-exclusion and property-restriction provisions—constitutes an unconstitutional taking. In any other industry, restrictions of this sort would raise alarm bells and be deemed a compensable taking, if they were permitted at all. To the extent the Internet poker industry is treated differently because providers operated in an uncertain legal environment, that only highlights the bill of attainder concerns raised by the legislation. *Cf.* Department of Justice Office of Legal Counsel, *Whether Proposals* *by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act* (Sept. 20, 2011) (concluding that the Wire Act, 18 U.S.C. § 1084, only applies to sports-related bets and wagers). The determination of whether past conduct was lawful is the job of courts and juries, not Congress in legislating punitively and barring companies from valuable economic opportunities. The Act also may suffer from due process problems because it retroactively upsets settled expectations.