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# Agency Culture and Conflict: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice

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# AGENCY CONFLICT AND CULTURE: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice

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## INTRODUCTION

The so-called "Founding Fathers," the men who came together to draft the United States Constitution, believed in divided government and the dispersion of governmental power among competing institutions. They believed that a system of separation of powers and checks and balances could prevent the aggregation of power in a single decision-maker who might abuse that power. The Founding Fathers of the United States would have been proud of the Congress that created the Indian Gaming Regulatory Act ("IGRA"). Aside from the Constitution, it is hard to imagine a federal law that disperses power more widely and among more institutions across more levels of government than IGRA. This article explores some of the ramifications of dispersing power (and responsibility) among three separate federal agencies that do not always cooperate. The result has been uneven, and sometimes inconsistent.

While the Constitution explicitly distributes power among only two sovereigns (states and the federal government), IGRA explicitly disperses power among three (states, the federal government, and tribes). In some provisions, the dispersion of power was a conscious decision by Congress. For example, IGRA's compacting provisions sought to force state and tribal governments to negotiate with one another about certain forms of gaming and authorized the Secretary of the Interior ("Interior Secretary") to review

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the outcome of the negotiations.[1] These provisions spread power widely, so as to prevent action in the absence of consensus.

Some of the later problems in the implementation of IGRA, on the other hand, were inadvertent. They came about as a result of a lack of careful thought in the drafting of the statute. One example is the provision in IGRA that presumed to give tribes the power to sue states in federal courts for failure to negotiate in good faith regarding Class III gaming.[2] The drafters took a significant risk in attempting to authorize tribes to sue states in federal court and making such an action a tribe's sole remedy for a state's failure to negotiate in good faith. At the time, it was not at all clear that Congress had the power to abrogate state Eleventh Amendment immunity from suit. Indeed, a major case presenting that very question, *Pennsylvania v. Union Gas Co.*,[3] was being litigated before the Supreme Court during the months that Congress was considering IGRA.[4] The Court granted certiorari for the second time in the *Union Gas* case approximately seven months before IGRA was enacted.[5] The Court fretted over *Union Gas* for most of October Term 1988 ("OT 1988"), taking well over a year to decide the case after certiorari was granted.

Ultimately, a sharply divided Court narrowly upheld Congressional power to abrogate state Eleventh Amendment immunity in a decision issued after IGRA had been signed into law.[6] The decision in *Union Gas* produced five separate opinions. A four-justice plurality favored Congressional power to abrogate state immunity,[7] joined only as to the result by a fifth justice

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1. 25 U.S.C. § 2710 (2006) (effective Oct. 17, 1988). However, the compact provisions did not work out quite as Congress intended. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (finding portions of the compacting provisions unconstitutional).

2. 25 U.S.C. § 2710(d)(7)(A)(i).

3. 491 U.S. 1 (1989). In that case, a sharply divided Court narrowly upheld Congressional power to abrogate state Eleventh Amendment immunity in a decision decided the summer after IGRA had been signed into law. Though the drafters of IGRA may have breathed a sigh of relief, the issue was not settled. The decision in *Union Gas* produced five separate opinions. A four-justice plurality favored Congressional power to abrogate. The plurality was joined by one other justice who agreed that Congress had the power, but disagreed with the plurality as to the basis for that power, making the opinion roughly a 5-4 decision.

4. *See* Order Granting Certiorari, Pennsylvannia v. Union Gas Co., 485 U.S. 958 (1988) (No. 87-1241).

5. *Id.* The petition for certiorari clearly raised the issue of Congressional power to abrogate a state's Eleventh Amendment immunity from suit. *See* Pennsylvania v. Union Gas Co., 832 F.2d 1343 (3d. Cir. 1987), *petition for cert. filed*, 1988 WL 1094054 (Jan. 21, 1988) (No. 87-1241).

6. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467, was signed into law on October 17, 1988, but *Union Gas* was not argued until October 31, 1988 and not decided until June 15, 1989. 491 U.S. 1.

7. *Union Gas*, 491 U.S. at 23.

who disagreed with the plurality as to the basis of the asserted power.[8] Thus, though the decision was 5-4 in favor of abrogation, this particular majority was even more fragile than in an ordinary 5-4 decision. The case left the Supreme Court deeply divided on the issue.

The drafters of IGRA must have breathed a sigh of relief when *Union Gas* came out in favor of the power to abrogate. However, while the issue may have been temporarily decided, it was not well settled as evidenced by the numerous decisions in the case. The incredible risk that drafters had taken materialized in 1996 when *Seminole Tribe v. Florida* was decided.[9] *Seminole Tribe* revisited and overruled *Union Gas*.[10] It produced a solid five-justice majority against congressional power to abrogate state immunity,[11] leaving Indian tribes with no statutory remedy for a state's failure to negotiate in good faith regarding Class III gaming.

On the issue of state immunity, the drafting of IGRA was apparently intentional, but it was a risky choice. In other contexts, however, the law scattered power among federal and state actors without adequate thought about the ramifications of the distribution of power.

One of the unanticipated consequences of IGRA, for example, was extensive litigation in state courts over constitutional issues of separation of powers in state governments. Since tribal-state compacts were relatively unusual before IGRA and such compacts rarely involved such high stakes, the law in many states was not clear as to whether the authority to negotiate and execute such compacts was executive or legislative in nature. In some states, governors, seeking to obtain a share of tribal gaming revenues, entered compacts only to be told by state supreme courts that the executive lacked compacting authority absent state legislative approval.[12]

Just as IGRA created a tug of war between branches of state government, it also created conflicts among three agencies within the federal government. This article will focus on areas in which IGRA failed to distribute power explicitly, creating confusion and litigation. It will evaluate the power struggles within federal agencies that accompanied federal

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8. *Id.* at 57 (White, J., concurring in part and dissenting in part). Justice White was the fifth vote. *Id.*

9. 517 U.S. 44 (1996).

10. *Id.* at 66.

11. *Id.* at 75–76.

12. For early examples, see State *ex rel.* Stephan v. Finney, 836 P.2d 1169 (Kan. 1992); State *ex rel.* Clark v. Johnson, 904 P.2d 11 (N.M. 1995); Narragansett Indian Tribe of R.I. v. Rhode Island, 667 A.2d 280 (R.I. 1995); *see also* Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427 (2001) (collecting cases). For more recent examples, see Fla. House of Representatives v. Crist, 990 So. 2d 1035, (Fla. 2008); Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047 (N.Y. 2003).

implementation of the law. After introducing the federal actors, this article will discuss three principal problem areas, including gaming classification questions, regulatory independence in litigation, and Indian lands decisions. It will demonstrate some of the effects of jurisdictional ambiguity at the federal level, the most notable of which may be an increase in tribal sovereignty as a result of federal paralysis.

## I. INTRODUCING THE KEY FEDERAL ACTORS IMPLEMENTING IGRA

### *A. The National Indian Gaming Commission*

When Congress enacted IGRA, it created the National Indian Gaming Commission ("NIGC"), an "independent Federal regulatory authority."[13] Though it is located "within the Department of the Interior,"[14] it is nevertheless substantially independent. The NIGC is headed by a presidentially appointed Chairman, who must be confirmed with the advice and consent of the Senate, and who serves a fixed term of three years.[15] During a term, the Chairman may be removed from office only for neglect of duty, malfeasance, or other cause.[16]

NIGC independence was controversial from the beginning. When the legislation was being debated in Congress, the Reagan Administration, speaking through the Department of Justice ("Justice") strongly objected to the limitations on the power to remove commissioners of the NIGC.[17] Congress rejected this argument. The "for cause" provision makes the NIGC an "independent regulatory agency," as this term is commonly used by administrative law theorists and in case law.[18] And while the term gives the NIGC a strong measure of political independence, the NIGC's

13. 25 U.S.C. § 2702(3) (2006).

14. *Id.* § 2704.

15. *Id.* §§ 2704(b)(1)(a), (4)(a).

16. *Id.* § 2704(b)(6).

17. *See* S. REP. NO. 100-446, at 22, 30 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 (letter to Congress from then-Assistant Attorney General John R. Bolton).

18. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (holding that, by statute, Congress may limit the power of the President to remove an officer of the United States in the manner prescribed by Congress, such as for explicit cause); Weiner v. United States, 357 U.S. 349 (1958) (holding that the President lacks the power to remove certain officials and reaffirming *Humphrey's Ex'r*). Congressionally-imposed limits on the power of the President to remove Presidential appointees are controversial as a matter of constitutional interpretation, and thus, the legitimacy of the independence of the so-called "fourth branch" of government is the subject of much debate. *See* Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (discussing unitary executive theory).

independence is sharply limited by three other aspects of IGRA and governmental organization.

First, IGRA provides that the NIGC's annual budget must be prepared "in coordination with the Secretary,"[19] which means, as a practical matter, that the NIGC's annual appropriation request is reviewed by the Interior Secretary and the Office of Management and Budget ("OMB"). Given Secretarial and OMB involvement, the executive branch maintains a tight rein on the purse strings of this agency. Under OMB rules, the NIGC cannot even approach Congress on budgetary matters without OMB's permission. Since the federal budget process occurs annually, and the NIGC needs to protect its appropriation, such control necessarily limits the political independence of the agency.

Second, the NIGC lacks independent litigation authority. Like most other agencies, it has regulatory and enforcement powers, but if there is a need to utilize the courts, the NIGC is represented by the Attorney General of the United States.[20] In other words, it cannot even use the federal court to enforce a lawful subpoena without the approval and the involvement of the Department of Justice.[21]

Finally, the NIGC is not the only agency with responsibilities for the interpretation of IGRA or the federal gambling laws generally. The Department of the Interior ("Interior") has an extensive role in Indian gaming that is recognized in IGRA,[22] as does Justice, and Justice has enforcement responsibility for numerous criminal statutes that address gambling, only a few of which are explicitly exempted from application to Indian gaming.[23]

### *B. The Department of the Interior and the Bureau of Indian Affairs*

Before the NIGC came into existence, there was the Bureau of Indian Affairs ("Bureau" or "BIA"). The Bureau is the primary actor within Interior on Indian gaming matters. Many of the important decisions delegated by Congress to the Interior Secretary have been further delegated

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19. 25 U.S.C. § 2717(b)(1) (2006).

20. 28 U.S.C. § 516 (2006) (providing that the right and responsibility to conduct litigation in which "an agency, or officer thereof" is a party is reserved to the Attorney General unless otherwise provided by law).

21. *See, e.g.*, 25 U.S.C. § 2715(b) (2006).

22. *See, e.g.*, 25 U.S.C. § 2710(d) (2006) (tribal-state compacts); § 2711(b)(3) (per capita distribution plans); § 2719(b)(1) (gaming on newly-acquired Indian lands).

23. *See, e.g.*, § 2710(d)(6) (making the Johnson Act inapplicable to Class III gaming); § 2720 (making federal lottery statutes inapplicable to Indian gaming).

by the Secretary to the Assistant Secretary for Indian Affairs, or to the Bureau.

Interior, through the Bureau and the Interior Solicitor, was involved in Indian gaming long before the enactment of IGRA. Indeed, if not for the enthusiastic support of the Bureau, the tribal right to conduct gaming may never have been confirmed in 1987 by the United States Supreme Court in *California v. Cabazon Band of Mission Indians.*[24] In a 6-3 decision, the *Cabazon* majority weighed the competing interests of the state and federal governments and ultimately found that the federal interests in favor of Indian gaming preempted the state's asserted interests in preventing it. In documenting the Bureau's involvement in Indian gaming, the majority found "the [Federal] Government's approval and active promotion of tribal bingo enterprises" to be "of particular relevance in this case."[25] Since the Solicitor General of the United States declined to file a brief in the case, the Bureau's actions in support of Indian gaming was the primary evidence of the keen federal interest. Thus, Indian gaming might never have received the blessing of the Supreme Court without the strong support of the Bureau and the Secretary.

Prior to the enactment of IGRA in 1988, the Bureau exercised pervasive involvement in Indian gaming. For example, the Bureau routinely reviewed and approved tribal ordinances establishing and regulating gaming operations.[26] It also made grants and guaranteed loans to finance the operations.[27] Under the authority of Section 81,[28] which authorized the Secretary the power to review contracts by Indian tribes relative to Indian lands, the Bureau sometimes reviewed "management contracts" for the development and operation of Indian gaming operations.[29]

In enacting IGRA, however, Congress dramatically reorganized the scope of Interior's responsibilities over Indian gaming. Just as God pulled a rib from Adam to make Eve, Congress pulled key responsibilities from the Bureau to construct the portfolio of the NIGC. Congress transferred to the newly created NIGC the Bureau's authority to review tribal gaming ordinances.[30] It also explicitly transferred to the NIGC the Bureau's

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24. 480 U.S. 202 (1987).
25. *Id.* at 217–18.
26. *Id.*
27. *Id.*
28. 25 U.S.C. § 81 (2006).
29. Such review apparently was not performed systematically until sometime in 1984. *See generally* United States *ex rel.* Shakopee Mdewakanton Sioux Cmty. v. Pan Am. Mgmt. Co., 616 F. Supp. 1200, 1205–06 (D. Minn. 1985).
30. 25 U.S.C. § 2710 (2006).

authority under Section 81 to review Indian gaming management contracts[31] and created new standards for approval of such contracts.[32]

IGRA also granted some additional functions to Interior. For example, IGRA gave Interior the responsibility to review tribal-state Class III gaming compacts and to grant a waiver in very limited circumstances to the general prohibition on gaming on lands taken into trust after the enactment of IGRA.[33]

While the Secretary has delegated to the Assistant Secretary or the Bureau most of the important tasks for which the Secretary is ultimately responsible with regard to Indian gaming, the Bureau has no in-house legal counsel. The Office of the Solicitor, which is outside of the Bureau, has the primary responsibility for representing the Bureau in agency litigation and communicating with outsiders regarding matters in litigation in the federal courts.

The lack of in-house legal counsel handicaps the Bureau in two ways. First, the Interior Solicitor reports to the Secretary, not to the Bureau or even the Assistant Secretary of Indian Affairs. This means that the Solicitor views the Secretary to be his primary client, and the Bureau to be a secondary client. This may give the Solicitor a broader perspective on legal questions, but it may well also diminish the Solicitor's responsiveness to the Bureau. This problem is compounded by two other factors. First, the Solicitor is a much higher profile official than the Assistant Secretary for Indian Affairs within Interior and is more likely to be an insider within the Interior leadership team. Second, the Bureau often has weak or no politically-appointed leadership. As a result, the Bureau may have relatively little influence as to many of the highly salient legal issues within Interior involving Indian affairs.

The second handicap resulting from the lack of in-house legal counsel is that only the Solicitor may communicate Interior's preferences about matters in litigation to the Department of Justice. Among other ramifications, this weakens the influence that the Assistant Secretary of Indian Affairs and the Bureau may have over matters in litigation, even if the Bureau is nominally the party to the litigation. For example, when a tribe makes a litigation request of Interior, it may attempt to lobby the Assistant Secretary for Indian Affairs, but it is the Solicitor who will make the decision. In sum, the Solicitor's Office lack of accountability to the Bureau makes the Bureau impotent in countless ways.

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31. *Id.* § 2711(h).

32. *Id.* §§ 2711(a)–(e), 2710(d)(9).

33. *Id.* § 2710(d) (tribal state compacts); *id.* § 2719(b) (an exception to the prohibition of gaming on lands taken into trust after October 17, 1988).

### C. The Department of Justice

In IGRA, Congress did not explicitly discuss the Department of Justice in any significant manner. However, Justice is keenly relevant in Indian gaming for at least two reasons. First, as mentioned above, it provides legal counsel to Interior and the NIGC and routinely represents these agencies in federal court. By leveraging its role as litigation counsel, Justice often broadens its "legal advice" into the policy arena and provides policy directives. Second, Justice has a long-standing independent interest in gambling that has a lengthy historical foundation. Justice has long conducted civil and criminal regulatory enforcement efforts in this area on its own behalf under statutes providing it clear authority.[34] Even aside from criminal enforcement, Justice has taken an active role in gaming throughout its history.

#### 1. Justice as Litigation Counsel

Justice's role as the attorney for the other two agencies makes it a very important institutional player in Indian gaming. Most significant disputes in Indian gaming ultimately find their way into federal court.[35] Because neither the NIGC nor Interior has independent litigating authority, it is Justice that represents both agencies in litigation in federal court.[36] This representation by Justice has several ramifications. First, Justice sometimes plays the referee in substantive disputes between the two agencies.[37] Second, Justice can effectively overrule either agency as to substance when a matter is in court because it is the responsibility of Justice to articulate that agency's position in court. This means that Justice can "confess error" as to a substantive decision made by Interior or the NIGC and effectively reverse the decision. Third, as a regulatory agency with investigative and enforcement powers, the NIGC must sometimes engage the federal courts to enforce subpoenas or regulatory orders. Since this requires action by Justice, Justice may effectively undermine an enforcement initiative by the NIGC.

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34. *See* 15 U.S.C. § 1171 (2006).

35. *See generally* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 857–88 (Nell Jessup Newton et al. eds., 2005).

36. Under 28 U.S.C. § 516 (2006), the "conduct of litigation" involving "the United States, an agency, or officer thereof" is "reserved to officers of the Department of Justice."

37. *See* Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1329 (2003) ("the Justice Department is often used as the arbiter of inter- or intra-agency disputes.").

In sum, the relationship between Justice and these two agencies is radically different than the ordinary relationship between attorney and client. Because Justice has the power to articulate the position of the United States and its agencies in federal court,[38] it also has the power to *define* that position. Since Justice was given this representative role by Congress,[39] an agency cannot simply "fire" its attorney, as a private client could. This means that, once a matter is in court, Justice effectively has the power to make or change agency policy. While Justice does not routinely depart from the represented-agency's position, and indeed usually works to reach consensus with the interested officials as to the appropriate litigating position, it effectively has the power to overrule an agency when it believes it is appropriate to do so. Thus, the ordinary relationship between attorney and client is inverted.

### 2. Justice As Gambling Enforcement Agency

One reason that Justice is sometimes inclined to reject a position articulated by Interior or the NIGC is that Justice has its own policy positions on gaming and gambling. Justice has long had a central role in regulating gambling in the United States and retains the primary role in prosecuting gambling offenses.

Indeed, just as it was the Bureau's and Interior's vigorous support for Indian gaming that won over the Supreme Court in *Cabazon*, Justice's own independent interest in the subject matter left it on the sidelines in that important case. When the case was pending in the Supreme Court, the United States had a request to file an amicus brief. Then-Solicitor General Charles Fried has said that the Criminal Division of the Department of Justice was strongly opposed to Indian gaming and believed it to be in violation of federal criminal laws. [40] Exactly such an argument was asserted by the State of California.[41] Thus, the Criminal Division strongly favored weighing in on the side of California.[42] Having supported and effectively authorized Indian gaming by approval of the tribal bingo ordinances, Interior favored supporting the interests of the Cabazon Band. When the Solicitor General informed a group of federal officials convened to discuss

38. 28 U.S.C. § 516 (2006).

39. *Id.*

40. Discussion with Charles Fried, Beneficial Professor of Law, Harvard Law School, in Cambridge, MA (April 2008).

41. Brief of Appellant, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (No. 85-1708), 1986 WL 728102.

42. *Id.*

the case that he was leaning toward the Criminal Division's position, representatives of Interior reportedly told him that he might as well send the FBI to arrest the Secretary of the Interior; if Indian gaming was a criminal enterprise, then the Secretary had clearly aided and abetted it.[43] At this point, General Fried decided it would be prudent for the United States to take no position in the case.[44]

Justice's responsibilities for gambling are handled primarily by the Criminal Division within the Organized Crime and Racketeering Section ("OCRS"), which enforces the criminal provisions on illegal gambling businesses.[45] Gambling issues have also been handled by other Justice components, including the Environment and Natural Resources Division, which primarily represents Interior and often litigates against state governments related to federal Indian affairs.[46] Because of the frequency of disputes between agencies, the Office of Legal Counsel has often had reason to become involved in the interpretation of IGRA. Likewise, because of the seemingly endless opportunity for appellate litigation in this area, the Solicitor General has also been deeply involved in gaming issues.

Given that it has criminal enforcement responsibility for numerous anti-gambling statutes, it is perhaps not surprising that Justice generally takes a prohibitory view toward gambling. In the Indian gaming context, it has sought to apply broadly the civil and criminal statutes that prohibit gambling and to interpret narrowly the statutes that authorize limited forms of gambling.[47]

While Justice's anti-gambling stance strongly influences Justice's general policy approach toward Indian gaming, Justice has also had a significant and important role to play in protecting Indian gaming. The U.S. Attorney's Offices, which tend to work fairly independently of "main Justice" on criminal matters, have primary responsibility for prosecuting thefts from Indian casinos. Section 23 of IGRA specifically defines three criminal offenses to be prosecuted by Justice.[48] Two of the criminal

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43. *Id.*

44. *Id.*

45. *See* 18 U.S.C. §§ 1511, 1955 (2006); *see also* U.S. ATTORNEYS MANUAL, CRIMINAL RESOURCE MANUAL 2085, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02085.htm.

46. *See, e.g.*, Governor of Kan. v. Kempthorne, 516 F.3d 833 (10th Cir. 2008).

47. *See, e.g.*, Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019 (10th Cir. 2003); United States v. Santee Sioux Tribe of Neb., 324 F.3d 607 (8th Cir. 2003); United States v. 162 Megamania Gambling Devices, 231 F.3d 713 (10th Cir. 2000); Diamond Game Enters. v. Reno, 230 F.3d 365 (D.C. Cir. 2000); United States v. 103 Elec. Gambling Devices, 223 F.3d 1091 (9th Cir. 2000).

48. *See* 18 U.S.C. §§ 1166–68 (2006).

offenses are traditional property offenses involving theft or embezzlement from Indian gaming establishments.[49] As one might expect in an industry involving vast sums of cash, federal prosecutors have been busy enforcing these statutes. By now, Justice has likely prosecuted more than 100 such cases since IGRA was enacted.[50] Moreover, Justice has occasionally interpreted these statutes in a creative manner beyond traditional modes of theft to reach suspects who cheat in Indian casinos.[51]

The third criminal statute enacted as part of IGRA assimilates state gambling laws onto Indian lands for any gambling not performed pursuant to IGRA.[52] This statute, rarely enforced, creates exclusive federal jurisdiction for violation of state gambling laws. It has the practical effect of giving teeth to the Class III tribal-state compact requirement; any Class III-type gaming performed in the absence of a compact theoretically exposes the participants to federal prosecution to the same extent of state prosecution if they were outside of Indian country.[53]

### 3. Justice "Pluralism"

As the foregoing discussion indicates, Justice plays a wide variety of roles in the Indian gaming context. Moreover, because of its sprawling organizational structure and the dispersion of authority within the organization, components of Justice reflect numerous, diverse legal perspectives. In the past ten years, the Office of Solicitor General, the Office of Legal Counsel, the Office of Tribal Justice, several sections of the Environment, and Natural Resources Division (Appellate, Natural Resources, Indian Resources, and the Policy Legislation and Special Litigation), as well as several distinct units of the Criminal Division, have played significant roles in litigation questions involving Indian gaming. In many of these disputes, a local United States Attorney's Office, within a state where litigation is proceeding, may also be heavily interested.

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49. *Id.* § 1167 (defining misdemeanor and felony theft from gaming establishments on Indian lands); *id.* § 1168 (defining two felony levels of theft by officers or employees of gaming establishments on Indian lands).

50. *See generally* GLENN A. FINE, U.S. DEP'T OF JUSTICE, REVIEW OF INDIAN GAMING CRIMES, REP. NO. I-2001-06 (2001), *available at* http://www.usdoj.gov/oig/reports/plus/e0106/results.htm (compiling statistics showing seventy cases prosecuted under §§ 1167 and 1168 from 1992 to 2000).

51. *See, e.g.*, United States v. Moore, 505 F. Supp. 2d 567, 571 (W.D. Wis. 2007) (convicting defendants in bench trial of theft for winning $10,000 by submitting thousands of counterfeit entry forms in a free casino give-away).

52. 18 U.S.C. § 1166 (2006).

53. *Id.* § 1166(b).

Thus, when Justice makes a significant decision with regard to civil litigation, the decision-making process often involves input from numerous components. Because the internal Justice components do not always express unanimous agreement, it is a mistake to view Justice as a monolithic entity. On the other hand, when Justice does formulate a final position, other Justice officials tend to accept that decision, even if they disagree vigorously. Protocol within Justice usually makes it clear which component of Justice has authority to make a final decision on any given issue. Moreover, the culture of Justice is to respect the chain of command. As a result, Justice tends to speak with one clear voice. The "one voice" notion is substantially facilitated by the fact that Justice tends to speak primarily in legal briefs filed in court, creating an opportunity to negotiate and "wordsmith" a unified position that carefully reconciles the nuances of differing legal positions that may exist among Justice's components.

Internal disputes between components at Justice only rarely become public because deliberations within the Justice are subject to attorney-client privilege and because attorneys at Justice tend to respect hierarchy, discretion, and confidentiality.[54] When internal disputes happen, they tend to undermine Justice's position as an advocate.[55]

## II. COOPERATION AND CONFLICT

The practical result of having three different major federal actors involved in the regulation and oversight of Indian gaming is to create a regime in which cooperation among federal actors is exceedingly important. An actor may have tools to address only part of a problem and may need cooperation from the other actors to address the problem fully. Moreover, one of the actors can easily become an obstacle to the other two. Because of the political nature of Indian gaming and public policy, full cooperation among all three actors occurs only rarely. And even when full cooperation is achieved among the executive branch actors, the courts do not always agree.

In some circumstances, the conflict among federal authorities produces a coordinated action problem that creates a sort of federal paralysis and that may well have the effect of maximizing tribal sovereign authority. An example is tribal revenue allocation plans authorized by IGRA. A 2003 Inspector General ("IG") report noted that the Interior has the authority to

54. Diamond Game Enters. v. Reno, 230 F.3d 365, 368 (D.C. Cir. 2000) (citing internal Justice memo noting dispute between the Criminal Division and the Office of Tribal Justice).

55. *See id.*

approve or disapprove such plans, but no authority to take enforcement actions against tribes that fail to comply with an approved plan.[56] While the NIGC had the authority to take enforcement action, the report noted that the NIGC had not engaged in any monitoring of tribal revenue allocation plans for compliance. Indeed, the NIGC responded to the IG's report by suggesting that Interior should undertake compliance monitoring and then refer the case to the NIGC if Interior identifies a problem.[57]

The result of such collective action difficulties may not be normatively problematic. The lack of oversight frees the tribal governments to act as they wish in distributing their gaming revenues. In other instances, however, the collective action problem may serve as an obstacle to federal actors who seek to use oversight powers in addressing circumstances harmful to a tribe.

The scheme of disjointed and sometimes overlapping authority has other implications as well. In some areas, it is unclear which actor possesses regulatory authority. Thus, many aspects of Indian gaming are fraught with uncertainty. Why is this problematic? The answer is that gaming is a commercial activity. Commercial actors prefer predictability and certainty. Indeed, commercial actors may prefer bad rules, which can be evaluated and sometimes contracted around, to uncertain rules, which create ambiguous risk that is much more difficult to "price." As a result, uncertainty has very real economic ramifications. Examples of the problems identified herein will be presented below.

### A. *The Game Classification Wars: Face-Off Between Justice and the NIGC*

In some ways, a problem arose in IGRA because of the lack of careful thought in drafting the statute. This problem is apparent in the provisions on classifications of games. Because the issue has, at times, placed the NIGC and Justice at odds, it is a prime example of the tension between agencies presaged by IGRA.

#### 1. IGRA and the Johnson Act

One of the matters that has vexed federal regulators at the NIGC and Justice for more than a decade is the relationship between Class II

56. U.S. DEP'T OF THE INTERIOR, EVALUATION OF THE BUREAU OF INDIAN AFFAIRS' PROCESS TO APPROVE TRIBAL GAMING REVENUE ALLOCATION PLANS, REP. NO. 2003-I-0055 7–8 (2003), *available at* http://www.doioig.gov/upload/2003-I-0055.pdf.

57. *Id.* at 23.

"technological aids" and the Johnson Act. Though the cases are highly technical and arcane, the overarching issue reflects a statutory turf battle over who has the regulatory authority as to certain gaming machines.

The Johnson Act, originally enacted in 1951, regulates the transportation of "slot machines."[58] It also regulates other machines or devices, such as roulette wheels, that are "primarily . . . [used for] . . . gambling" and which a player can, through the application of an element of chance, win money or property.[59] The Johnson Act is a regulatory statute with criminal sanctions, and it generally prohibits the transportation of such devices, except under narrow circumstances. It also prohibits the mere possession of such devices within Indian country.[60] The Johnson Act was enacted at a time when federal and state governments had adopted a strongly prohibitory stance against gambling and gambling devices. Since the language of the Johnson Act is broad, Justice has applied it broadly.

When IGRA was enacted, it divided profitable forms of gaming into two categories: Class II games, such as bingo and pull-tabs;[61] and Class III games, which is a residual category including all other forms of gaming.[62] Importantly, Congress indicated that bingo is a Class II game "whether or not electronic, computer, or other technological aids are used in connection therewith."[63] However, Class II gaming explicitly does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."[64] Therefore, such devices necessarily fall into Class III. Because of the fluidity of the terms used and because of the very nature of technology, the line between a Class II "electronic, computer, or other technological aid[]" to bingo and a Class III "electronic or electromechanical facsimile or slot machine[] of any kind" is not crystal clear.

If IGRA were the only statute that might be relevant to these questions, the NIGC would have a compelling argument that it has the primary responsibility to identify the murky line between these two classes of gaming. However, since Justice, under the Johnson Act, has long had the responsibility of prohibiting the transportation of slot machines and the possession of such devices in Indian country, it claims a strong interest in the subject. Indeed, the drafters of IGRA recognized the relevance of the

58. Johnson Act of 1951, 15 U.S.C. §§ 1171(a)(1), 1172 (2006).
59. *Id.* § 1171(a)(2).
60. *Id.* § 1175(a).
61. 25 U.S.C. § 2703(7)(A) (2006).
62. *Id.* § 2703(8).
63. *Id.* § 2703(7)(A)(i).
64. *Id.* § 2703(7)(B)(ii).

Johnson Act when they explicitly provided that the Johnson Act would no longer apply to Class III games operated under an effective tribal-state Class III gaming compact.[65] Because IGRA contains no provision abrogating the Johnson Act for Class II gaming, the Department of Justice has argued consistently that it has the authority to apply the Johnson Act to Class II devices that come within its ambit and, further, that any device that does come within this ambit is therefore a Class III device for which a tribal-state compact is required.[66]

These two laws and the uncertain relationship between them set the stage for significant conflict between the NIGC and Justice around the turn of the century. The entire gaming industry developed primarily by exploiting differences in state approaches to gambling, and the Indian gaming industry especially developed by exploiting such differences.[67] The lack of clarity in the laws here spelled opportunity, particularly for gaming machine developers and manufacturers. Gaming machine developers were in a position to test the scope of the terms within IGRA. As gaming machines grew in popularity and became far more profitable than card games played on green felt tables, there was an incentive for gaming machine manufacturers to build a better slot machine for Class III markets and to build something equally attractive to serve Class II markets where tribes lacked gaming compacts.[68] Since the uncertainty in the language in IGRA related to technology, the market sought to produce Class II games that had the touch and feel of Class III slot machines and that would, therefore, attract the same kind of interest.

Despite some early stumbles,[69] the market succeeded in producing cabinet games that had the "look and sound" of slot machines,[70] but that nevertheless could be characterized as Class II games. In the mid-1990s, the NIGC undertook a series of negotiations with a key manufacturer of some of these games; it encouraged the manufacturer to modify the game in such a manner that the NIGC could conclude it was a Class II game, and the

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65. *Id.* § 2703(7)(D).

66. Heidi McNeil Staudenmaier, *Proposed Johnson Act Amendments Seek to "Clarify" Distinction Between Class II and Class III Gaming*, 10 GAMING L. REV. 4, 4–5 (2006).

67. *See, e.g.*, Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285 (2004) (substantial prohibitions of gambling in state laws make Indian gaming viable by creating monopolistic or oligopolistic market environments for Indian casinos).

68. *See generally* I. Nelson Rose, *Technically Not Slot Machines*, 8 GAMING L. REV. 225, 225 (2004).

69. Cabazon Band of Mission Indians v. Nat'l Indian Gaming Com'n, 14 F.3d 633, 636 (D.C. Cir. 1994) (video pull tab machines were "facsimiles of games of chance and therefore [were] Class III gaming" devices); Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994) (same).

70. United States v. Santee Sioux Tribe of Neb., 324 F.3d 607, 615 n.3 (8th Cir. 2003).

NIGC ultimately opined that the game was a Class II game.[71] The NIGC opinions angered Justice.[72] The NIGC generally adhered to its position, but backed away from any claims that its Class II finding made the games lawful under the Johnson Act.[73]

### 2. A Storm of Litigation on Classification

Meanwhile, Justice declined to defer to the NIGC's classification and took a much more aggressive stance as to such games. It soon filed civil forfeiture actions under the Johnson Act in California and Oklahoma.[74] Justice argued that because the putative Class II game played too fast, proceeded at such a manic pace, and offered such high stakes, it could not be characterized as bingo and was not a Class II game.[75] In two cases, Justice lost at the district court level when the district courts granted summary judgment in favor of the tribes and gaming manufacturers, and in both of these cases, Justice lost again on appeal.[76] Ninth Circuit Judge Berzon, writing for the court, rejected Justice's approach to defining bingo as a "nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns" and held that Justice's "efforts to

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71. Letter from Harold Monteau, Chairman, NIGC, to Larry Montgomery, President, Multimedia Games, Inc. (July 10, 1996) (on file with author), *available at* http://nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/bingo/Megamania%20071096.pdf (concluding that MegaMania is a Class II game); Letter from Ada Deer, Acting Chair, NIGC, to Larry Montgomery, President, Multimedia Games, Inc. (April 9, 1997) (on file with author), *available at* http://nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/class%20II%20games/megamania040997.pdf (finding MegaMania to be a Class II bingo game).

72. *See, e.g.*, Letter from Ada Deer, Acting Chair, NIGC, to Larry Montgomery, President, Multimedia Games, Inc. (March 28, 1997), *available at* http://nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/bingo/Changes%20to%20Megamania%20System%203.28.97.pdf (indicating that the NIGC had consulted with the Department of Justice and ordering MegaMania to stop play of the MegaMania game until it had changed certain characteristics).

73. Letter from Penny Coleman, Acting Gen. Counsel, NIGC, to Larry Montgomery, President, Multimedia Games, Inc. (July 23, 1997) (on file with author), *available at* http://nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/Class%20II%20Games/megamania072397.pdf (finding MegaMania to be a Class II bingo game, but refusing to opine as to whether the game is a Johnson Act gambling device and refusing to speak for the Department of Justice).

74. *See infra* notes 75–76.

75. United States v. 103 Elec. Gambling Devices, 223 F.3d 1091 (9th Cir. 2000).

76. *Id.*; United States v. 162 Megamania Gambling Devices, 231 F.3d 713 (10th Cir. 2000).

capture more completely the Platonic 'essence' of traditional bingo" were not helpful.[77]

In both cases, the circuit courts made careful inquiries into the technical requirements of the game of bingo as elucidated in the NIGC regulations.[78] And both courts ultimately relied heavily on the NIGC's views in finding the game at issue to be Class II bingo.[79] Aside from its opinion letters and regulations,[80] the NIGC was a bystander to the litigation.

In these cases, Justice was litigating under its own authority as the agency responsible for enforcing the Johnson Act and was representing the United States as opposed to a client agency. The result was curious. In the first major disagreement between the NIGC and Justice, the NIGC had conceded the field to Justice. Yet the NIGC prevailed when private parties carried the NIGC's banner into battle, as the NIGC watched from the sidelines.

In both cases, the courts held that the Johnson Act provisions do not apply to gaming machines characterized as Class II aids to bingo.[81] In Judge Berzon's words, "IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids."[82] Though this statement resolved the issue in the case, it was patently false, or at least highly exaggerated. If Congress had clearly made such a statement in IGRA, Justice might have agreed that the NIGC was the master of the determinations of the scope of the Johnson Act in the game classification context in Indian gaming. That Congress did explicitly preempt the Johnson Act as to Class III gaming made its application all the more uncertain as to Class II gaming.

The next case to arise was a declaratory action by Diamond Game Enterprises seeking a determination that its Lucky Tab II gaming device was a Class II game.[83] In this case, though the game's manufacturers had sought a classification opinion from the NIGC, the NIGC did not oblige, apparently because the commissioners of the NIGC were divided as to the classification of the game.[84]

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77. 223 F.3d at 1096.

78. *See, e.g.*, 25 C.F.R. § 502.8 (2009).

79. 223 F.3d at 1096–97; 231 F.3d at 722.

80. *See supra* notes 71–73.

81. 223 F.3d at 1101–02 ("IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids."); 231 F.3d at 725 ("Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid.").

82. 223 F.3d at 1101.

83. Diamond Game Enter. v. Reno, 9 F. Supp.2d 13 (D.D.C. 1998).

84. Diamond Game Enter. v. Reno, 230 F.3d 365, 368 (D.C. Cir. 2001).

Though the decisions within the Ninth and the Tenth Circuits might have emboldened the NIGC in its game classification endeavors, these decisions also made clear where the courts would look for expertise on such questions. As a result, Justice aggressively lobbied the NIGC, producing gridlock in decision-making at the NIGC. Indeed, at least one member of the NIGC urged a gaming manufacturer to go to court for a gaming determination.[85]

Though it was losing in similar cases under the Johnson Act in the Ninth and Tenth Circuits, Justice prevailed in the district court in *Diamond Game Enter. v. Reno*.[86] When the case reached the D.C. Circuit, however, the court was highly critical of the NIGC. The court was disappointed that it was forced to proceed without the views of the agency charged with implementing IGRA, and noted "we have no idea what the [NIGC] thinks about the policy questions presented by the Lucky Tab II."[87] Though Justice vigorously argued that the game was a Class III electronic facsimile and that the speed of play of the game would make it easier "to lose the rent money,"[88] the D.C. Circuit concluded, with little difficulty, that Lucky Tab II was a Class II game.[89]

The decision in *Diamond Game* highlighted to the NIGC the need to take a more active and central role in the classification of games. Disagreeing with Justice is a sensitive matter, however, because of the attorney-client problem discussed above. The NIGC lacks the authority to fire Justice as its attorney, or even to express itself independently of Justice, at least regarding matters in court. Justice has the actual (though perhaps not legitimate) ability to dictate the NIGC's position in litigation. Moreover, if the NIGC expresses itself outside of court in a manner that Justice views as undermining it in litigation, the NIGC takes the risk that Justice will simply refuse to take the NIGC's cases, or that Justice will confess error any time a target of the NIGC's enforcement challenges that enforcement in court. In sum, the dynamics require cooperation on many levels between the NIGC and Justice.

Following the *Diamond Game* decision, the NIGC was in a bind. Though it had not classified the Lucky Tab II game at issue in *Diamond Game*, it had classified a very similar game, called Magic Irish Bingo, as a Class III

85. *See* United States v. Santee Sioux Tribe of Neb. (*Santee III*), 324 F.3d 607, 609 (8th Cir. 2003).

86. 9 F. Supp.2d at 13.

87. 230 F.3d at 366, 369.

88. *Id.* at 371.

89. *Id.*

game.[90] Its classification of Magic Irish Bingo had been based, at least in part, on the now-repudiated district court decision in *Diamond Game*.[91] Justice was then defending litigation in Oklahoma over the Magic Irish Bingo opinion and continuing to press its own interpretation of the Johnson Act. The bind for the NIGC was this: given the D.C. Circuit's decision in *Diamond Game*, it would be exceedingly difficult for the NIGC to find that game unlawful. If it continued to oppose games similar to the game at issue in *Diamond Game*, it would essentially hand Diamond Game a monopoly on those kinds of gaming machines.

### 3. The NIGC Breaks Ranks with Justice

Though the NIGC did not withdraw its decision with respect to the classification of Magic Irish Bingo, it did communicate to the parties that it was willing to accept the D.C. Circuit's decision in *Diamond Game* that Lucky Tab II was a Class II technological aid.[92] Though the NIGC's new position had dramatically undermined the position of Justice, Justice continued to litigate the issue. Shortly thereafter, the parties in the Magic Irish litigation stopped using the Magic Irish game and switched to the Lucky Tab II.[93] The NIGC's position had substantially undermined Justice's litigation efforts. The Tenth Circuit, in declining to find the matter moot, ultimately ruled against Justice in *Seneca-Cayuga*.[94] In its lengthy decision, the Tenth Circuit again concluded, much more clearly and forcefully than in its previous decision on this issue,[95] that the Johnson Act was not applicable to Class II technological aids.[96]

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90. *See* Letter from Kevin K. Washburn, Gen. Counsel, NIGC, to Stephen A. Lenske, Esq. (Feb. 29, 2000), *available at* http://nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/bingo/magicalirishinstantbingo022900.pdf (concluding that "Magic Irish Bingo" was a Class III gaming device).

91. *See id.*

92. *See, e.g.*, Letter from Kevin K. Washburn, Gen. Counsel, NIGC, to Cyrus Schindler, President, Seneca Nation of Indians (May 31, 2001), *available at* http://nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/Class%20III%20Games/breakthebank053101.pdf (discussing *Diamond Game* opinion); Letter from William F. Grant, Senior Attorney, NIGC, to John J. Gruttadaurio, Esq. (Mar. 21, 2001), *available at* http://nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/Class%20II%20Games/lucktabII032101.pdf (same).

93. Seneca-Cayuga Indian Tribe of Okla. v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019, 1027 (10th Cir. 2003).

94. *Id.* at 1027, 1044.

95. United States v. 162 Megamania Gambling Devices, 231 F.3d 713, 723–25 (10th Cir. 2000).

96. *Seneca-Cayuga*, 327 F.3d at 1030–35.

Meanwhile, the NIGC's acceptance of the *Diamond Game* decision undermined Justice's position in longstanding litigation against the Santee Sioux in Nebraska. In 1996, the NIGC had ordered closure of the Santee Sioux gaming operation for operation of Class II gambling devices without a compact.[97] Although the tribe initially complied, it soon reopened its facility, prompting Justice to seek injunctive relief to enforce the NIGC Chairman's closure order.[98] When the district court granted an injunction, the tribe refused to obey and the government moved for contempt, eventually succeeding in obtaining a contempt judgment in excess of $1 million.[99] In an effort to settle the matter, the Santee Sioux consulted the NIGC. As the Eighth Circuit related, "the NIGC's Chief of Staff wrote a letter to the Tribe's legal counsel suggesting that the Tribe install and operate the Lucky Tab II dispensers. The NIGC thereafter dissolved its closure order because it took the position that the Lucky Tab II is not a class III gaming device."[100] Justice strongly disagreed with the NIGC's dissolution of the closure order. Despite the NIGC's clear position, Justice continued to contend in the Eighth Circuit that Lucky Tab II was a Class II gaming device and that it was prohibited by the Johnson Act.[101] The Eighth Circuit ultimately rejected Justice's contentions.[102]

After the *Diamond Game* decision and prior to the circuit court decisions in the Magic Irish and *Santee Sioux* cases, the NIGC slightly modified its longstanding definitional regulations to clarify the relevance of the Johnson Act to the NIGC gaming classifications and to distance itself from Justice's approach.[103] This action, no doubt, further insured Justice's defeat in those cases.[104] Faced with five appellate losses in four different circuits, Justice sought Supreme Court review in both Magic Irish and *Santee Sioux* on the basis of an asserted circuit conflict regarding a narrow technical

97. United States v. Santee Sioux Tribe of Neb. (*Santee I*), 135 F.3d 558, 564–65 (8th Cir. 1998).

98. *Id.*

99. *See generally* United States v. Santee Sioux Tribe of Neb. (*Santee II*), 254 F.3d 728, 735–37 (8th Cir. 2001).

100. *Santee III*, 324 F.3d 607, 609 (8th Cir. 2003).

101. *Id.* at 611.

102. *Id.* at 612.

103. The action was controversial within the Commission, producing a dissent by the Chairman. Definitions: Electronic, Computer or other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166-02 (June 17, 2002) (to be codified at 25 C.F.R. §§ 502.7–502.9).

104. *See, e.g.*, *Santee III*, 324 F.3d at 615–16 (describing the new regulations and concluding that "the NIGC has now given its imprimatur to these types of machines").

interpretation of the Johnson Act and IGRA.[105] The Supreme Court denied both certiorari petitions,[106] effectively ending the litigation chapter on this issue.

### 4. Understanding the Cultural Gap Between the NIGC and Justice

While it is possible to conclude that Justice behaved unreasonably in this litigation, Justice presented a credible legal argument. Given the lack of clarity in IGRA as to how to interpret it in relation to the Johnson Act, reasonable minds could differ as to the proper application of the Johnson Act with regard to Indian gaming. This, however, does not explain why Justice was so aggressive. One could argue that Justice has an interest in protecting its authority and a duty to read its own statutes broadly to effectuate Congressional intent. If distribution of such power is a zero-sum game, then Justice might be inclined to read broadly the statutes over which it exercises authority and to read narrowly the statutes over which other agencies exercise primary authority. Though this answer might formally answer the question, the real explanation of Justice's aggressiveness toward Indian gaming may lie deep in Justice's cultural DNA.

Justice has a longstanding and deeply held antipathy toward gambling. A defining moment for Justice was Attorney General Robert Kennedy's efforts to combat organized crime, a component of which involved gambling enforcement.[107] In doing so, Robert Kennedy dramatically increased the stature of the Department in the public eye, giving it a much higher enforcement profile than it ever had before. Indeed, Kennedy made enactment of the Wire Act a centerpiece of his efforts.[108]

In contrast to Justice's central role of prohibiting illegal gambling, the NIGC was born out of a more permissive attitude toward gambling. Moreover, Justice is a law enforcement agency. It is affected by the role it plays as a lawyer. The criminal prosecutor at Justice is not accustomed to

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105. Petition for Writ of Certiorari, Ashcroft v. Seneca-Cayuga Tribe of Okla., 540 U.S. 1218 (2004) (No. 03-740), 2003 WL 22873066; Petition for Writ of Certiorari, United States v. Santee Sioux Tribe of Neb., 540 U.S. 1229 (2004) (No. 03-762), 2003 WL 22873068.

106. Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019 (10th Cir. 2003); United States v. Santee Sioux Tribe of Neb., 135 F.3d 558 (8th Cir. 1998); Petition for Writ of Certiorari, *Ashcroft*, 540 U.S. at 1218 (No. 03-740); Petition of Writ of Certiorari, *Santee Sioux Tribe of Neb.*, 540 U.S. at 1229 (No. 03-762).

107. H.R. REP. NO. 87-967, at 4–6 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2633–34 (letter from the then-Attorney General Robert F. Kennedy and proposed legislation that would ultimately become the Wire Act 18 U.S.C § 1084 (2006)).

108. *See generally* DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET (2005).

being lobbied by affected members of the industry and may believe it improper even to speak to lobbyists. Likewise, the civil litigator at Justice generally may not speak directly to an opposing party without counsel present. In contrast, lobbying by the affected industry happens often at a regulatory agency, like the NIGC. The NIGC is thus likely more inclined than Justice to be responsive to regulated entities.

While the NIGC tends to be somewhat responsive to regulated entities, Justice is tone deaf to the political realities in the Indian gaming industry. After losing repeatedly in the litigation discussed above, Justice drafted a bill that would have achieved legislatively what it could not persuade the courts to accept through litigation.[109] However, Justice was apparently unsuccessful in finding a member of Congress willing to introduce the bill and it failed to get any formal hearing. Thereafter, Justice came full circle back to the NIGC and attempted to persuade the NIGC to adopt rule changes to accomplish some of Justice's purposes.[110] Ultimately, after substantial pushback from the Indian gaming industry, the NIGC declined to adopt such an approach through formal rules.[111]

The relationship between Justice and the NIGC has been rocky, but it is only one side of the federal triangle. As the next section demonstrates, the relationship between the NIGC and Interior has also been sometimes rocky.

### B. *DOI v. the NIGC: Establishing the NIGC's Independence of Interior in Cobell v. Secretary of the Interior*

The relationship between Interior and the NIGC, while sometimes cooperative, was tested as part of the ongoing litigation in *Cobell v. United States*.[112] This litigation helped establish the independence of the NIGC and showcased dramatic differences in the roles of the two agencies.

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109. Letter from William. E. Moschella, Assistant Att'y Gen., to Richard B. Cheney, President, United States Senate (June 7, 2006), *available at* http://www.usdoj.gov/otj/amendments2006.pdf. The bill was entitled, the "Gambling Devices Act Amendments of 2006."

110. *See, e.g.*, Classification Standards for Bingo . . When Played Through an Electronic Medium, 71 Fed. Reg. 30238–61 (May 25, 2006) (to be codified at 25 C.F.R. pt. 502).

111. *See* Press Release, Nat'l Indian Gaming Comm'n, NIGC Approves Class II Minimum Internal Control, Technical Standards (Sept. 24, 2008), *available at* http://www.nigc.gov/ReadingRoom/PressReleases/ PR103092008/tabid/885/Default.aspx; Press Release, Nat'l Indian Gaming Comm'n, Notice of Withdrawal of Proposed Rule (Sept. 24, 2008), *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/pressreleases/FacsimileWithdrawal.pdf.

112. To date, this case encompasses numerous published opinions in the D.C. Circuit and numerous opinions and orders below. *See* Cobell v. Salazar (*Cobell IV*), 573 F.3d 808 (D.C Cir.

In IGRA, Congress created the NIGC and located it "within" the Department of the Interior.[113] However, the NIGC is an independent federal regulatory agency occupying the same unusual governmental space occupied by numerous other "fourth branch" agencies, such as the Federal Energy Regulatory Commission (established within the Department of Energy).[114] The NIGC Chairman is presidentially-appointed and must be confirmed by the Senate; the Associate Commissioners are appointed by the Secretary of the Interior.[115] The independence of the Chairman and Commissioners, and thus the agency, is established by the language in IGRA that provides that none of these officials can be removed, except for cause.[116] Such independence, however, is limited by practical needs and political necessity.

From the late 1990s up to the present, Interior has been embroiled in *Cobell v. United States*, one of the most complex Indian trust cases ever to be filed against the United States.[117] On December 17, 2001, Judge Royce Lamberth of the U.S. District Court for the District of Columbia, who was then presiding over the *Cobell* case, ordered Interior to disconnect entirely from the Internet.[118] The justification for the order was the court's concern that the lack of security on Interior computers gave rise to a fear that hackers could access Interior computers and manipulate Indian trust data.[119]

In January 2002, during a routine meeting at Interior between the NIGC Office of General Counsel and BIA's Indian Gaming Management Staff, attorneys from the NIGC mentioned an item that they had seen on an Internet website about a pending gaming matter that was relevant to both offices. Soon after the NIGC attorneys returned to the NIGC, they received a call from attorneys within the Solicitor's Office of Interior, expressing concern that the NIGC remained connected to the Internet in violation of

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2009); Cobell v. Kempthorne (*Cobell III*), 455 F.3d 301 (D.C. Cir. 2006); Cobell v. Norton (*Cobell II*), 392 F.3d 461 (D.C. Cir. 2004), Cobell v. Babbitt (*Cobell I*), 240 F.3d 1081 (D.C. Cir. 2001).

113. *See* 25 U.S.C. § 2704(a) (2006).

114. Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1141–44 (2000).

115. 25 U.S.C. § 2704(b)(1) (2006).

116. *Id.* § 2704(b)(6).

117. *See Cobell III*, 455 F.3d at 302 (partial listing of citations).

118. Cobell v. Norton, 274 F. Supp. 2d 111, 135 (D.D.C. 2003) (discussing genesis of injunction requiring the Department of the Interior to "immediately disconnect from the Internet all Information Technology Systems within [its] custody or control . . . until such time as the Court approves their reconnection to the Internet").

119. *Id.* at 127, 135–36.

Judge Lamberth's order in *Cobell*.[120] The attorneys asserted that, as a component of Interior, the NIGC was subject to the order.[121]

Furious negotiations and analysis followed while the NIGC reviewed the *Cobell* order and sought guidance from Justice as to whether the order applied to the NIGC.[122] The NIGC did not possess Indian trust account data.[123] Moreover, because of the nature of the Indian gaming industry and the responsibility to process literally hundreds of gaming employee background investigation applications each week, if the *Cobell* order had been applicable to the NIGC, it would have substantially interrupted the NIGC's ability to meet its regulatory responsibilities. Moreover, the NIGC's General Counsel was concerned that Interior was interpreting the *Cobell* order in a manner designed to inflict maximum pain within Indian country to bring negative pressure to bear on Judge Lamberth and the *Cobell* plaintiffs.[124]

The attorneys at the Solicitor's Office asserted fears that the Secretary might be held in contempt of court if the NIGC did not immediately comply with the order.[125] The NIGC responded that it was an independent agency, that it was not a named party in *Cobell*, and that it had never previously been consulted by Justice or Interior about the case, nor had it participated in any way.[126]

After more than a week of heated discussions in which Justice was brought into the conversation, the NIGC General Counsel had a final conversation on a Friday afternoon with several attorneys at Interior and Justice working on the case.[127] During the conversation, Phil Hogen, then Associate Solicitor of Indian Affairs at Interior, attempted to strike a conciliatory tone. To the NIGC General Counsel, he said, "[l]ook, we are up to our [necks] in alligators and we are arguing about how to drain the swamp; let's just work together and follow the order until we can all find a

120. Some of these facts are recollections of the author, who was then the General Counsel of the NIGC.

121. *See* Letter from Kevin K. Washburn, Gen. Counsel, Nat'l Indian Gaming Comm'n, to Alan Balaran, Cobell Special Master (Jan. 26, 2002) (on file with author).

122. *Id.* (outlining the content of those discussions).

123. *Id.*

124. For two different views of Judge Lamberth's handling of the case, *compare* Richard J. Pierce, Jr., *Judge Lambert's Reign of Terror at the Department of Interior*, 56 ADMIN. L. REV. 235 (2004), *with* Jamin B. Raskin, *Professor Richard J. Pierce's Reign of Error in the Administrative Law Review*, 57 ADMIN. L. REV. 229 (2005).

125. Recollection of the author, who was then the General Counsel of the NIGC.

126. Letter from Kevin K. Washburn, Gen. Counsel, Nat'l Indian Gaming Comm'n, to Sandra Spooner, Cobell Lead Attorney, U.S. Dep't of Justice (Jan. 22, 2002) (on file with author).

127. Recollection of the author.

way to get out from under it."[128] The NIGC General Counsel responded with an analogy from a different aquatic environment: "On the contrary, Interior seems to have purchased tickets for a ride on the Titanic, and you are trying to sell one of them to the NIGC. We've seen how that one ended. We saw the movie. We are not inclined to buy a ticket and go down with you."[129] Because the meeting ended with no capitulation by the NIGC, the attorneys at the Solicitor's Office warned that the Secretary would be sending a letter that would order the NIGC Chairman to disconnect from the Internet.

Later that Friday evening, Secretary Gail Norton faxed a letter to the NIGC referring to the lengthy communications with the General Counsel and ordered the NIGC Chairman Montie Deer to disconnect the NIGC's Internet connection immediately.[130] This letter placed the NIGC in an awkward position. The Secretary, despite being a Cabinet-level official, lacked any legal authority to order the Chairman of the NIGC to act. But because the matter was in litigation, and because Justice had been working closely with Interior, Justice might well feel duty-bound to honor the position that had been adopted at the very highest level at Interior and might overrule the NIGC's position. Because it was a matter in litigation and Justice was acting within its authority to represent the NIGC, Justice essentially could have consented on behalf of the NIGC to a finding that the order applied to the NIGC. NIGC might well have been bound by its attorney's assertion.[131]

To avoid taking such a risk, the NIGC responded early Saturday morning by filing its own letter brief with the *Cobell* Special Master.[132] In the letter brief, the NIGC asserted that it sought to be immediately forthcoming with the court in light of the concern that the court might interpret the order to apply to the NIGC.[133] In the brief, the NIGC waived its attorney-client privilege regarding communications on the matter, attached copies of its lengthy written correspondence with Interior and Justice, provided arguments as to why the order should not apply to the NIGC, and finally,

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128. *Id.*

129. *Id.*

130. Letter from Gale A. Norton, Sec'y, Dep't of Interior, to Montie R. Deer, Chairman, Nat'l Indian Gaming Comm'n (Jan. 25, 2002) (on file with the author).

131. *See* HAROLD J. KRENT, PRESIDENTIAL POWERS 65 (2005) (noting that "[w]hen two agencies' views differ, then either the Department of Justice or the courts must resolve the clash").

132. Letter from Kevin K. Washburn, Gen. Counsel, Nat'l Indian Gaming Comm'n, to Alan Balaran, Cobell Special Master (Jan. 26, 2002) (on file with author).

133. *Id.*

offered to disconnect from the Internet immediately if the Special Master deemed such action mandatory according to the order.[134]

After reviewing the NIGC's letter brief, the Special Master contacted the NIGC on Saturday afternoon for more information.[135] On Monday morning, the NIGC filed a letter providing examples of different sorts of data in its information systems that might fall within the broadest interpretation of the *Cobell* order,[136] and later provided additional information about its information systems security.[137]

The denouement to the NIGC's brush with *Cobell* was the court's decision not to order the NIGC to follow the *Cobell* order.[138] The court's decision to take no action vindicated the NIGC Chairman's decision to decline to follow a direct order by Secretary Norton.

Because it was the first time the NIGC Chairman had rejected a direct order from the Secretary of the Interior, the *Cobell* episode clarified the NIGC's independence from Interior. As a practical matter, the NIGC's action also reflected its political independence in high profile litigation. In defying the Secretary, the NIGC signaled that it took its responsibility seriously to provide effective regulation of Indian gaming, and this responsibility took precedence over blind loyalty to another agency that might have been acting for political purposes.

This episode provided insight on the precarious position that the NIGC occupies with respect to the attorneys at Justice. Only by fortunate circumstances was the NIGC able to outmaneuver Justice and Interior and approach the court directly. The NIGC's lack of independent litigation authority, its small size, and its political independence from Interior make it vulnerable when it attempts to take a position in court that is at odds with Interior. Because Justice and Interior are part of the Executive branch, the NIGC's very independence sometimes makes it the "odd man out" in its relational triangle with Justice and Interior.

The insight of this episode is that IGRA failed to give the NIGC independent litigation authority, rendering the NIGC subject to the views of Justice and, to a lesser extent, Interior, regarding the exercise of the NIGC's mission. Given the highly political nature of many aspects of Indian gaming, the lack of independent litigation authority means that some of the NIGC decisions will occasionally be driven by political considerations at

134. *Id.*

135. Recollection of the author.

136. Letter from Kevin K. Washburn, Gen. Counsel, Nat'l Indian Gaming Comm'n, to Alan Balaran, Cobell Special Master (Jan. 28, 2002) (on file with author).

137. Recollection of the author.

138. *Id.*

Justice or Interior, rather than what is best for the regulation of Indian gaming.

Congress has given some agencies independent litigating authority.[139] Presumably, one reason that the drafters of IGRA created the NIGC as an independent agency was to professionalize its focus as a regulatory body and to make the agency less subject to the political whims of any given administration. If the drafters of IGRA were truly concerned about keeping political judgments out of the regulation of Indian gaming, however, Congress should have granted the NIGC independent litigating authority.

### C. *Indian Lands Issues: Conflict Between Interior and NIGC*

Prior to IGRA, the Secretary of the Interior had broad authority under Section 5 of the Indian Reorganization Act ("IRA") to acquire lands for Indian tribes by virtually any voluntary means.[140] The general purpose of the IRA, enacted in 1934, was to reject the allotment policies and halt the erosion of the tribal land base that had occurred during the allotment era.[141] During the era immediately prior to adoption of the IRA, from roughly 1887 to 1934, approximately 90 million acres was lost to Indian tribes.[142] The IRA sought to stem the losses, and, moreover, in Section 5, Congress gave the Secretary the discretion to acquire lands for Indians to reverse some of the land losses.[143]

When IGRA was enacted, Congress appears to have sought to limit expansion of gaming, but it evinced no intent to limit the acquisition of trust lands for Indian tribes. IGRA offered two simple and relatively straightforward rules designed to address both interests.[144] IGRA provided, first, that Indian tribes can conduct gaming only on "Indian lands,"[145] and,

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139. Congress has conferred independent litigation authority on the Equal Employment Opportunity Commission, the Federal Election Commission, the Federal Trade Commission, the National Labor Relations Board, and the Securities and Exchange Commission, to name a few examples. *See* KRENT, *supra* note 131, at 64.

140. 25 U.S.C. § 465 (2006).

141. Mary Jane Sheppard, *Taking Indian Land into Trust*, 44 S.D. L. REV. 681, 681 n.1 (1999).

142. *The Purposes and Operation of the Wheeler-Howard Indian Rights Bill: Hearings on H.R. 7902 Before the S. and H. Comms. on Indian Affairs*, 73d Cong. 15–18 (1934) (memorandum of John Collier), *reprinted in part in* DAVID GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 171 (4th ed. 1998).

143. 25 U.S.C. § 465 (2006).

144. *Id.* §§ 2710(b)(1), 2710(d)(1).

145. According to the definition provided in the statute: "The term 'Indian lands' means—(A) all lands within the limits of any Indian reservation; and (B) any lands' title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held

second, that no tribe can conduct gaming on lands taken into trust outside of Indian reservations after the enactment of IGRA in 1988.[146] Both rules were generally designed to prevent the expansion of gambling. The first rule was presumably designed to ensure that Indian tribes could continue to conduct and expand Indian gaming within their existing lands, but at the same time create a clear geographical or territorial limit to growth in Indian gaming. By ensuring that gaming generally could not be conducted on land taken into trust after the enactment of IGRA in 1988, the second rule presumably sought to preserve the ability to take land into trust without concern that such acquisitions would cause further expansion of gambling.

Ultimately, IGRA's structure fulfilled neither of these apparent goals well. Moreover, IGRA's structure has had the effect of undermining Congress's efforts in the IRA to assist tribes in reclaiming lands lost during the allotment era. This section further explains some of these problems.

### 1. IGRA Section 20 and IRA Section 5.

IGRA authorizes gaming only on Indian lands.[147] It defines "Indian lands" as "lands within the limits of any Indian reservation,"[148] tribal or individual trust lands,[149] or tribal or individual fee lands subject to a federal restriction on alienation, as long as an Indian tribe has governmental power to regulate.[150] While one could quibble with the way that the NIGC has interpreted IGRA in this area,[151] the rule is relatively clear. Section 20 of

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by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." *Id.* § 2703(4) (2006).

146. *Id.* § 2719(a).

147. *Id.* § 2702(3).

148. *Id.* § 2703(4)(A).

149. *Id.* § 2703(4)(B).

150. *Id.*

151. *Id.* As this section indicates, IGRA explicitly requires a tribe to demonstrate that it exercises governmental powers over fee lands subject to a federal restriction on alienation. This is a sensible requirement in light of the fact that a tribe has significant regulatory responsibilities with regard to Indian gaming. A tribe cannot meet this responsibility if it lacks governmental authority with regard to the land in question. In sum, IGRA provides that a tribe may not label an activity "Indian gaming" if it lacks the authority to regulate that activity.

IGRA differentiated between fee lands and trust and reservation lands; however, IGRA did not impose a requirement of proof of governmental authority over reservation lands; it assumes it. *Id.* Likewise, IGRA did not clearly impose such a requirement on trust lands that are outside of reservations. Very early on, however, the NIGC made the further decision to require tribes to prove tribal governmental authority before conducting gaming on land held in trust by the federal government. 25 C.F.R. § 502.12 (1999). *See* Definitions under the Indian Gaming Regulatory Act, 57 Fed. Reg. 12,382, 12,388, 12,393 (Apr. 9, 1992) (to be codified at 25 C.F.R. pt. 500). Congress has long distinguished between fee lands and trust lands for purposes of

IGRA imposes a further restriction: No gaming shall occur on lands taken into trust by the Interior Secretary after the enactment of IGRA in 1988.[152] If these two simple rules were the only rules to govern new Indian gaming lands acquisitions, however, they would unduly and unfairly narrow gaming opportunities for certain tribes.[153] To address this problem, Congress created numerous exceptions to the prohibition on gaming on lands taken into trust after 1988.[154]

Indeed, the Section 20 prohibition on gaming lands acquired after IGRA's 1988 enactment has a certain "Swiss cheese" quality, creating several holes in the basic prohibition. The exceptions in Section 20 help to make this section one of the most convoluted and poorly drafted provisions of IGRA.[155] The graceless drafting in Section 20 reflects political wrangling over the scope of the prohibition and the reach of its exceptions. As in many laws, statutory elegance was sacrificed for political expediency.

Although Section 20's exceptions are numerous, each is fairly circumscribed and relatively clear. All of them consist of non-waivable legal rules, and almost none provide any room for agency discretion regarding the prohibition or its exceptions. In only one limited circumstance does IGRA provide federal agency discretion to waive the prohibition on lands taken into trust after IGRA's enactment. Under the so-called "two-part" test, the Secretary may waive the prohibition on gaming on such lands if: 1) after consulting with the tribe and state and local officials, the Interior

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tribal authority. *See, e.g.*, 18 U.S.C. §§ 1151(a)–(b) (2006) (general definition of Indian country). *See also id.* §§ 1154, 1156 (Indian liquor laws). Thus the NIGC probably need not have sought to require proof of governmental authority over trust lands. Since tribal governments generally have authority over their federal trust lands, and because federal trust status generally preempts state authority on Indian trust lands, proof that an Indian tribe holds lands in trust may be adequate to prove that the tribe has governmental authority over such lands. The wording of IGRA on this point may have given rise to confusion or uncertainty.

152. 25 U.S.C. § 2719(a) (2006).

153. For example, tribes not recognized and without a reservation at the relevant time in 1988 might never be able to conduct gaming. *See id.* § 2719(b)(1)(B)(iii).

154. Restrictions are imposed on Indian lands acquired after October 17, 1988. *See generally id.* § 2719.

155. A close competitor for most convoluted drafting, however, is Section 11 of IGRA which addresses tribal gaming ordinances, revenue allocation plans, tribal state compacts, and, curiously, Class III management contract requirements. *See id.* § 2710(d)(9). The location of the Class III management contract requirements is curious because the very next section of IGRA, Section 12, is styled "Management Contracts" and it deals fairly comprehensively with the general management contract requirements. Class III gaming management contracts are often the most lucrative and "high stakes" contracts in Indian gaming. Burying the provisions for Class III management contract review in a convoluted section outside the "management contracts" section of IGRA has confused more than a few experienced Indian gaming attorneys who had difficulty determining the source of the NIGC's authority over Class III management contracts.

Secretary determines that it would be in the best interest of the tribe and not detrimental to the surrounding community; and 2) the governor of the state in which the land lies concurs in the Secretary's determination.[156] Given the required consultation in making the determination, this exception is inherently political in nature. Furthermore, given the requirements of consultation of local and state officials, assessment of best interests, and gubernatorial concurrence, the discretion granted therein is quite limited, effectively to non-controversial applications.

While Section 20 is ungainly, it is relatively easy to apply. Moreover, in light of the basic clarity in both the general rule and its exceptions, Congress left little need for any expert agency interpretation of the scope of the exceptions. Except for the narrow exception requiring gubernatorial concurrence, Section 20 affords no particular authority or interpretive discretion to any federal agency.[157] Moreover, while Section 20 prohibits gaming on lands taken into trust after IGRA's 1988 enactment, Section 20 also expressly provides that it does not "affect or diminish" the Secretary's "authority and responsibility" to take land into trust for Indian tribes.[158]

In sum, IGRA seems to be structured to minimize agency discretion and to render gaming a non-issue for the Secretary when making decisions on land-into-trust applications. Indeed, while IGRA limits a tribe's ability to conduct gaming on such lands, it does not affect the Secretary's authority to take land into trust in any way.

### 2. Political and Legal Influences in Land-into-Trust

Perhaps ironically, IGRA can be interpreted to gently encourage the Interior Secretary to take land- into- trust. Prior to IGRA, the Secretary had the discretion to take land-into-trust.[159] In IGRA, Congress characterized this discretion as a power and also a "responsibility."[160]

Prior to the rise of Indian gaming, the Secretary's ability to meet its "responsibility" to take land into trust was practically limited by rare and limited federal appropriations for such endeavors. Land-into-trust even outside the gaming context is sometimes controversial because it shifts authority away from state and local governments and toward the federal and tribal governments. As a result of gaming, however, some tribes have substantial resources of their own to acquire land. If the acquisition is one

156. *Id.* § 2719(b)(1)(A).
157. *Id.*
158. *Id.* § 2719(c).
159. Indian Reorganization Act of 1934 § 5, 25 U.S.C. § 465 (2006).
160. 25 U.S.C. § 2719(c) (2006).

that might fall under an exception to the Section 20 prohibition, a tribe may well have access to investors willing to fund land acquisition in return for a stake in a gaming venture. Because many land-into-trust applications require no federal appropriation, the natural limits on such applications have been raised substantially.

In generally providing that lands taken into trust are not available for gaming, IGRA seems to have sought to shield such decisions from political judgments related to gaming. Yet though IGRA has seemingly attempted to shield land-into-trust applications from additional controversy related to gaming, expansion of gaming is often controversial. Given that the Secretary's "responsibility" to acquire land-into-trust for tribes is subject to such broad discretion, it is naïve to think that the Secretary will ignore political considerations related to gaming in making such decisions. Since land-into-trust always requires an exercise of discretion and a positive action by a federal official, political pressure may well be brought to bear on that official. Thus, instead of embracing the fact that IGRA sought to shield Interior from the political ramifications of land-into-trust related to gaming, Interior has embraced this activity as a political endeavor.

What does this mean? At Interior, the first response to controversy related to Indian gaming, at least by the politically appointed management, is to move very slowly.[161] As a result, Interior has moved much more deliberatively (i.e., slowly)[162] with regard to land-into-trust. Interior has centralized final land-into-trust decisions for gaming in BIA headquarters in Washington, D.C., and has repeatedly grappled with policy questions on land-into-trust applications.[163]

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161. For an example in the Indian gaming context, consider the length of time it took Interior to implement secretarial alternative compacting procedures after the *Seminole Tribe* decision in 1996. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). Though the procedures were suggested in May of 1996, closely on the heels of the decision, and the final rule was adopted less than three years later, *see* Class III Gaming Procedures, 64 Fed. Reg. 17,535 (April 12, 1999) (codified at 25 C.F.R. pt. 291 (2009)), the Seminole Tribe had to file an action in March of 2007 to get the Secretary to move on issuing procedures. *See* Fla. House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008).

162. *See, e.g.*, Indianz.com, *Gaming Clouds Already Lengthy Land-into-Trust Process*, Sept. 15, 2005, http://64.38.12.138/News/2005/010327.asp (last visited Mar. 28, 2010) (quoting BIA official George Skibine that "rumors of a moratorium on land-into-trust decisions are unfounded," but admitting that delays make it look like nothing is happening at Interior).

163. *See* Acquisition of Title To Land in Trust, 66 Fed. Reg. 56,608 (Nov. 9, 2001) (codified at 25 C.F.R. pt. 151 (2009)) (explaining the aborted attempt to adopt formal regulations on land into trust specifically addressing off-reservation acquisitions for gaming); *see also* Memorandum from Carl Artman, Assistant Sec'y, U.S. Dep't of the Interior, to Reg'l Dirs., Bureau of Indian Affairs, and George Skibine, Office of Indian Gaming, Guidance on taking off-reservation land into trust for gaming purposes (Jan. 3, 2008), *available at* http://www.indianz.com/docs/bia artman010308.pdf.

3. Interior and the NIGC

In IGRA, the NIGC was given the power to regulate gaming on Indian lands.[164] By necessity, as a matter of jurisdiction, the NIGC may proceed only if it is satisfied that lands are "Indian lands."[165] One great irony of Indian gaming regulation—and a source of chagrin to some federal and state officials—is that the NIGC consistently takes the position that it lacks authority over any unlawful gaming by Indian tribes that does not occur on Indian lands.[166] While this position is probably sound as a matter of legal interpretation of IGRA, it effectuates a surrender of a key area of significant regulatory interest to a gaming regulator. The practical ramification is to leave enforcement of such matters to state and federal enforcement agencies that may well be less sophisticated about Indian jurisdictional issues. In the end, the NIGC's position may enhance tribal sovereignty by creating confusion among unsophisticated actors over who has authority to take action.

The NIGC's need to determine its own jurisdiction means that making an "Indian lands determination" is sometimes crucial to performing its work.[167] As a result, it sometimes needs to make a determination quickly as to the relevant question, namely: Is the gaming facility located on Indian lands? Because the NIGC's focus is narrow in regard to Indian gaming, because Interior has a much wider perspective and broader responsibilities as to Indian affairs, and because the NIGC and Interior should be making consistent decisions as to what constitutes "Indian lands" for purposes of gaming, the NIGC has usually sought to work closely with Interior on making Indian lands determinations.[168] Nevertheless, the NIGC's need for timely determinations has occasionally caused frustration when dealing with slow-moving Interior.

To bring greater deliberation and more resources to bear on Indian lands determinations, Interior and the NIGC signed a Memorandum of Understanding in January 2000 that sought to achieve coordination on

164. 25 U.S.C. § 2706(b)(10) (2006).

165. *Id.* § 2702(3) (noting that a key purpose of IGRA is "the establishment of Federal standards for gaming on Indian lands").

166. *See, e.g.*, U.S. DEP'T OF THE INTERIOR, OFFICE OF THE INSPECTOR GEN., EVALUATION REPORT: THE PROCESS USED TO ASSESS APPLICATIONS TO TAKE LAND INTO TRUST FOR GAMING PURPOSES 27 (2005), *available at* http://www.doioig.gov/upload/2005-G-0030.pdf.

167. *See generally Oversight Hearing on IGRA Exceptions and Off-Reservation Gaming Before the S. Comm. on Indian Affairs*, 109th Cong. (2005) (testimony of Penny J. Coleman, Acting General Counsel, National Indian Gaming Commission), *available at* http://www.indian.senate.gov/2005hrgs/072705hrg/coleman.pdf.

168. *See infra* notes 167–70.

Indian lands questions.[169] Further memoranda modified the general agreement.[170] When, in 2001, the Tenth Circuit held that Interior lacked the special authority to interpret the meaning of the term "reservation" in Section 20 of IGRA, Interior quickly sought and obtained an appropriations rider from Congress that aimed to clarify that IGRA had indeed delegated such authority to Interior.[171] Thus, Interior has jealously guarded its prerogative to make Indian lands determinations in certain contexts.

Despite Interior's efforts to address primary control over some questions of the scope of the exceptions in Section 20, Interior and the NIGC have occasionally disagreed as to the Indian land status of a particular tract of land. In 2008 the NIGC Chairman issued an Indian lands opinion in which he refused to wait for Interior guidance on the question.[172]

The NIGC has also sought to create a regulatory structure that requires tribes to consider routinely the status of land on which they intend to conduct gaming and to provide notice to the NIGC in advance of commencing gaming on such lands.[173] This regulatory strategy seems to provide a sound and comprehensive approach to addressing questions regarding Indian lands determinations. It also has the benefit of regularizing the inquiry, encouraging tribes to address such questions at the outset and to provide their own analysis, and assuring that the tribal voice is heard loud and clear.

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169. The Memorandum of Understanding signed in 2000 is not available on the NIGC's current website, but is on file with the author.

170. *See* Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460, 462–63 (D.C. Cir. 2007) (discussing Memorandum of Agreement between the NIGC and the Department of the Interior dated Feb 26, 2007); *see also* Miami Tribe of Okla. v. United States, 198 F. App'x 686, 690 (10th Cir. 2006) (unpublished) (discussing and quoting Memorandum of Agreement between National Indian Gaming Commission and Department of the Interior dated May 31, 2006).

171. Dep't of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107–63, § 134, 115 Stat. 414, 442–43 (2001) (Section 134, entitled "Clarification of the Secretary of the Interior's Authority Under Sections 2701–2721 of Title 25," provides: "The authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701–2721 of title 25, United States Code, was delegated to the Secretary of the Interior [in IGRA]." Though the assertion is unusual, the D.C. Circuit characterized the rider as overturning the Tenth Circuit's decision and gave the appropriations rider legal effect in *Citizens*, 492 F.3d at 468.).

172. Letter from Philip N. Hogen, Chairman, Nat'l Indian Gaming Comm'n, to Buford L. Rolin, Tribal Chairman, Poarch Band of Creek Indians (May 19, 2008), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2Findianlands%2FPoarch-Final+Opinion+-+05.19.08.pdf (generally suggesting that the opinion may differ from forthcoming policies at Interior but concluding that the "decision will not open the [IGRA] to . . . far ranging and unexpected interpretations").

173. Facility License Standards, 73 Fed. Reg. 6,019–30 (Feb. 1, 2008) (codified at 25 C.F.R. pts. 502, 552, 559, 573).

## CONCLUSION

Several insights about the federal implementation of IGRA spring from the foregoing analysis. First, the dispersion of federal Indian gaming authority across several federal agencies has increased collective action problems and provided ample opportunity for conflict among the agencies. Second, the division of authority has presented a modest *Chevron*[174] problem in that it is sometimes difficult for federal courts to determine which agency, if any, is entitled to deference in the interpretation of IGRA. Third, when the federal government has acted, it has often failed to act with a clear unified voice. For the most part, the beneficiary of this conflict has been Indian tribes, which likely are happy to avoid the imposition of federal authority.

Presuming that regulation has benefits as to the regulated community (however idealistic this hopeful presumption may be), the conflict between agencies may well have occasionally harmed tribes. For example, Justice's aggressive enforcement of its erroneous view on the Johnson Act and gaming classification matters likely had strong negative ramifications. Indeed, Justice's persistent, unsuccessful attempts to apply the Johnson Act to Class II "technological aids" created an atmosphere of legal uncertainty.

This uncertainty may have had significant costs. Despite Justice's repeated losses in the federal courts of appeal, the threat of federal prosecution may have discouraged prudent gaming companies from entering the market for gaming machines. In other words, Justice likely succeeded in driving out of the market those companies that are most respectful of the rule of law, leaving the gaming machine market dominated by a few companies that are willing to operate in a legal "gray area," where they might face federal prosecution. In sum, the companies with the largest involvement in such gaming are those that are willing to tread very close to the thin line separating lawful and unlawful gaming. Because reputable companies refused to enter the market, Justice's approach thus rewarded risk-taking companies with extraordinary and quite possibly monopoly-type profits that would not be available in a market with full and open competition.

Those profits came at the expense of Indian tribes whose choices of business partners were thereby constrained by Justice's actions and threatened actions. In market economic terms, Justice suppressed supply and created monopoly or oligopoly profits for a few companies, thus creating a transfer of wealth from tribes to these few gaming machine

174. *See generally* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

vendors. Since the tribes most affected by Justice's actions were tribes engaged only in Class II gaming, the effect was particularly severe. It effectively penalized the poorest gaming tribes and rewarded the risk-taking companies willing to operate in the shadow of the law.[175] Here, poor coordination by federal agencies may have undermined IGRA's clear command to ensure that Indian tribes, and not their outside business partners, are the primary beneficiaries of Indian gaming.

A second insight is that the NIGC ought to be more willing to take up the mantle of *expert* federal agency. In the past, the NIGC has tended to defer to Justice and to non-expert federal courts on matters well within the NIGC's expertise. This has resulted in an abdication of responsibility that has sometimes frustrated even the federal courts.[176] The law gives the NIGC far more room to exercise authority than it has taken. The agency has been extremely conservative in key areas. Rather than blindly following court decisions and swiftly changing its own policies with each succeeding court opinion, the NIGC should embrace its role as expert and provide the industry and the courts with a rational approach to Indian gaming regulation.

Finally, while Indian gaming sometimes raises inherently political choices, Interior, Justice, and the NIGC have the responsibility to make decisions deliberately and expeditiously. Where they err, Congress is free to provide additional guidance. Moreover, a hearing in which a Senate committee chair or member verbally criticizes an Administration official may not constitute guidance. While a key part of an official's job is to hear and respect the concerns of Members of Congress, Congress has the power to change legal rules to achieve its goals. To some degree, therefore, an Administration official is wise to exercise discretion and perspective when Indian gaming questions become the source of political intrigue.

Until Section 5 of the IRA is repealed, Interior has Congressional marching orders reflecting a delegation of responsibility to Interior to take land into trust for tribes requesting such action. Section 20 of IGRA prohibits gaming on some such tracts and allows it on others, but it provides little discretion to Interior to make decisions on the legal question of whether an exception applies.

On the subject of land-into-trust, as in many areas of Indian affairs, federal Indian affairs officials frequently decline to exercise available authority in favor of Indian tribes. The argument that they often make is as

175. For a more lengthy articulation of this argument, see *Oversight Hearing on the Regulation of Indian Gaming Before the S. Comm. on Indian Affairs*, 109th Cong. 26–29 (2005) (statement of Kevin K. Washburn, Associate Professor of Law, University of Minnesota).

176. *See* Diamond Game Enters. v. Reno, 230 F.3d 365 (D.C. Cir. 2001).

follows: If the federal official does what a tribe requests under an existing law, the action may alienate the public and Congress and result in a change in the law, causing all tribes to lose the benefit of the law. Because the premise of the argument is that the federal official knows better than the tribe what is best for the tribe or the industry, the argument can be described as paternalistic. That is not to say that this argument is always wrong. One tribe may not have the interests of all tribes at heart when it makes its request. However, federal policymakers tend to live in Washington, D.C., and thus may have a comparative advantage in understanding how Congress may react.

In light of the inherent paternalism of this kind of argument, however, federal officials should wield it carefully. Congress is a very difficult body to move. Federal officials may well be overly conservative in making such calculations. Often, the worst sanction that will follow an imprudent exercise of federal power in favor of a tribe is a tongue-lashing by a Congressman or Senator. While this may be uncomfortable for the federal official, fear of such an incident alone is not enough to justify refusing a tribal request. When it happens, it allows a single member of Congress to undermine the will of the majority that gave the agency the power at issue. Where Congress has given an agency a power and a responsibility to benefit tribes, the agency should seek to avoid being stingy in the exercise of that power.

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