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SURFING FOR WAMPUM: FEDERAL REGULATION OF INTERNET GAMBLING AND NATIVE AMERICAN SOVEREIGNTY

*Jeffrey A. Dempsey**

I. Introduction

With the recent explosion in the use of the Internet and computer technology, the federal government has been struggling to keep up. Some federal laws in place now were written years ago and do not seem to apply to the new areas opened by technology. It has been observed that: "[m]ost state and federal anti-gambling statutes were written before the advent of the Internet, which created a loophole, a gray area, that has proven both lucrative and scarcely legal."¹ One area in which the federal government is considering broadening its enforcement powers is Internet gambling. Although Internet gambling is a relatively new activity, the government has been struggling with the issue of gambling for many years. If Congress enacts legislation giving the federal government jurisdiction over Internet gambling, not only will states' rights be affected but also Native American sovereignty. Native American tribes are watching any proposed laws to ban Internet gambling closely. They are concerned that a ban on Internet gambling would prevent them from doing what the federal government and states are allowing them to do now, legally. The only difference is that they want to expand their casinos into cyberspace. It is not clear at this point whether, if passed, a ban on Internet gambling would or should apply to Native American tribes already engaged in the operation of legal casinos.

This comment will explore existing and proposed anti-gambling laws and their applicability to Internet gambling. The analysis will be set against the background of Native American sovereignty as applied to gaming. In the end, the comment will offer a course of action for the government that seems to adequately address the dangers of Internet gambling while respecting both Native American and state sovereignty.

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First place winner, 1999-2000 *American Indian Law Review* Writing Competition.

1. Jamie Monastryski, *New York Tribe Eye Internet Gambling Operation*; INDIAN COUNTRY TODAY, Oct. 4, 1999, at 2 (Knight-Ridder Tribune Business News).

II. Background: Internet Gambling

There is no question that Internet gambling has proliferated in recent years and there is no reason to believe it will slow. Estimates show that "between 1997 and 1998, Internet gambling more than doubled, from 6.9 million to 14.5 million gamblers, with revenues doubling from \$300 million to \$651 million."² Since online gambling first emerged in 1994, at least 120 sites have been established.³ These sites offer gambling similar to the games played at "real" casinos such as blackjack, slots and poker. One author described the future of Internet gambling by stating:

Take a stroll down Money Lane. Three dimensional pictures with vivid colors illuminate your first stop on the Internet: Casino Antigua. Next door is Casino Belize. Enter and meander through virtual poker tables surrounded by virtual people and dealers. Virtual slot machines clang with awards, sounds blasting from the speakers attached to your personal computer. Across the way is the virtual lounge. Have a seat, have a virtual drink. Chat with the stars or have a live cyber-affair with a user from any part of the world. The technology is here and the program will soon follow.⁴

Some sites offer players real-time playing experiences while other sites require users to download proprietary software applications to their own computer.⁵ Methods of payment seem to differ slightly.

Some sites require that real money, either from a credit card or an electronic wallet, be used for each wager. Other sites allow users to gamble with "chips" that may or may not be redeemed for money. The latter type of site typically seek to derive their revenue from banner advertising or periodic "membership" fees that are unrelated to the amounts wagered.⁶

III. Existing Federal Laws

Although gambling regulation has been primarily left to the states, the federal government has the authority under the Commerce Clause to regulate gambling

2. *Indian Gaming: Hearings on S. 692 Before the Judiciary Committee, 106th Congress* (1999) (statement of Kevin DiGregory, Department of Justice).

3. See Monastryski, *supra* note 1.

4. Seth Gorman & Antony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 *LOY. L.A. ENT. L.J.* 667, 667 (1996).

5. Peter Brown, *Regulation of CyberCasinos and Internet Gambling*, in 19TH ANNUAL INSTITUTE ON COMPUTER LAW 9, 12 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. G0-004-D, 1999), available in Westlaw, 547 PLI/Pat 9.

6. *Id.* at 12.

activity that affects the flow of interstate commerce.⁷ "Five federal statutes appear to have direct applicability to online gambling: the Wire Act;[⁸] the Travel Act;[⁹] the Interstate Transportation of Wagering Paraphernalia Act;[¹⁰] the Professional and Amateur Sports Protection Act;[¹¹] and the federal aiding and abetting statute.[¹²]"¹³ To date, only the Wire Act has been applied in prosecution of Internet gambling, but the question of its applicability has still not been determined. Although the Wire Act prohibits gambling operations from receiving illegal sports bets over interstate and international wires, it is unclear whether the act applies to the Internet. The act does not specifically mention casino-style games of chance. The Act states in part:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.¹⁴

Because Internet gambling depends on interstate wires to transmit bets, it is reasonable to believe that the Wire Act provides the legal justification for Congress to declare Internet gambling illegal. "Although the issue has not yet been adjudicated, providers of on-line gambling would likely fall under the 'wire communication' language of the statute since Internet communications are transmitted over phone lines."¹⁵ Access providers and individual gamblers do not appear to be subject to liability under the Act because they do not qualify as individuals "engaged in the business" of gambling.¹⁶ Even though the Wire Act seems best suited to be applied to Internet gambling it was enacted to cover professional gambling and therefore leaves the casual bettor unaffected.

The Travel Act was enacted to prevent organized crime from travelling interstate in furthering illegal activity.¹⁷ "Although the purpose of the Act was

7. *Id.* at 21.

8. 18 U.S.C. § 1084 (1994).

9. 18 U.S.C. § 1952 (1994).

10. 18 U.S.C. § 1953 (1994).

11. 28 U.S.C. § 3702 (1994).

12. 18 U.S.C. § 2 (1994).

13. Rebecca Gradinger, *How Federal Government, States Deal with Internet Gambling*, MULTIMEDIA & WEB STRATEGIST, Apr. 1999.

14. 18 U.S.C. § 1084 (1994).

15. Brown, *supra* note 5, at 21.

16. *See id.* at 21-22.

17. *See id.* at 22.

to prohibit illegal syndicated gambling, the scope of the Act may reach on-line gamblers who use interstate facilities, such as telephone lines, to access the Internet in furtherance of illegal activities.¹⁸ The statute "subjects to penalty persons using 'any facility in interstate or foreign commerce . . . with the intent to . . . further any unlawful activity.' The statute defines unlawful activity as 'any business enterprise involving gambling.'"¹⁹ Consequently, this statute may subject both operators of Internet gambling sites and online gamblers to liability.²⁰

When Congress passed the Interstate Transportation of Wagering Paraphernalia Act, it was meant to stop the distribution of materials used in illegal gambling.²¹ The Act prohibits "individuals from knowingly sending or carrying in interstate or foreign commerce any 'paraphernalia' or 'other device' to be 'used . . . or designed for use' in illegal gambling."²² Under this Act, operators of Internet gambling sites would be subject to criminal penalties when they shipped their software over state lines.²³ In fact, the United States Court of Appeals for the Ninth Circuit decided, in *United States v. Mendelsohn*²⁴, that the term "device" included a computer disk containing gambling records that was shipped interstate.²⁵

The Professional and Amateur Sports Protection Act "makes it unlawful for any person to 'sponsor, operate, advertise or promote . . . betting, gambling, or wagering . . . on one or more competitive games in which amateur or professional athletes participate."²⁶ Although the language of the statute does not expressly mention Internet casinos, the language may be broad enough to encompass them.

Internet casino operators may also be violating the Federal Aiding and Abetting statute which provides that "whoever commits an offense against the United States or aids, abets . . . or procures its commission, is punishable as a principal."²⁷ Therefore, anyone who knowingly facilitates the operation and use of Internet gambling casinos would be in violation of this law and subject to prosecution.²⁸

18. *See id.* at 23.

19. *Id.* (quoting 18 U.S.C. § 1952 (1994)).

20. *See id.* at 23.

21. *See id.*

22. *See id.*

23. *See id.*

24. *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1989).

25. *See Brown, supra* note 5, at 23; *Mendelsohn*, 896 F.2d at 1187.

26. *Id.* at 24.

27. *Id.* at 24-25.

28. *See id.* at 25.

IV. Case Law

A Missouri case marked one of the first times that criminal charges were filed in the United States against an Internet gambling site.²⁹ In *State v. Interactive Gaming & Communications Corp.*,³⁰ the defendant pled guilty to a misdemeanor count of promoting gambling.³¹ He was fined \$2500 and his company was fined \$5000 as well as having to pay the state \$20,000 to pay for the prosecution of the case.³²

The United States Attorney's Office for the Southern District of New York also recently brought a prosecution for Internet gambling.³³ In that case, criminal complaints were filed against twenty-one individuals who owned and managed nine overseas sports betting businesses that accepted bets from United States citizens over the telephone and via the Internet in violation of the Wire Act.³⁴ Six of the defendants charged have pled guilty already. Notwithstanding the guilty pleas, the cases do not fully establish that gambling via the Internet falls within the scope of the Wire Act. It is still not clear if the term "wire communication facility" contained in the statute covers the Internet.

Concerns over prosecution of Internet gambling companies based overseas were recently addressed in a New York case. In *People ex rel. Vacco v. World Interactive Gaming Corp.*, the Attorney General of New York brought suit against an Internet gaming operation based in Antigua.³⁵ The World Interactive Gaming Corporation (WIGC) is a Delaware corporation that maintains corporate offices in New York and owns Golden Chips Casino, Inc. (GCC), an Antigua corporation, which is licensed by Antigua to operate a casino.³⁶ The Attorney General sought to enjoin WIGC and GCC from offering residents of the State of New York gambling over the Internet.³⁷ A person who wanted to gamble on the GCC site was required to wire money to open an account in Antigua and download software from the site.³⁸ Users were asked to enter their permanent address and if the address was in a state that allowed gambling, like Nevada,

29. *Internet 'Bookie' Pleads Guilty to Promoting Gambling*, WHITE-COLLAR CRIME REP., Jan. 1999, at 1.

30. No. 197CF0014 (Mo. Cir. Ct., Greene City, Sept. 22, 1998).

31. *See id.*

32. *See id.*

33. *United States v. Budin*, No. 98-M-00463 (S.D.N.Y. Mar. 2, 1998).

34. Matthew E. Yarbrough, *Internet Gambling: The Risks and Rewards*, in 19TH ANNUAL INSTITUTE ON COMPUTER LAW 1213, 1219 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. G0-004-D, 1999), available in Westlaw, 547 PLI/Pat 1213.

35. *People ex rel. Vacco v. World Interactive Gaming Corp.*, No. 404428/98, 1999 WL 591995 (N.Y. Sup. Ct. July 22, 1999).

36. *See id.* at *1.

37. *See id.*

38. *See id.* at *2.

they would be able to play.³⁹ A user, however, could simply lie about their address to gain access to the site.⁴⁰ Once a user was admitted to the site they could play virtual slots, blackjack or roulette.⁴¹ The main issue to be decided in the case was whether the State of New York could enjoin a foreign corporation, legally licensed in a foreign country, from offering Internet gambling to New York residents.⁴² The Attorney General brought the action claiming that the respondents were in violation of federal and state anti-gambling laws and New York State's Executive Law.⁴³ The respondents claimed that the transactions occurred offshore and that no state or federal law regulates Internet gambling.⁴⁴ They based much of their defense on the fact that they were a legitimate business, licensed in Antigua, and were in total compliance with Antiguan laws.⁴⁵ In disagreeing with the respondent's arguments, the court found that federal laws did apply and that they were violated.⁴⁶ The trial court found that the Wire Act, Travel Act and Wagering Paraphernalia Act all applied because each specifically state in their language that they apply to "foreign commerce."⁴⁷ For example, the court looked at the Wire Act's legislative history, which states:

The purpose of the bill is to assist various states and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.⁴⁸

The court held that the Internet site was offering gambling services to New York residents in direct violation of New York and federal laws.⁴⁹ The court granted the Attorney General injunctive relief as well as a bond by GCC to ensure that no future violations would occur.⁵⁰ The court also determined that

39. *Id.*

40. *See id.*

41. *See id.*

42. *See id.* at *1.

43. *Id.* at *3 ("Executive Law § 63(12) authorizes the Attorney General to bring a special proceeding against a person or business committing repeated or persistent fraudulent or illegal acts. Any conduct which violates state or federal law or regulation is actionable under this provision.").

44. *World Interactive Gaming Corp.*, 1999 WL 591995 at *2.

45. *See id.*

46. *See id.* at 6.

47. *Id.* at 6.

48. *Id.* at 7.

49. *See id.* at 8.

50. *See id.* at 9.

restitution, penalties, and costs would be awarded to the State, the amount of which to be determined at a later hearing.⁵¹

While this case was important in determining the reach of federal anti-gambling laws, it is hardly dispositive. The question still remains as to whether the United States can prosecute foreign citizens operating an Internet gambling site if their only contact with the United States is through the site.

V. Proposed Federal Legislation

To address the ambiguity in the Wire Act, Congress has been considering legislation that would ban Internet gambling on the federal level. In 1998, the Senate adopted, by a vote of 90-10, an Internet gambling bill, but the legislative session ended before any other action was taken.⁵² This year, that same legislation was reintroduced by Sen. Jon Kyl (R-Ariz.), entitled the "Internet Gambling Prohibition Act."⁵³ The bill, Senate Bill 692, was referred to the Senate Judiciary Committee and was sent to the Senate floor on June 17, 1999. On November 19, 1999, the bill was passed by the Senate and referred to the House of Representatives. As of this writing, no further action was taken on the bill but it is expected to be considered when Congress reconvenes on January 24, 2000. One of the purposes of the bill is to clarify that the Wire Act covers all forms of telecommunications used to transmit all types of gambling.⁵⁴ Senate Bill 692 would amend the federal criminal code to make it unlawful for "any person engaged in a gambling business to knowingly use the Internet or any other interactive computer service to: (1) place, receive, or otherwise make a bet or wager; or (2) send, receive, or invite information assisting in the placing of a bet or wager."⁵⁵ The penalties for violation of the Senate Bill 692 are as follows:

A person engaged in a gambling business who violates this section shall be —

- (A) fined in an amount equal to not more than the greater of
 - (i) the total amount that such person bet or wagered, or placed, received, or accepted in bets or wagers, as a result of engaging in that business in violation of this section; or
 - (ii) \$20,000
- (B) imprisoned not more than 4 years; or

51. *Id.*

52. *Stage Set for Internet Gambling Bill Next Year*, GAMING DEVELOPMENTS BULL. (Nat'l Ass'n of Attorneys General), Fall 1998.

53. See Debra Baker, *Betting on Cyberspace: When it Comes to the Future of Internet Gambling, All Wagers Are Off*, A.B.A. J., Mar. 1999, at 54, 55.

54. See Bruce Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1583 (1999).

55. S. 692, 106th Cong. (1999).

(C) both⁵⁶

Additionally, a court would be empowered to enter a permanent injunction enjoining the person from engaging in such activity in the future.⁵⁷ The bill also authorizes civil proceedings to be instituted by the Federal Government, State Attorney Generals and sports organizations.⁵⁸ The bill, however, does carve out some exceptions. The prohibition would not apply to "any otherwise lawful bet or wager that is placed, received, or otherwise made wholly intrastate for a State lottery, or for a multi-state lottery operated jointly between [two] or more States in conjunction with State lotteries" if certain conditions are met.⁵⁹ Those conditions include: that the lottery must be expressly authorized, licensed, or regulated under applicable State law; the bet must be placed on a private network; and each person placing or receiving the wager must be physically located at a facility that is open to the general public.⁶⁰ The bill also exempts live horse and dog racing as long as it is expressly authorized, licensed, or regulated by the State and the wager is placed on a closed-loop subscriber-based service.⁶¹

Internet gambling operated by Native Americans is addressed by the bill. Senate Bill 692 provides enforcement authority for violations taking place on Indian lands. The bill states in part:

[T]he prohibition in this section does not apply to any otherwise lawful bet or wager that is placed, received, or otherwise made on any game that constitutes class II gaming or class III gaming, or the sending, receiving, or inviting of information assisting in the placing of any such bet or wager⁶²

Among the conditions that must be met to lawfully conduct Internet gambling are that each person must be physically located on Indian lands and the game must be conducted on a closed-loop, subscriber-based system or a private network.⁶³ As written, the bill would allow Indian tribes to offer Internet gambling services only to people physically located on their lands. This prohibits the tribes from reaching beyond their borders to expand their clientele. It appears that a tribe could operate an Internet gambling site as long as both ends of the transmission are located on Indian lands, even if located in different parts of the country, as long as they use a closed network. As this comment will

56. *Id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *Id.*

63. *See id.*

explore, the exception in the bill for Native American tribes appears to be a Pyrrhic victory.

Proponents of the ban on Internet gambling cite substantially similar arguments to those urged for regulation of "conventional" gambling. The dangers of addiction, effect on families and corruption of youth apply just as much to Internet gambling. Internet gambling, however, amplifies some of those dangers to a new level. The accessibility of the Internet to minors makes it easier for a minor to engage in gambling activities. While casinos can and must monitor and verify the ages of their customers there is no such opportunity on the Internet. There are few requirements beyond having a valid credit card that keep people out of those sites. A minor who uses his parent's credit card can easily gain access to gambling sites. The other danger of online gambling which is magnified in cyberspace is unfair payouts and odds manipulation. In commenting on this danger one author stated, "because Internet gambling is unregulated, consumers don't know who is on the other end of the connection. The odds can be easily manipulated and there is no guarantee that fair payouts will occur. Anyone who gambles over the Internet is making a sucker bet."⁶⁴ While addressing the Judiciary Committee in support of his bill, Senator Kyl stated, "This affects all of us. Not every problem that is national is also necessarily federal. Internet gambling is a national problem and a federal problem. The Internet is, of course, interstate in nature. States cannot protect their citizens from Internet gambling if anyone can transmit it into their states."⁶⁵

Although the Internet Gambling Prohibition Act has been supported by a number of State Attorney Generals, it may conflict with state sovereignty. Regulation of gambling has been primarily left to the states pursuant to the Tenth Amendment.⁶⁶ Currently, all fifty states and the District of Columbia regulate gambling in some way. "At one end of the spectrum is Nevada, which is well known for its full legalization of gambling. At the other end are Hawaii and Utah, which have blanket prohibitions barring all forms of gambling."⁶⁷ Typically, states allow only highly regulated types of gambling like lotteries, charitable bingo, pari-mutuel wagering on horse racing and private or social gambling.⁶⁸ States allow gambling for the primary goal of raising tax revenues and creating jobs but states fear that Internet gambling will actually take jobs away and direct the revenues to private persons who usually are not a resident of that state.⁶⁹ "If gambling in one state will substantially affect the economic status of another state, the federal government is authorized to intervene through

64. 105 CONG. REC. S3123-02 (statement of Sen. Kyl).

65. *Id.*

66. *See Brown, supra* note 5, at 14.

67. *Id.*

68. *See id.*

69. *See id.*

the specifically enumerated power granted to Congress in the Commerce Clause.⁷⁰ The Internet Gambling Prohibition Act is based on that authority. If passed, the law could face a *Lopez* challenge.⁷¹ The Act does not allow intrastate gambling over the Internet and it restricts states from offering intrastate gambling through the use of a computer service.⁷² For instance, it would restrict a state from selling lottery tickets to its residents using the Internet.⁷³

VI. Native American Sovereignty

To fully understand the applicability and effect of the Internet Gambling Prohibition Act on Native American casinos, any analysis must start with the basis of tribal sovereignty and the Indian Gaming Regulatory Act (IGRA).⁷⁴

Native Americans have struggled to claim and define their own sovereignty since Europeans first populated the North American continent. As time has passed, the federal government and Native American tribes have made strides toward a symbiotic relationship. Although the federal government has extended wide grants of power to Native American tribes, the government still has ultimate control. Native Americans have found themselves in a tenuous position, caught between federal and state sovereignty. "Native Americans are not only citizens of the tribe, but also of the United States and the state in which they reside. This 'triple citizenship' creates an ambiguous matrix of regulatory and other jurisdictional requirements for Indians, on and off their reservations."⁷⁵ The roots of tribal sovereignty can be traced back to 1831 when the United States Supreme Court decided *Cherokee Nation v. Georgia*.⁷⁶ In deciding that case, Justice Marshall "announced a new category of legal status for the 'tribes which reside within the acknowledged boundaries of the United States', asserting that they were not 'foreign nations', but 'domestic dependent nations.'"⁷⁷ That is not to say that the federal government retains no control. Native Americans are subject to the jurisdiction of their tribal governments and are not subject to

70. Stevie A. Kish, *Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling*, 51 FED. COMM. L.J. 449, 457 (1999).

71. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that a federal law which prohibited possession of a firearm in a school zone was beyond Congress' power to legislate under the Commerce Clause. Subsequently, similar challenges to federal laws have been brought on the basis that the charged activity or offense does not have a substantial effect on interstate commerce and is, therefore, beyond Congress' power under the Commerce Clause.

72. See Kish, *supra* note 69, at 458.

73. See *id.*

74. 25 U.S.C. §§ 2701-2721 (1994).

75. Susan Johnson, *From Wounded Knee to Capitol Hill*, ST. LEGISLATURES MAG., Oct./Nov. 1998, available in <<http://204.131.235.67/programs/ESNR/susanpub.htm>>.

76. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

77. Stephanie A. Levin, *Betting on the Land: Indian Gambling and Sovereignty*, 8 STAN. L. & POL'Y REV. 125, 125 (1997).

the jurisdiction of the state in which the reservation is located.⁷⁸ It is important to know that both the tribal governments and the individual Indians are not completely free from control but they are subject to the plenary power of Congress to legislate for them.⁷⁹ Although Congress holds that power, Congress uses it sparingly, leaving much of the tribal government unregulated by the federal government. Although tribal governments and the federal government have clashed, the major source of contention remains between the tribes and the states. A tribe located in a certain state is largely free from that state's control.

The tensions between Native American tribes and state governments have come to a head in recent years over the issue of gambling. In fact, "[t]he appearance of Indian gaming on the national landscape has caused abundant and often bitter contention between tribal leaders and state governments over who should have the right to control gambling on Indian land."⁸⁰ Indian gaming began in the late 1970s and involved only reservation bingo halls and card rooms throughout the country.⁸¹ As some tribes, including the Mission Indians in California, the Seminole Tribe in Florida, the Oneida Tribe in Wisconsin, and the Mashantucket Pequot Tribe in Connecticut sought to expand their operations, state officials objected.⁸² The States complained that the expanded gaming violated state gambling laws and threatened to close many of the Indian gaming operations.⁸³ The tribes fought back, arguing that because they were sovereign nations, state law did not apply to their activities on the reservation.⁸⁴ Eventually, the United States Supreme Court was faced with this issue in 1987 with *California V. Cabazon Band of Mission Indians*.⁸⁵ The case proved to be a victory for the Indians as the Supreme Court held that "as long as state law did not explicitly prohibit a form of gambling altogether, tribes could run games according to their own regulatory regimes, ignoring state or local laws concerning hours of operation, betting limits, and other similar details."⁸⁶ The court further stated that "tribal sovereignty is dependant on, and subordinate to, only the Federal Government, not the States."⁸⁷ The outcome of this case was encouraging for tribes that were considering the use of gambling as a source of tribal income. During the 1980s, many states began endorsing various forms of

78. See Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1344 (1969).

79. See *id.*

80. Levin, *supra* note 76, at 126.

81. See *id.*

82. See *id.*

83. See *id.*

84. See *id.*

85. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

86. See Levin, *supra* note 76, at 127.

87. *Id.*

gambling mainly through the adoption of state lotteries.⁸⁸ In accord with the ruling in *Cabazon*, tribes could argue that gambling no longer violated public policy in those states with state-sanctioned gambling.⁸⁹ Now that the tribes were holding all the cards, the states went to Congress for help.

VII. *The Indian Gaming Regulatory Act*

In an effort to strike a compromise between state and tribal sovereignty, Congress enacted the Indian Gaming Regulatory Act of 1988 (IGRA).⁹⁰ The Congressional findings in the statute are set out as follows:

Congress finds that:

(1) numerous Indian tribes have become engaged in or have licensed gaming on Indian lands as a means of generating tribal government revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) Existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) A principle goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.⁹¹

The IGRA divides all Indian gaming activity into three classes, I, II, and III, and creates different rules for each.⁹² Class I gaming basically includes all forms of noncommercial gambling where the prizes are of small value.⁹³ Class I games are left to the tribes to regulate with no state or federal control.⁹⁴ Games such as bingo and non-casino card games comprise class II games in which the tribes regulate with oversight from the federal government and still no control by the state.⁹⁵ Class III games are the games most people think of

88. *See id.*

89. *See id.*

90. 25 U.S.C. §§ 2701-2721 (1994).

91. *Id.*

92. *See Levin, supra* note 76, at 127.

93. *See id.*

94. *See id.*

95. *See id.*

when they picture a casino. The statute defines class III games as "all forms of gambling that are not class I gaming or class II gaming."⁹⁶ In order for tribes to offer class III games on their land they must fulfill three requirements under the IGRA.⁹⁷ "First, the tribal government itself must adopt an ordinance, approved by the federal government, authorizing such gaming. Second, the tribal lands must be 'located in a State that permits such gaming for any purpose by any person, organization, or entity.' And third, the tribe must form, with the state, a 'Tribal-State compact' that regulates by joint agreement the conduct of the gaming activity."⁹⁸ The last requirement has proven to be a major source of litigation between tribes and states. The statute requires a state to negotiate with a tribe in good faith and it gives the tribes a remedy against states that do not fulfill their part.⁹⁹ The IGRA provides the federal district courts with jurisdiction to hear disputes between tribes and states. If such a dispute arises and "a state could not prove that it had negotiated in good faith, the court was authorized to order a state to conclude a compact with the tribe within sixty days. If the state failed to accomplish this, the tribe and state would be compelled to submit their last best offers to a federal mediator who would chose between the two."¹⁰⁰ States have challenged this infringement on their sovereignty claiming that they are immune to suit under the Eleventh Amendment.¹⁰¹ In 1996, the United States Supreme Court in *Seminole Tribe v. Florida* held that "Congress lacked the power under the Indian Commerce Clause of the Constitution¹⁰² to abrogate the state's Eleventh Amendment sovereign immunity against suit in federal court."¹⁰³ At first blush, it appeared that the decision took away the only recourse that tribes had against noncooperative states. In fact, it did just the opposite as it made it easier for tribes to obtain the gaming conditions that they wanted.¹⁰⁴ Under the IGRA, if a state refused to follow the decision of the mediator, as described earlier, the Secretary of the Interior would be notified.¹⁰⁵ At that point the Secretary of the Interior, who has jurisdiction over Indian affairs, decides, in consultation with the tribe, which type of class III gaming will be permitted.¹⁰⁶ "One plausible reading of this scheme is that if a state refuses to negotiate about gambling with a tribe and a court can no longer order it to do so, then the state's input is simply bypassed altogether. In the end, then, the decision on procedures for

96. *Id.*

97. *See id.*

98. *Id.* at 128.

99. *See id.*

100. *Id.*

101. *See id.*

102. U.S. CONST. art. I, § 8, cl. 3.

103. Levin, *supra* note 76, at 129.

104. *See id.*

105. *See id.*

106. *See id.*

conducting class III gambling is made by the Secretary of the Interior and the tribe."¹⁰⁷

The Indian Gaming Regulatory Act is still the primary scheme under which tribal gaming has flourished even though the tribes and states are not totally comfortable with the results and effects of the Act. Although it would appear that Indian tribes have received the "upper-hand" because of the Act, they continue to comment on the apparent intrusion on their sovereignty. Their arguments has been stated as follows:

Because tribal leaders see their tribes as sovereign entities, they believe that they should have the same right to make decisions for their territory as any state government has for its territory. Since no state expects to be able to dictate to any other state what decisions it should make about legalized forms of gambling, why then, tribal leaders ask, do states feel that they have the right to shape or dictate gambling policy on Indian territory? Just as New Jersey is free to establish casinos in Atlantic City without interference from New York, and New York is able to run its lottery or off-track-betting enterprises without oversight by Connecticut, so too, the tribes feel, they should be entitled to make independent decisions regarding gambling policy. Therefore, tribal leaders regard the IGRA's requirements that they must even negotiate with surrounding states as a derogation of their sovereignty.¹⁰⁸

As mentioned earlier, litigation involving Internet gambling is still in its infancy but there have been a few cases that have proven to be good indicators of the legal issues at stake.

State of Missouri v. Coeur D'Alene Tribe involved an Indian tribe operating a lottery via the Internet.¹⁰⁹ This decision shed light on important issues involving interpretation of the IGRA and state's rights. The Coeur D'Alene tribe is federally registered and resides on a reservation in northern Idaho.¹¹⁰ The Coeur D'Alenes ran a bingo hall but their opportunity for profit is limited because they are located about sixty miles from Spokane, the nearest large city.¹¹¹ Facing further restrictions on future gaming prospects by Idaho law, the tribe turned their attention to the Internet.¹¹² On June 19, 1997, the tribe launched its Internet site, "U.S. Lottery."¹¹³ "Located at www.uslottery.com,

107. *Id.*

108. *Id.*

109. *Missouri v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir.), *cert. denied*, 119 S. Ct. 2400 (1999).

110. *See id.* at 1104.

111. *See* Ed Penhale, *Gambling Site on Net Is Legal, Tribe Declares*, SEATTLE POST-INTELLIGENCER, July 28, 1997, at A1.

112. *See id.* at 2.

113. *See id.*

the site is an interactive store where players register a credit card number for billing purposes, then buy instant lottery tickets. Numbers are chosen by lottery balls seen flying on the computer screen; scratch-type tickets are rubbed by computer generated coins. Winnings are credited automatically to the gambler's U.S. Lottery account.¹¹⁴ Not long after the site was launched, the Missouri Attorney General filed two state court actions seeking to enjoin the Coeur D'Alene tribe and its contractor from operating the Internet gambling program with Missouri residents.¹¹⁵ The tribe and contractor removed the suit to federal court arguing that the Indian Gaming Regulatory Act completely preempted state regulation of tribal gaming.¹¹⁶ The United States District Court for the Western District of Missouri dismissed the State's claims as barred by the doctrine of tribal immunity and the State of Missouri appealed.¹¹⁷ The state was seeking to enjoin the operation because Internet gambling is illegal in Missouri and therefore the Tribe was violating state law.¹¹⁸ The State argued that the U.S. Lottery is not gambling on "Indian lands" within the meaning of the IGRA and therefore the issue was not within the scope of IGRA preemption.¹¹⁹ The Tribe, on the other hand, moved to dismiss for failure to state a claim based on tribal immunity.¹²⁰ The District Court denied the State's motion on the theory that the IGRA completely preempts the field of Indian gaming regardless of whether the gaming occurs on Indian lands.¹²¹ On appeal, the United States Court of Appeals for the Eighth Circuit disagreed.¹²² After examining an earlier opinion the court determined that both the language and legislative history of the IGRA refer only to gaming on Indian lands.¹²³ As the court stated:

[O]nce a tribe leaves its own lands and conducts gaming activities on state lands, nothing in the IGRA suggests that Congress intended to preempt the state's historic right to regulate this controversial class of economic activities. For example, if the State of Missouri sought an injunction against the Tribe conducting an internet lottery from a Kansas City hotel room, or a floating crap game in the streets of St. Louis, the IGRA should not completely preempt such a law enforcement action simply because the injunction might "interfere with tribal governance of gaming."¹²⁴

114. *Id.*

115. *Coeur D'Alene Tribe*, 164 F.3d at 1102.

116. *See id.*

117. *See id.* at 1104.

118. *See id.* at 1105.

119. *Id.* at 1105.

120. *See id.*

121. *See id.*

122. *See id.* at 1108.

123. *Id.*

124. *Id.*

The critical issue on appeal was whether the gaming was taking place "on Indian lands."¹²⁵ The court decided that if the Tribe's lottery was being conducted on its lands, then the IGRA would completely preempt the state's ability to regulate or prohibit the activity.¹²⁶ Alternatively, if the lottery was being conducted in Missouri, the IGRA would not preempt any state law claims.¹²⁷ The court remanded the case for the District Court to determine whether the Tribe's Internet lottery is a gaming activity on Indian lands.¹²⁸

It is interesting to note, however, that the Coeur D'Alene Tribe was also involved in a suit with AT&T in which this very issue was decided. In *AT&T Corp. v. Coeur D'Alene Tribe*¹²⁹, the court granted AT&T's motion for a declaration that the firm was not required to serve the tribe with toll-free interstate service to any state in which the operation of U.S. Lottery would violate that state's law.¹³⁰ Ultimately, the court found that the IGRA requires that the gambling activities must occur on lands within the reservation, and that the IGRA has no application to gaming activities outside the limits of the reservation. The court concluded "that ordering a chance was an activity material to the Lottery's operation, and since the proposal for the 800 number contemplated orders being placed from states other than Idaho, the proposed gaming activities were not 'on Indian lands.'"¹³¹ In sum, the court determined that the Tribe's lottery is not on Indian lands when the wager is placed by telephone from off of the reservation.

It seems clear that when the District Court examines *Missouri v. Coeur D'Alene Tribe* on remand it will follow the reasoning in *AT&T*. Just as placing bets by telephone while off the reservation is not gaming on "Indian lands," neither is placing bets over the Internet. Although these cases were not brought pursuant to any federal statute such as the Wire Act, the reasoning from these cases will most likely predict the outcome in future cases involving Internet gambling. These cases determined that the IGRA does not give Indian tribes the authority to operate gambling activities off the reservation and would, therefore, seem to prevent Indian tribes from operating Internet gambling sites.

VIII. Economic Considerations

Weighing heavily into the decision to ban Internet gambling will be the economic interests of the states. States have a significant economic interest in the forms of gambling that they allow in their state as a source of revenue.

125. *Id.* at 1109.

126. *See id.*

127. *See id.* at 1109.

128. *Id.*

129. *AT&T Corp. v. Coeur D'Alene Tribe*, 45 F. Supp. 2d 995 (D. Idaho 1998).

130. *See id.* at 1005.

131. *Court Rules on National Indian Lottery*, GAMING DEVELOPMENTS BULL. (Nat'l Ass'n of Attorneys General), Winter 1999.

States view the expansion of Indian gaming into cyberspace as the loss of significant revenue for themselves. It is apparent that "states have their own vested economic interests in taxing non-Indian gaming, which can be a significant source of revenue. States are not likely to favor Indian gaming, which they cannot tax, when it is likely to compete with gambling enterprises on non-Indian land."¹³² Tribal casinos are tax-free enterprises under federal law and, therefore, have a big advantage over other gambling operators.¹³³ However, states can reap big profits from Indian casinos through state-tribal compacts under the IGRA. The tribes want the least amount of competition possible so they are willing to pay states considerable fees as an incentive to minimize off-reservation gambling.¹³⁴ An example of this kind of agreement can be found between the Mohegan Tribe and the State of Connecticut. In 1994, "the Mohegan Tribe had signed an agreement with Connecticut promising an annual payment to the state of twenty-five percent of slot-machine revenues or at least \$80 million as long as Connecticut law enforced a Pequot-Mohegan slot-machine duopoly."¹³⁵ It is inevitable that both the states and Indian tribes will clash in their attempt to lobby Congress on this issue.

Indian tribes, however, cite considerations beyond pure economics in support of their expansion into cyberspace. Although Indian gaming has proven to be essential to tribal growth, the reality is that only a small number of tribes have benefitted.¹³⁶ "As of February, 1997, the National Indian Gaming Commission reported there were 115 tribes with class III operations and 164 tribe/state compacts in twenty-four states. Less than one-third of the tribes in the United States have gaming operations. Indian gaming is only 5% of the entire gaming industry."¹³⁷ Notwithstanding some tribes' success, Indian reservations are among the poorest communities in the United States.¹³⁸ Tribes use their gaming profits on things such as "law enforcement, education, economic development, tribal courts and infrastructure improvement."¹³⁹ Tribes are using gaming profits to fund social service programs, scholarships, health care clinics, new roads, new sewer and water systems, adequate housing, chemical dependency treatment programs and dialysis clinics, among others."¹⁴⁰ The

132. Julian Schriebman, *Developments in Policy: Federal Indian Law*, 14 YALE L. & POL'Y REV. 353, 356 (1996).

133. *See id.* at 361.

134. *See id.* at 362.

135. *Id.*

136. National Indian Gaming Ass'n, *Where the Proceeds Go: Helping Indian Nations Recover From Centuries of Economic and Social Neglect* <<http://www.dgsys.com/~niga/regulatn.html>> [hereinafter *Where the Proceeds Go*].

137. National Indian Gaming Ass'n, *Statistics on Economic Impact of Indian Gaming* <<http://www.dgsys/~niga/stats.html>>.

138. *See id.*

139. *See Where the Proceeds Go*, *supra* note 135.

140. *Id.*

tribes feel that their gaming enterprises should be given the same opportunities as those sponsored by state governments or else the result would undermine the concept of tribal sovereignty. The money that tribes have made from their casinos has been critical in building infrastructure and strong tribal governments. The income from gambling has "enabled tribes to invest in education and social services for their people, to enlarge their land base, and in some cases to develop other, nongambling, economic enterprises. In short, gambling has reduced tribal dependency while increasing tribal visibility at the local, state, and national levels."¹⁴¹

Of course, with jobs and income from gambling follow the traditional vices associated with gambling. It is clear that "[g]aming holds some hope for reducing Indian poverty, but it is not a panacea."¹⁴²

IX. Conclusion: To Regulate or Ban, That Is the Question

Congress is faced with an admittedly tough decision: should it ban Internet gambling altogether, should it institute a partial ban through strict regulation, or should it do nothing at all? It is clear that the third option is not realistic considering the social dangers involved.

A better solution is to ban Internet gambling altogether but the impossibility of enforcing that ban quickly becomes apparent. As technology advances, new techniques of evading detection on the Internet also advance. Experience has shown that "hackers" are always one step ahead of the safeguards in place. The federal government would spend an enormous amount of money and resources chasing technologically savvy gambling operators around the vast Internet. Furthermore, as discussed earlier, providers can search out foreign countries where Internet gambling is legal and set up there. The United States would be faced with serious international law issues in trying to stop those businesses.

In a total ban scenario, states and Indian tribes would lose an opportunity for increased revenue. In terms of the states, serious issues of federalism would likely embroil the federal government in years of litigation. It seems that the hardest hit would be the Indian tribes. The passage of the IGRA and the growth of gaming on Indian lands have provided Native American tribes with the financial means to assert and strengthen their position as "sovereign domestic nations." In a short period of time they have been able to build strong tribal governments and purchase back land that was taken from them long ago. A ban on Internet gambling would seem to push Indian sovereignty a step backwards. It would be a bitter reminder of the inferior status the federal government has given them. Further, the ban would seem to put a cap on the growth of Indian tribes. Many successful Indian tribes with casinos appear to be reaching their potential. The expansion into cyberspace would give them a whole new source

141. Levin, *supra* note 76, at 134.

142. *Where the Proceeds Go*, *supra* note 135.

of revenue to continue the Native American rebirth. As one advocate put it, "All we want is to help ourselves. [] This Internet lottery would take us a long way down the road to independence."¹⁴³ It seems that a total ban on Internet gambling economically disadvantages both states and tribes while creating an enforcement nightmare for the government.

The second option, and seemingly the most realistic, is to institute a partial ban on Internet gambling through strict regulation. This option is the most realistic because it recognizes the fact that it may be impossible to stop Internet gambling. The federal government should exempt states and Indian tribes from a ban on Internet gambling. This way, Indian tribes will be able to increase their revenue through this new opportunity. The legitimate concerns over the dangers of Internet gambling can be easily addressed through the regulatory structure that already exists. In essence, a regulatory framework would be a partnership between the states, Native American tribes, and the federal government, and would be paid for by industry profits.¹⁴⁴ "Regulation would have to include strict licensing requirements, permanent U.S. siting requirements to ensure a jurisdictional nexus and U.S. control, appropriate state, tribal and federal limitations, inspection of hardware and software, and complete accountability through advanced auditing technology. Consumer protection would be achieved and taxes would be collected."¹⁴⁵ If the government has already decided that, notwithstanding the dangers of gambling, Indian tribes can operate casinos on their lands, why can't they also offer Internet gambling? In support of that position it has been stated:

The use of new technology to provide alternative forms of wagering has little impact on regulatability. So long as there is a physical location and hardware that can be inspected by tribal gaming regulators, the National Indian Gaming Commission, or any other regulatory body, integrity and consumer protection can be accomplished. In short, the regulation of tribally operated interactive or internet gaming can be done in the exact same manner that land-based gaming is regulated.¹⁴⁶

Although this approach will not stop foreign operators from trying to offer Internet gambling to Americans, it will narrow the field of enforcement for the government. The incentive for Americans to seek out foreign Internet gambling sites would be greatly reduced if they are given the option of gambling on sites operated by states or tribes.

143. Penhale, *supra* note 110.

144. *Internet Gaming: Hearings Before the United States Senate Committee on Indian Affairs 106th Congress 19 (1999)* (testimony of Frank Miller).

145. *Id.*

146. *Id.*

The fate of the Internet Gambling Prohibition Act lies in the hands of the House of Representatives when Congress reconvenes. It is clear that much is at stake for Native American tribes in the outcome of this legislation. As written, it appears that the bill would in fact ban the operation of Internet gambling sites by Native American tribes. This author urges Congress to examine the impact of this bill more closely. If the bill is passed as is, time will expose its weaknesses, particularly the difficulty of enforcement and the creation of a virtual black market offering gambling online. In the meantime, Native Americans must explore other avenues toward economic independence.