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THE INTERNET GAMBLING PROHIBITION ACT OF 1999: CONGRESS STACKS THE DECK AGAINST ONLINE WAGERING BUT DEALS IN TRADITIONAL GAMING INDUSTRY HIGH ROLLERS

INTRODUCTION

In late 1997, a fourteen-year-old boy logged onto the Internet and visited the United States Lottery World Wide Web site,¹ where he opened an account and wagered on several lottery-type drawings using a false name, Social Security number, and credit-card account number.² At the time, and in subsequent months, members of various concerned constituencies claimed this case was unremarkable in the current environment, in which unregulated Internet gambling threatens multitudes of minors each day.³ This minor's access to the Idaho Coeur

1. See *US Lottery* (visited Nov. 3, 1998) <<http://www.uslottery.com>>.

2. See *Missouri Attorney General Wins Order Blocking Indian Tribe's Online Gambling*, BNA MANAGEMENT BRIEFING-INTERNET, Feb. 10, 1998, available in Westlaw, BNA-DNEWS database [hereinafter FEB. 10 BNA MANAGEMENT BRIEFING].

3. See, e.g., *Internet Gambling Prohibition Act: Hearings on H.R. 2380 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter *Crime Hearings*] (testimony of David G. Jemmett); *Crime Hearings, supra*, (testimony of Marianne McGettigan); *Crime Hearings, supra*, (testimony of Rep. Bill McCollum, Committee Chairman) (stating that "[a]nti-gambling activists also fear that cybergambling will create a new generation of gambling addicts—computer savvy youths able to bankrupt themselves and their families from the comfort of their own homes"); *Internet Gambling Prohibition Act: Hearings Before the Subcomm. on Technology, Terrorism, and Government Information of the Senate Comm. on the Judiciary*, 105th Cong. (1999) [hereinafter *Technology Hearings*] (testimony of Sen. John McCain); *Technology Hearings, supra* (testimony of Sen. Jon Kyl); *Technology Hearings, supra* (testimony of Ohio Attorney General Betty Montgomery); *Technology Hearings, supra* (testimony of Jeffrey Pash, Executive Vice President, National Football League) (stating that "Americans can lose their life savings with the mere click of a mouse. Many of these gambling Web sites have been designed to resemble video games, and therefore are especially attractive to children"). Representative McCollum is a Republican representing the state of Florida. See *Members of the United States House of Representatives*, available in Westlaw LEGIS-DIR database. Senator McCain and Sen. Kyl are Republicans representing the state of Arizona. See *id.* See also Rick Alm, *Measure Would Outlaw Some Internet Gambling*, THE KANSAS CITY STAR, Nov. 23, 1999, at D12 (quoting Sen. Kyl: "Internet gambling exacerbates the problems generally associated with gambling. Children can wager with Mom's credit card—click the mouse

D'Alene Indian Tribe's online lottery was somewhat atypical, however, because the Missouri Attorney General's office conceived and directed it.⁴ Providing the fourteen-year-old with the proper matching identification numbers that enabled the teen to deceive the host computer into believing he was an adult, Attorney General Jay Nixon set up an undercover "sting" operation. It provided the evidence his office needed to file state-court suits seeking to enjoin the Coeur D'Alene Tribe and its contractor, UniStar Entertainment, from offering Missouri residents chances in its national online lottery.⁵

Opposing parties in the Internet gambling debate view the circumstances of the Missouri Attorney General's ensnarement of the Coeur D'Alene Tribe either as the epitome of the excesses and errors of a recent, fervid push to prohibit Internet gambling or as emblematic of the legitimate justifications for such

and bet the house."); *Federal Legislation is Needed to Prohibit Internet Gambling, Senate Witnesses Say*, BNA WASHINGTON INSIDER, July 29, 1997.

4. See FEB. 10 BNA MANAGEMENT BRIEFING, *supra* note 2, at 1.

5. See *id.* (discussing *Missouri v. UniStar Entertainment*, No. CV-198-7CC (Mo. Cir. Ct. Jan. 29, 1998)). Attorney General Nixon's battle with the Coeur D'Alene and UniStar would not end in state court. See *Missouri v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1105, 1109 (8th Cir. 1999), *cert. denied*, 119 S.Ct. 2400 (1999). Nixon first sued the Tribe and UniStar in state court in the Western District of Missouri; defendants removed to the United States District Court for the Western District of Missouri, arguing that the Indian Gaming Regulatory Act preempted state regulation of tribal gaming on Indian lands, and the state moved to remand. See *id.* at 1105. The district court denied the motion to remand, denied the State's motion for interlocutory appeal, granted defendants' motion to dismiss the claim against the Tribe as barred by tribal immunity, but denied the motion to dismiss the claim against UniStar. See *id.* To make the Western District's order final and appealable, the State voluntarily dismissed its claim against Unistar without prejudice and appealed the Western District's order to the United States Court of Appeals for the Eighth Circuit. See *id.* The State also filed a second, separate suit against Unistar and two tribal leaders in their individual capacities in state court in the Eastern District of Missouri. See *id.* Defendants again removed, this time to the United States District Court for the Eastern District of Missouri, and the state moved to remand or, alternatively, for a preliminary injunction. See *id.* The Eastern District court denied the State's motions and transferred venue to the Western District "to preserve judicial economy"; the State again appealed to the Eighth Circuit. See *id.* Consolidating both cases, the Eighth Circuit reversed in part, remanding to the Western District the preemption/federal jurisdiction issue. See *id.* at 1109. The United States Supreme Court denied the Tribe's petition for writ of certiorari. See 119 S.Ct. 2400 (1999).

prohibition.⁶ Some commentators have noted that the reality probably lies somewhere in the middle.⁷

Gambling is a growth industry in America.⁸ A 1996 *Washington Post* article observed that gambling generates “six times the revenue of all American spectator sports combined.”⁹ The amounts Americans spend on other “leisure activities . . . such as movie[s] . . . , theme parks, cruise ships, and recorded music[,]” are still \$3 billion less than what they spend on gambling.¹⁰ The U.S. gambling industry’s revenues totaled \$550 billion in 1995, a figure three times that year’s revenues for General Motors Corp;¹¹ by 1999, the “combined handle” (total

6. Compare 144 CONG. REC. S8775 (daily ed. July 22, 1998) (statement of Sen. Craig), and Steve Chapman, *Vice is Nice*, SLATE, Sept. 17, 1998, available in CENTER RIGHT, Oct. 19, 1998, with 144 CONG. REC. S8775 (daily ed. July 22, 1998) (statement of Sen. Bryan). Senator Craig is a Republican representing Idaho, and Sen. Bryan is a Republican representing Nevada. See *Members of the United States Senate*, available in Westlaw LEGIS-DIR database.

7. See generally Seth Gorman & Antony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L.J. 667 (1996). Gorman and Loo agree that Congress cannot rely on the marketplace to regulate Internet gambling but suggest three alternative solutions short of enacting an IGPA-like law that would prohibit all Internet gambling. See *id.* at 702-09.

The authors suggest that Internet gambling be conditionally legalized to avoid any jurisdictional, international comity[,], and enforcement concerns. Under this approach, Internet gambling should be permitted only to casinos that block access to minors and submit to United States jurisdiction and its laws. Alternatively, Congress may prevent access to the Internet casinos by holding access providers liable if they permit any access to the casinos. Finally, Congress can promote family use of “blocking technology.”

Id. at 669.

8. See 142 CONG. REC. H3622 (daily ed. Apr. 18, 1996) (statement of Rep. Wolf) (citing “explosive growth in legalized gambling,” quoting *Don’t Bet on a U.S. Gambling Study*, WASHINGTON POST, Apr. 18, 1996). Representative Wolf is a Republican representing Virginia. See *Members of the United States Senate*, available in Westlaw LEGIS-DIR database. See also Guy Calvert, *Gambling America: Balancing the Risks of Gambling and Its Regulation*, POLICY ANALYSIS (CATO Institute, Washington, D.C.) June 18, 1999 at 2 (stating that “fully 32 percent of U.S. households gambled at a casino in 1996[,] . . . for an overall total of 176 million visits,” a 14% increase from 1995) (citing *Harrah’s Survey of Casino Entertainment*, 1997 (visited Jan. 17, 1999) <http://www.harrahs.com/survey/ce97/ce97_index.html>)); *Harrah’s Survey of Casino Entertainment*, 1997 (visited Jan. 17, 1999) <http://www.harrahs.com/survey/ce97/ce97_index.html> (stating that 1996 U.S. casino revenue increased 12% over 1995); *infra* notes 9-16 and accompanying text.

9. 142 CONG. REC. H3622 (daily ed. Apr. 18, 1996) (statement of Rep. Wolf) (quoting *Don’t Bet on a U.S. Gambling Study*, WASHINGTON POST, Apr. 18, 1996, at A1).

10. *Id.*

11. See 143 CONG. REC. S2553, S2560 (daily ed. Mar. 19, 1997) (statement of Sen. Kyl); Mark G. Tratos, *Issues in Cyberspace: Gaming on the Internet*, 3 STAN. J.L. BUS. & FIN.

amount bet) of all legal U.S. gambling—state lotteries, race tracks, casinos, and Nevada sports betting—had grown to \$640 billion a year.¹² Illegal bets add tens of billions of dollars more to that number.¹³

Online gambling, which allows bettors to use personal computers to place bets via the Internet either with electronic sports books or “virtual casinos,” is one of the most rapidly growing segments within the gambling industry.¹⁴ In 1999, analysts projected that the Internet’s World Wide Web (“Web”) would account for \$1 billion in gambling revenue that year,¹⁵ the Internet gambling market having “doubled from 1997 to 1998, . . . with the number of gamblers increasing from 6.9 million to 14.5 million and revenue jumping from \$300 million to \$651 million.”¹⁶ Most studies project an approximately \$3 billion market by 2002,¹⁷ with some forecasting \$100 billion by 2006.¹⁸

101, 102 (1997).

12. See Richard C. Morais, *Entrepreneurs*, FORBES, Nov. 15, 1999, at 216.

13. In 1995, illegal U.S. gambling totaled as much as \$30 billion. See Gorman & Loo, *supra* note 7, at 668 n.9 (citing CNN television broadcast, June 3, 1995).

14. See I. Nelson Rose, *Internet Gambling: Domestic and International Developments*, S.C. 91 A.L.I.-A.B.A. 131 (1998) [hereinafter Rose I]. Rose, a professor at Whittier Law School, Costa Mesa, California, writes in this American Law Institute-American Bar Association Continuing Legal Education study course that “gambling online” consists of “[i]ndividuals . . . mak[ing] wagers from any computer with a modem.” *Id.* at 133. According to Rose, although the “[g]reatest concern [is] the use of a personal computer (‘PC’) from home or office[,] . . . [o]ther technology is being developed, such as interactive T.V. and stand-alone Internet terminals that accept cash. Even the PC can be eliminated: MonaCall allows casino gaming from a touch-tone phone.” *Id.* Rose also quotes a letter from the United States Department of Justice (DOJ) to the National Association of Attorneys General stating that “Internet gaming is expected to mushroom.” *Id.* at 149. See also *Technology Hearings*, *supra* note 3 (testimony of Ohio Attorney General Betty Montgomery) (stating that VIP sports, “a popular Netherlands Antilles online gambling site . . . reported a 2000 percent growth rate in revenue and customers during 1998”).

15. See Justin Matlick, *Gamblers Will Surf Around Any Electronic Blockade*, LAS VEGAS REV.-J., Oct. 28, 1999, at B9 (citing a study by Christensen Capital Advisors, New York); Richard Smith, *How to Lose Your Home Without Ever Having to Leave It*, CREDIT MGMT., Nov. 1, 1999, at 20 (citing a Datamonitor study).

16. Tom W. Bell, *Gambler’s Web: Why Online Betting Can’t Be Stopped—And Why Washington Shouldn’t Bother Trying*, REASON, Oct. 1999, at 25, 28 (citing economist Sebastian Sinclair).

17. See *id.* (citing Sinclair’s prediction of 43 million Internet gamblers generating a \$2.3 billion market in 2001); Justin Hibbard, *Internet Gambling Takes a Hit*, THE RED HERRING, Oct. 1, 1999, available in 1999 WL 19628259 (citing Christiansen/Cummings Associates marketing research firm’s forecast of a \$3 billion worldwide market by 2002).

18. See *Technology Hearings*, *supra* note 3 (testimony of Sen. Jon Kyl) (quoting Debra Baker, *Betting on Cyberspace: When It Comes to the Future of Internet Gambling, All*

The most prevalent type of online gambling takes the form of electronic simulations of traditional casino games, including card games such as blackjack and Caribbean poker, table games such as craps and roulette, and slot machines.¹⁹ Indeed, by 1999, “[e]stimates of the number of gaming Web sites var[ied] from 250 to 1000”²⁰ sites, which accept wagers from Internet users located within the United States and throughout the globe.²¹

Aiming to halt Internet gambling’s “exponential growth”²² before it becomes uncontrollable,²³ Congress, in each session since 1995, has considered legislation criminalizing all Internet gambling.²⁴ Sponsors voice concern over the detrimental social

Wagers Are Off, A.B.A. J., Mar. 1999, at 54); John T. Fojut, *Ace in the Hole: Regulation of Internet Service Providers Saves the Internet Gambling Prohibition Act of 1997*, 8 DEPAUL-LCA J. ART & ENT. L. 155, 159 (1997). Fojut quotes Steve Toneguzzo, an advisor to the Australian government, as projecting \$50 billion by 2000 and U.S. analyst John Bigness as projecting at least \$100 billion to \$200 billion by 2005. *See id.*

19. *See* Rose I, *supra* note 14, at 135 (stating that sports betting “[m]ay still have the greatest dollar volume, though there are now more casino sites online”).

20. Bell, *supra* note 16, at 26; *see also Crime Hearings*, *supra* note 3 (testimony of Rep. Bill McCollum, Chairman) (claiming that “currently over 500 sites” exist); Matlick, *supra* note 15, at B9 (estimating approximately 400 sites [in 1999]). In 1998, commentators quoted the number of Internet gambling Web sites as 140 to 150. *See* 144 CONG. REC. S8689, S8763 (daily ed. July 22, 1998) (statement of Sen. Bryan) (“[Internet gambling] approaches nearly \$1 billion of annual revenue; 140 Web sites currently operate on the Internet”); Rose I, *supra* note 14, at 137 (noting that “[a]pproximately 150 sites accept real-money wagers”). A search via the AltaVista Internet search engine, available at <<http://www.altavista.digital.com>>, conducted November 12, 1998, using the Boolean search terms “online gambling” AND “online lottery” AND “online casino” returned 370 Web pages containing all three terms; the same search conducted January 18, 2000 returned 60,201 Web pages. The addition of the term “Internet gambling” returned 56,250 Web pages containing all four terms. The same search using the Yahoo! Internet search engine, available at <<http://www.yahoo.com>>, returned 1234 Web pages containing all four terms; the Yahoo Internet directory, available at <<http://dir.yahoo.com/BusinessandEconomy/Companies/Gambling/Casinos/>> listed 435 sites that self-identified as either “Individual Casinos” or “Online Casinos.” Finally, a popular Internet gaming directory Web site, Gambling.com, available at <<http://www.gambling.com>>, lists 10,240 entries in 18 categories, ranging from blackjack (228) to casinos (1332) to sports betting (2841).

21. *See* Gorman & Loo, *supra* note 7, at 667.

22. 144 CONG. REC. S8689, S8763 (daily ed. July 22, 1998) (statement of Sen. Bryan).

23. *See id.* at S8760 (statement of Sen. Kyl). “[I]f we don’t stop this activity now, the money that is generated by this kind of illegal activity is going to, I am afraid, become so influential in our political process that we will never get it stopped.” *Id.*

24. *See* Title XV of the Crime Prevention Act of 1995, S. 1495, 104th Cong. §§ 1501-1503; Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong.; Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. Senator Kyl introduced each of these measures, along with various co-sponsors. *See* 141 CONG. REC. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl); 143 CONG. REC. S2553, S2560 (daily ed. Mar. 19, 1997)

effects,²⁵ especially on minors,²⁶ and the unregulated nature of the burgeoning Internet gambling industry,²⁷ some facets of which current federal law prohibits.²⁸ Sponsors also fear that the increasingly rapid advance of technology carries with it the potential to render existing federal gambling laws inapplicable to Internet gambling.²⁹

The United States Senate addressed these issues during the 104th Congress but failed to pass a bill.³⁰ In the following session, Senator Jon Kyl introduced an Internet gambling bill.³¹ After modifying the measure,³² the Senate passed the Internet

(statement of Sen. Kyl); 145 CONG. REC. S3123, S3144 (daily ed. Mar. 23, 1999). *See also* H.R. 4427, 105th Cong. (1998), *reported in* 144 CONG. REC. H7410, H7411 (daily ed. Aug. 6, 1999); H.R. 3125, 106th Cong. (1999), *reported in* 145 CONG. REC. H10,724 (daily ed. Oct. 21, 1999). Representative Goodlatte, a Republican, represents Virginia. *See Members of the United States House of Representatives*, available in Westlaw LEGIS-DIR database. Representative Goodlatte and co-sponsors introduced both House measures. *See* 144 CONG. REC. H7410, H7411 (daily ed. Aug. 6, 1999); 145 CONG. REC. H10,724 (daily ed. Oct. 21, 1999).

25. *See* 144 CONG. REC. S8689, S8760 (daily ed. July 22, 1998) (statement of Sen. Kyl). We know that about [five] percent of the people who gamble will become addicted. . . . Of those, about 80 percent will contemplate suicide, and about 17 percent of those will commit suicide. Bankruptcies are huge and growing. . . . [U]p to 90 percent of pathological gamblers commit crimes to pay off their wagering debts.

Id.

26. *See id.* (stating that "the youth of our society are the most at risk for conducting Internet gambling. . . . [O]ur [n]ation's children are at risk").

27. *See id.*

The kind of gaming that we have legalized in this country is the kind of thing where you have to go to that site. You have to engage in the activity there. It is highly regulated. One of the reasons this kind of activity is so dangerous is because there is nobody there to check the activity. It occurs in the privacy of your own home with nobody there to say, "Wait a minute. Haven't you done this long enough? Haven't you lost enough money?"

Id.

28. *See* Scott M. Montpas, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163, 180-81 (1996). Montpas notes that "[b]ecause Internet gambling depends on interstate wires to transmit bets, many people believe [18 U.S.C.] section 1084 provides the legal justification for declaring Internet gambling to be illegal," but "[b]y its plain meaning, section 1084(a) does not cover casino-style gambling," only sports bookmaking. *Id.* at 180-81. *Cf.* discussion, *supra* note 27.

29. *See* 144 CONG. REC. S8689, S8759 (daily ed. July 22, 1998) (statement of Sen. Kyl); *see also* discussion *infra* note 94-95 and accompanying text.

30. *See* Title XV of the Crime Prevention Act of 1995, S. 1495, 104th Cong. §§ 1501-1503 (1995).

31. *See* Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997).

32. *Compare* Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997)

Gambling Prohibition Act (IGPA)³³ by a vote of 90-10 on July 23, 1998.³⁴ In the House of Representatives, a bill containing virtually the same provisions³⁵ passed the Judiciary Crime Subcommittee;³⁶ yet at the close of the 105th Congress, both the House and Senate measures awaited consideration by the full House Judiciary Committee.³⁷ Thus, the IGPA fell victim to the legislative calendar.³⁸

In the 106th Congress, Senator Kyl introduced the Internet Gambling Prohibition Act of 1999;³⁹ with one exception, the 1999 Act contained substantially the same language as the version that the Senate passed in 1998.⁴⁰ The exception significantly changed the 1998 legislation, however, because it removed the 1998 Act's penalties for individual bettors.⁴¹ After hearings in

(introduced by Sen. Kyl on Mar. 19, 1997), *with* Internet Gambling Prohibition Act of 1998, S. 2260, § 624, 105th Cong. (1998) (as passed by the Senate, July 23, 1998), *reported in* 144 CONG. REC. S9302-04 (daily ed. July 29, 1998).

33. S. 2260, 105th Cong. § 624 (1998), *reported in* 144 CONG. REC. S9302-04 (daily ed. July 29, 1998).

34. *See* 144 CONG. REC. S8822 (daily ed. July 23, 1998).

35. *Compare* H.R. 4427, 105th Cong. (1998), *reported in* 144 CONG. REC. H7410, H7411 (daily ed. Aug. 6, 1998), *with* S. 2260, 105th Cong. § 624 (1998), *reported in* 144 CONG. REC. S9302-04 (daily ed. July 29, 1998).

36. *See Crime Hearings, supra* note 3 (testimony of Rep. Bill McCollum, Chairman) (noting the Subcommittee's approval of the previous year's legislation).

37. *See* 145 CONG. REC. S14,863, S14,866 (daily ed. Nov. 19, 1999) (statement of Sen. Kyl); 145 CONG. REC. S3123, S3146 (daily ed. Mar. 23, 1999) (statement of Sen. Kyl). In addition, on July 29, 1998, Rep. Stearns, a Republican representing Florida, *see Members of the United States House of Representatives, available in* Westlaw LEGISDIR database, introduced H.R. 4350, which H.R. 4427 appeared to duplicate entirely; at the close of the 105th Congress, H.R. 4350 also appeared on the House Judiciary Committee's legislative calendar. *See* 144 CONG. REC. H6696, H6697 (daily ed. July 29, 1998).

38. *See* 145 CONG. REC. S14,863, S14,866 (daily ed. Nov. 19, 1999) (statement of Sen. Kyl). Moreover, Rep. Stearns introduced an amendment to the House Commerce-Justice-State Departments Appropriations Act that would have included the Senate-approved language. *See* 144 CONG. REC. H7262, H7269 (daily ed. Aug. 5, 1998). Representative Stearns withdrew his amendment, however, after assurance by Rep. Goodlatte that the Judiciary Committee intended to pass H.R. 4427. *See* 144 CONG. REC. H7262, H7272 (daily ed. Aug. 5, 1998).

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

40. *Compare* Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. (1999) (engrossed in Senate Nov. 19, 1999), *with* Internet Gambling Prohibition Act of 1998, S. 2260, 105th Cong. § 624 (1998) (as passed by the Senate, July 23, 1998), *reported in* 144 CONG. REC. S9302-04 (daily ed. July 29, 1998).

41. *See* 145 CONG. REC. S3123, S3145 (daily ed. Mar. 23, 1999) (statement of Sen. Kyl) ("To address concerns raised by the Department of Justice, the bill (like the Wire Act) does not contain penalties for individual bettors."); *Technology Hearings, supra* note 3

the Senate Judiciary Committee,⁴² the Committee sent a substitute bill to the full Senate.⁴³ After two floor amendments that further altered the Act's scope⁴⁴ passed without objection,⁴⁵ the Senate passed the IGPA upon unanimous consent on November 19, 1999.⁴⁶

Therefore, at the opening of the 106th Congress's second session on January 24, 2000,⁴⁷ the fate of the IGPA again rested in the House of Representatives.⁴⁸ The House Judiciary Committee will consider both the Senate version as well as a House bill⁴⁹ that the Subcommittee on Crime approved for full Committee action at the first session's close.⁵⁰ Although similar to the Senate legislation,⁵¹ the House bill contains different exceptions,⁵² and the debate evinced some House members'

(testimony of Sen. Jon Kyl) (same). Compare S. 692, 106th Cong. (1999) (prohibiting only "a person engaged in a gambling business" from engaging in Internet gambling), with S. 2260, 105th Cong. § 624 (1998) (containing separate provisions prohibiting both "a person" and "a person engaged in a gambling business" from engaging in Internet gambling); see also discussion *infra* Part IV.B.

42. See 145 CONG. REC. S3123, S3146 (daily ed. Mar. 23, 1999) (statement of Sen. Kyl); *Technology Hearings*, *supra* note 3 (testimony of Sen. Jon Kyl).

43. See 145 CONG. REC. S14,863 (daily ed. Nov. 19, 1999) (indicating Judiciary Committee's report of an amendment offered as a substitute); 225 DAILY TAX REP. (publisher) N-1, Nov. 23, 1999 (containing Legislative Calendar for Nov. 19, 1999, indicating adoption of committee amendment as a substitute).

44. See 145 CONG. REC. S15,117 (daily ed. Nov. 19, 1999); *id.* at S15,117, at S15,120 (daily ed. Nov. 19, 1999).

45. See 145 CONG. REC. S14,863, S14,870 (daily ed. Nov. 19, 1999).

46. See *id.*

47. See 225 DAILY TAX REP. (BNA) N-1, Nov. 23, 1999 (containing Legislative Calendar for Nov. 22, 1999, indicating that the first session adjourned *sine die* and the second session would convene Jan. 24, 2000 at noon).

48. See *infra* notes 49-58 and accompanying text.

49. H.R. 3125, 106th Cong. (1999) (introduced Oct. 21, 1999 by Rep. Goodlatte). See 145 CONG. REC. E2153 (daily ed. Oct. 21, 1999) (extension of remarks by Rep. Goodlatte).

50. See 145 CONG. REC. D1251 (daily ed. Nov. 3, 1999). The Judiciary Committee held hearings and marked up the bill in March and April 2000 and ordered the bill reported as amended on June 7, 2000. See 146 CONG. REC. H4034-07 (daily ed. June 7, 2000). The Judiciary Committee referred the bill to the Commerce Committee for a period ending no later than June 23, 2000. See *id.* The Commerce Committee's Subcommittee on Telecommunications, Trade, and Consumer Protection began hearings on the bill June 15, 2000. See 146 CONG. REC. D606, D607 (daily ed. June 15, 2000).

51. Compare H.R. 3125, 106th Cong. (1999), with S. 692, 106th Cong. (1999).

52. Compare H.R. 3125, 106th Cong. (1999) (allowing wholly intrastate wagering on a closed-loop subscriber-based service if allowed by state law; containing no provision for Indian Gaming on Tribal Lands), with S. 692, 106th Cong. (1999) (containing no provision for wholly intrastate wagering; allowing some types of Indian Gaming on Tribal Lands, within specified restrictions).

strong prohibitionist leanings.⁵³ Congressional observers predict the bill will pass the full House⁵⁴ but remain skeptical about either body capitulating and passing a non-compromise version.⁵⁵ Thus, although a strong anti-Internet gambling law has not yet passed both houses, anti-Internet gambling advocates advance their cause a step further in each subsequent session;⁵⁶ observers believe that the 106th Congress will enact some version of the IGPA.⁵⁷ Significantly, House opposition to the exception-filled Senate version and continued advocacy by some legislators of outright prohibition makes penalties against individual bettors a continued possibility.⁵⁸

Although state governments primarily regulate gambling in the United States,⁵⁹ the federal government retains concurrent jurisdiction to regulate or prohibit gambling that affects interstate commerce.⁶⁰ In addition, Congress has enacted a regulatory scheme that applies to gambling on sovereign Indian lands.⁶¹ Notwithstanding these and other measures,⁶² gambling regulation remains primarily the states' province as a traditional exercise of their police power.⁶³

Despite this longstanding policy of federalism in gambling regulation, the IGPA would vastly expand federal jurisdiction

53. See Robert MacMillan, *Judiciary Subcommittee OK's Gambling Ban Bill*, NEWSBYTES, Nov. 3, 1999, available in 1999 WL 20021880. MacMillan reports that the subcommittee approved the bill on a 5-3 party-line vote after ranking Democrat Rep. Bobby Scott of Virginia "withdrew a proposed amendment that would target[] individual Internet gambler[s], instead waiting to offer the amendment before the full Judiciary Committee." *Id.* MacMillan also reports that, although Subcommittee Chairman McCollum "changed his stance" on prosecuting individual gamblers from supporting that provision in the 1998 House bill to opposition in 1999, the bill's sponsor, Rep. Goodlatte, "told Newsbytes that he would be comfortable with Scott's amendment." *Id.*

54. See H.R. 3125, BILLCAST, Dec. 31, 1999, available in Westlaw BC Database.

55. See *id.*

56. See *supra* notes 28-42 and accompanying text.

57. Telephone Interview with James W. Butler III, ITECH partner, Arnall Golden & Gregory, LLP, Atlanta, and Chairman, Legal and Legislative Special Interest Group, Association of Online Professionals (Nov. 11, 1998) [hereinafter Butler Interview].

58. See MacMillan, *supra* note 53.

59. See Fojut, *supra* note 18, at 155-56; Montpas, *supra* note 28, at 164-76.

60. See Fojut, *supra* note 18, at 155-56.

61. See Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2710 (1998).

62. See *supra* note 61 and accompanying text.

63. See Montpas, *supra* note 28, at 164; see also *supra* note 59 and accompanying text.

over gambling.⁶⁴ With some notable exceptions,⁶⁵ the IGPA would criminalize under federal law all forms of gambling conducted over the Internet, including some forms of currently legal gambling.⁶⁶ Moreover, in the current legislative climate,⁶⁷ Congress could conceivably enact an IGPA that would create the first federal gambling law enforceable not only against persons "in the business of gambling," but also against "casual bettors."⁶⁸ The IGPA also contains enforcement provisions that would allow federal or state law enforcement personnel to force Internet service providers (ISPs) to stop carrying the Web sites of suspected violators.⁶⁹

This Note examines the policy choices behind, and the implications of, the IGPA's approach toward Internet gambling regulation and the degree to which the nonterritorial nature of the Internet does or does not require a regime of outright prohibition. Part I establishes the history of significant federal gambling regulation and examines the current regime under the Interstate Wire Act.⁷⁰ Part II discusses the nonterritorial nature of the Internet and corresponding issues of jurisdiction and enforcement of laws regulating Internet activity.⁷¹ Part III examines the applicability of the existing Internet Wire Act to the nonterritorial Internet and questions whether additional

64. See 144 CONG. REC. S8689, S8759, S8761 (daily ed. July 22, 1998) (statement of Sen. Kyl) (noting that Wisconsin Attorney General Jim Doyle, head of the National Association of Attorneys General, testified that "[f]ederal authorities must take the lead in this area," that "ordinarily [state] attorneys general don't come to the [f]ederal [g]overnment and ask for statutes to be federalized," and that "[f]or state attorneys general to urge the [f]ederal [g]overnment to take [f]ederal jurisdiction over something like this is almost unprecedented"); see also Wendy R. Leibowitz, *Senate Bans Most 'Net Gambling'; Many Bet on Poor Enforcement*, NAT'L L.J., Aug. 10, 1998, at B6 (quoting Tom W. Bell, assistant professor, Chapman University; director of telecommunications studies, Cato Institute, who stated "[the legislation] represents an expansion of federal authority' in an area long regulated by the states"); *Attorney General Doyle Testifies in Favor of Federal Internet Gaming Bill*, NAT'L ASS'N ATT'YS GEN. GAMING DEV. BULL., JULY-AUG. 1997, at 1.

65. See *infra* notes 127-42 and accompanying text.

66. See S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999); see also discussion *infra* Part IV.

67. See MacMillan, *supra* note 53.

68. *Id.*; see also discussion *infra* Part IV.

69. See S. 692, 106th Cong. (1999); see also discussion *infra* Part IV.

70. See *infra* notes 77-96 and accompanying text.

71. See *infra* notes 97-124 and accompanying text.

regulation, such as the IGPA, is required.⁷² Part IV traces the development of the current proposed legislation and analyzes the likely effect and policy implications of several features of the Senate and House versions, including the prohibition of all Internet gambling,⁷³ possible criminal penalties for casual bettors,⁷⁴ enforcement provisions involving Internet service providers,⁷⁵ and the possible criminalization of some forms of gambling made legal by the Indian Gaming Regulatory Act of 1988 (IGRA).⁷⁶

I. HISTORY OF UNITED STATES FEDERAL GAMBLING REGULATION

One expert characterizes the history of gambling regulation in America as “a short-term crackdown, then a slow legalization.”⁷⁷ In both historical stages—prohibition and tightly regulated legalization—state law has chiefly regulated gambling in the United States.⁷⁸ The handful of existing federal gambling laws control gambling activity that is either not easily regulated by the states or that affects more than one state.⁷⁹ One of the most significant federal gambling laws of the latter type, the Interstate Wire Act (“Wire Act”),⁸⁰ “criminalizes the use of wire communications . . . in placing a sports wager between states or between a state and a foreign nation.”⁸¹ United States Circuit

72. See *infra* notes 125-44 and accompanying text.

73. See *infra* notes 146-65 and accompanying text.

74. See *infra* notes 166-78 and accompanying text.

75. See *infra* notes 179-91 and accompanying text.

76. 25 U.S.C. §§ 2701-2710 (1994). See *infra* notes 192-239 and accompanying text.

77. Leibowitz, *supra* note 64, at B6 (quoting Tom W. Bell). Bell expects to see this pattern repeated with Internet gambling, only “quicker because it [is] on the Internet.” *Id.*

78. See *supra* notes 45-46; see also Montpas, *supra* note 28, at 176 & n.90 (citing CAL. PENAL CODE § 337a(1) (West 1988) (declaring pool selling or bookmaking illegal); MINN. STAT. ANN. § 609.76(1) (West Supp. 1996) (declaring the maintenance or operation of a gambling place illegal); OHIO REV. CODE ANN. § 2915.02(A)(1) (Anderson 1993) (declaring the maintenance or operation of a gambling place illegal)).

79. See Fojut, *supra* note 18, at 155-56.

80. 18 U.S.C. § 1084 (1994).

81. Fojut, *supra* note 18, at 156; see also 18 U.S.C. § 1084(a) (1998).

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

Courts of Appeals have held the Wire Act's regulation of interstate gambling to be a valid constitutional exercise of Congress's power to regulate interstate commerce under the United States Constitution's Commerce Clause.⁸²

Although Part III discusses in greater detail the scope of the Wire Act's coverage and the policies underlying its enactment,⁸³ two features of the Wire Act are particularly relevant to an analysis of the Internet Gambling Prohibition Act. First, by its plain language, the Wire Act prohibits only the interstate transmission of wagers or information enabling wagers on "sporting events or contests."⁸⁴ Therefore, the Wire Act does not apply to other forms of gambling, such as the casino gambling currently popular on the Internet.⁸⁵ Second, the Wire Act subjects to prosecution only those persons in the "business of betting or wagering"⁸⁶; recreational or casual bettors cannot be

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 . . . or both.

Id.

Other federal gambling laws include the Gambling Ship Act, 18 U.S.C. §§ 1081-1083 (1994); National Gambling Impact Study Commission Act, 18 U.S.C. § 1955 (1994 & Supp. 1998); Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2710 (1994); Interstate Transportation of Wagering Paraphernalia Act (ITWP), 18 U.S.C. § 1953 (1994); Gambling Devices Act (Johnson Act), 15 U.S.C. §§ 1171-1178 (1994); Interstate Horse Racing Act, 15 U.S.C. §§ 3001-3007 (1994); and Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701-3704 (1994).

82. See, e.g., *Martin v. United States*, 389 F.2d 895, 896 (5th Cir. 1968), *cert. denied*, 391 U.S. 919 (1968) (stating that, without exception, repeated constitutional attacks on the Wire Act had failed (citing *United States v. Kelley*, 254 F. Supp. 9 (S.D.N.Y. 1966); *United States v. Borgese*, 235 F. Supp. 286 (S.D.N.Y. 1964); *United States v. Yaquina*, 204 F. Supp. 276 (N.D.W. Va. 1962)) and that recent petitioners had stopped challenging the law's constitutionality); see also U.S. CONST. art. I, § 8, cl. 3 (providing that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

83. See *infra* notes 125-44 and accompanying text.

84. 18 U.S.C. § 1084(a)-(b) (1994).

85. See 143 CONG. REC. S2553, S2560 (daily ed. Mar. 19, 1997) (statement of Sen. Kyl) ("Currently, nonsports betting is interpreted as legal.").

86. 18 U.S.C. § 1084(a) (1994). Courts have not set out a bright-line test to determine when an individual or group is "in the business of betting or wagering." *Id.* Courts have held that the statute does not require that a defendant be engaged in such a business exclusively. See *United States v. Reeder*, 614 F.2d 1179 (8th Cir. 1980). This section of the Act fails to distinguish between those persons engaged in such business on their own behalf and those engaged in business on behalf of others. See *Cohen v. United States*, 378 F.2d 751 (9th Cir. 1967), *cert. denied*, 389 U.S. 897 (1967). Regularly placed bets between friends are insufficient to support conviction under this section. See

prosecuted under this federal law.⁸⁷ The Wire Act also exempts from prohibition the transmission of information used in news reporting⁸⁸ and “the transmission of information assisting in the placing of bets or wagers on a sporting event or contest”⁸⁹ when such betting is legal in both the state or jurisdiction where the transmission originates and the state or jurisdiction where the information is received.⁹⁰ Finally, the Wire Act contains a clause defining the duties of common carriers similar to the IGPA’s provision that enforces its ban through Internet service providers.⁹¹ Part IV Section C discusses this provision, a controversial section of the IGPA in its original form that Congress modified during the legislative process.⁹²

Although individuals currently access the Internet primarily through telephone wires,⁹³ as technology advances and wireless Internet access becomes commonplace, some commentators and legislators disagree on the Wire Act’s continued application to Internet gambling.⁹⁴ In his introduction of the IGPA, Senator Kyl spoke to this concern, stating that:

United States v. Anderson, 542 F.2d 428 (7th Cir. 1976). One court held that an individual who wagered an average of \$800 to \$1000 per day, three or four times per week, was not “engaged in the business of betting or wagering.” See United States v. Baborian, 528 F. Supp. 324, 331 (D.R.I. 1981).

87. See 18 U.S.C. § 1084(a) (1994); see also *Baborian*, 528 F. Supp. at 328-29 (finding that “Congress never intended to include a social bettor within the prohibition of the statute”).

88. See 18 U.S.C. § 1084(b) (1994). Under this exception, courts have acknowledged that “[t]hose who use communications facilities . . . to receive and transmit racing and other news to be published in publications sold and distributed to the general public did not violate [§ 1084].” *Kelly v. Illinois Bell Tel. Co.*, 325 F.2d 148 (7th Cir. 1963).

89. See 18 U.S.C. § 1084(b) (1994).

90. See *id.*

91. See 18 U.S.C. § 1084(d) (1994).

When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a . . . law enforcement agency[. . . that any facility furnished by [the carrier] is being used or will be used for the purpose of transmitting or receiving gambling information . . . in violation of [the] law, it shall discontinue or refuse the leasing, furnishing, or maintaining of such facility

Id.; see also S. 2260, 105th Cong. § 624(d)(2)(C) (1998).

92. Compare S. 474, 105th Cong. (1997), with S. 692, 106th Cong. (1999), and H.R. 3125, 106th Cong. (1999); see also *infra* notes 179-91 and accompanying text.

93. See *Tratos*, *supra* note 11, at 107 (stating that “[s]ince the Internet and the Web are presently based on telephone communication[s], federal law prohibits Internet gambling”).

94. See 144 CONG. REC. S8689, S8759 (daily ed. July 22, 1998) (statement of Sen. Kyl).

One of these days wires are not going to be the means of electronic transmission. It is going to be fiber-optic cable or microwave transmission through satellites. We are not at all sure that when that happens that the [Interstate Wire] Act will be able to be used by prosecutors⁹⁵

Despite debate over the Wire Act's applicability to Internet gambling conducted via current Internet communication technology, in an effort to avoid liability under the proposed IGPA, almost all existing Internet casino operators have closed their United States operations and incorporated in foreign jurisdictions that have legalized Internet gambling.⁹⁶

II. THE NONTERRITORIAL NATURE OF THE INTERNET

The myriad definitions that exist for the Internet exemplify the medium's boundlessness.⁹⁷ Some have described the Internet variously as "a medium through which people in real space in one jurisdiction communicate with people in real space in another jurisdiction"⁹⁸; "one of the most influential developments in communication technology of the twentieth century;"⁹⁹ "a collection of networks;"¹⁰⁰ "a giant network which interconnects innumerable smaller groups of linked computer networks;"¹⁰¹ and "a decentralized, global medium of communications—or "cyber space.""¹⁰² As the previous quotation demonstrates, some equate the Internet with

95. *Id.*

96. See Gorman & Loo, *supra* note 7, at 668 n.4 (naming online casinos in the Turks and Caicos Islands and Antigua); see also Tratos, *supra* note 11, at 107 (stating that "the Caribbean Islands, Mexico, and Canada have filled the void").

97. See, e.g., Electronic Communications Act, 47 U.S.C. § 230(e)(1) (Supp. 1997); *Reno v. A.C.L.U.*, 521 U.S. 844, 849-50 (1997); *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 WL 97097, at *1 & n.1 (S.D.N.Y. Feb. 26, 1997); Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475, 476 (1998); Harley Goldstein, *On-Line Gambling: Down to the Wire?*, 8 MARQ. SPORTS L.J. 1, 9-12 (1997); Montpas, *supra* note 28, at 175.

98. Goldsmith, *supra* note 97, at 476.

99. John Edmund Hogan, Comment, *World Wide Wager: The Feasibility of Internet Gambling Regulation*, 8 SETON HALL CONST. L.J. 815, 818 (1998).

100. Montpas, *supra* note 28, at 174.

101. *Hearst*, 1997 WL 97097, at *1 (quoting *A.C.L.U. v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996)).

102. *Id.* (quoting William S. Byasse, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 220 n.5 (1995)).

“cyberspace,” although others judge it to be an example of a “pre-cyberspace.”¹⁰³

However, the federal government’s statutory definition of the Internet is perhaps most pertinent to an analysis of the Internet Gambling Prohibition Act.¹⁰⁴ In the Electronic Communications Act,¹⁰⁵ Congress defined the Internet as “[t]he international computer network of both Federal and non-Federal interoperable packet switched data networks.”¹⁰⁶ Congress incorporated this definition into the IGPA.¹⁰⁷

These definitions suggest that the Internet primarily functions as a concrete, technical communications tool—a medium through which users share information.¹⁰⁸ However, the content of that communication—its arguably greater resemblance to conduct rather than speech—distinguishes the Internet from communications tools such as the telephone.¹⁰⁹ Some commentators argue that the Internet’s interactivity allows a user to perform tasks in a foreign jurisdiction while online.¹¹⁰ With each mouse click, the local user directs the

103. See Goldstein, *supra* note 97, at 10-18. Goldstein recounts William Gibson’s origination of the term “cyberspace” and discusses how Gibson’s original usage has come to mean “the shared imaginary reality of computer networks,” which may or may not be a venue unto itself, existing independently from the physical world, into which an Internet user can enter and engage in conduct that may not be subject to regulation under the laws of any physical jurisdiction. See *id.* Goldstein then quotes Tim McFadden, *Notes on the Structure of Cyberspace and the Ballistic Actors Model*, in *CYBERSPACE: FIRST STEPS* 335, 350 (Michael Benedikt ed., 1991), as saying that the Internet is a pre-cyberspace because humans cannot yet “experience it as humans experience the space and ‘everyday’ objects of the world.” *Id.* at 10-13 nn.47-53.

104. See Electronic Communications Act, 47 U.S.C. § 230(e)(1) (1998).

105. See *id.*

106. *Id.* § 230(e)(1).

107. See S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999).

108. See Montpas, *supra* note 28, at 174 (writing “[t]oday, the Internet is not one network but a collection of networks, which allows for uninterrupted communication. Information is sent across the Internet in data packets with an affixed destination address.”).

109. See Goldstein, *supra* note 97, at 9-10.

When a user enters the Internet through his or her computer, his or her consciousness travels over the phone lines in the form of binary data. The phone lines are the cyberspatial [sic] equivalent of streets. The user, through his or her computer, “visits” someone else’s computer—the equivalent of another house or building in a faraway location.

Id.

110. The Principality of Liechtenstein sells chances for its global lottery at <<http://www.interlotto>> to residents of jurisdictions that prohibit interstate or foreign lotteries under the claim that “when playing InterLotto on the Internet, players are

remote host computer, or server, to perform certain functions;¹¹¹ the user can in many ways be thought to perform the functions herself via the remote server.¹¹²

The development of the graphical portion of the Internet, known as the World Wide Web, hastened the Internet's transition from its early origins in academic and military corridors¹¹³ to an open, general-use research, entertainment, and communication facility.¹¹⁴ With the Web came increased development of commercial uses for the Internet,¹¹⁵ along with inevitable disputes over parties' economic rights.¹¹⁶

traveling [sic] to Liechtenstein to enter the lottery. For most individuals, it is legal to take part in the legal activities of the country which they are visiting." I. Nelson Rose, *State Lotteries on the Internet?*, ANDREWS GAMING INDUS. LITIG. REP., May 1997, at 10 [hereinafter Rose II]. Idaho's Coeur d'Alene Tribe maintains a similar argument on its U.S. Lottery Web site, <<http://www.uslottery.com>>, stating that "when you log on to our system from wherever you are in the world, you are conducting a transaction on the reservation. . . . When you click the mouse in the privacy of your home, you are simply instructing our server in Idaho to conduct the transaction." Leibowitz, *supra* note 64, at B6.

111. See, e.g., Goldstein *supra* note 97, at 9 & n.32. Goldstein discusses the example of a user accessing a "gopher site," explaining that gopher is an information retrieval tool "that permits you to browse in search of diverse Internet resources Gopher enables you to retrieve these items without having to know the technical details of where these resources are located." *Id.* at n.32.

112. See discussion *supra* note 110.

113. See *Reno v. A.C.L.U.*, 521 U.S. 844, 849-50 (1997) (describing the Internet as "the outgrowth of what began in 1969 as a military program called 'ARPANET,' which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war").

114. See *id.* at 852.

The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. . . . Each has its own address—"rather like a telephone number." Web pages frequently contain information and sometimes allow the viewer to communicate with the page's . . . author. They generally also contain "links" to other documents created by that site's author or to other (generally) related sites.

Id.

115. See *id.* "Access to most Web pages is freely available, but some allow access only to those who have purchased the right The Web is thus comparable, from the readers' viewpoint, to both a vast library . . . and a sprawling mall offering goods and services." *Id.* at 852-53.

116. See, e.g., *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997).

The Internet's unique ability to allow users to perform physical tasks in a foreign jurisdiction without leaving their own jurisdiction and the increasingly common conception of the Internet as a separate, "cyberspatial" realm¹¹⁷ have created debate about the continued viability of traditional territorial concepts of jurisdiction.¹¹⁸ Moreover, unlike directed systems such as telephones, the postal service, or a commercial distribution chain, Internet users do not intentionally select a physical jurisdiction with which to establish contact.¹¹⁹ In fact, the Internet "is indifferent to . . . physical location . . . , and there is no necessary connection between an Internet address and a physical jurisdiction."¹²⁰ For these reasons, commentators have questioned the applicability to the Internet of an "effects test" of personal jurisdiction.¹²¹ Instead, courts have begun to formulate in Web cases a "purposeful availment" test based on a series of factors, including whether the site is active or passive and whether the Internet content provider is aware of the user's geographical location through billing or membership records, and thus knowingly transmits information into the jurisdiction.¹²²

117. See Goldstein, *supra* note 97, at 10-18.

118. See, e.g., Goldsmith, *supra* note 97, at 476.

119. See *Hearst* 1997 WL 97097, at *20 & n.21 (holding that establishment of a Web site was not activity directed or targeted toward any specific jurisdiction, quoting Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues In This New Frontier*, 59 ALB. L. REV. 1083, 1115-33, 1129-30 (1996)).

[J]urisdiction should not be permissible in any random state in which a cyberspace message may be read The connection is . . . remote between a cyberspace user posting a message in one state and the user that ultimately downloads the same message in another state. In both situations, the personal jurisdiction assertion is improper because of the lack of directed purposeful activity towards the forum and the 'uncertainty' or 'unpredictability of the contact.'

Id.

120. Fojut, *supra* note 18, at 168.

121. See, e.g., Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 FORDHAM L. REV. 2241 (1997); David Thatch, Note and Comment, *Personal Jurisdiction and the World-Wide Web: Bits (and Bytes) of Minimum Contacts*, 23 RUTGERS COMPUTER & TECH. L.J. 143 (1997).

122. See, e.g., *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

The Internet presents a final hurdle to the legal system—the problem of enforceability.¹²³ Take, for example, a hypothetical situation that might arise under the proposed IGPA. Assume that federal law enforcement officials can establish, based on the nature and content of the transmissions, that the operator of an Internet gambling site located in a foreign jurisdiction purposely directed wagering information into the United States. The prosecutor can obtain personal jurisdiction in such a case but lacks the means to enforce the law.¹²⁴

III. GAPS IN THE INTERSTATE WIRE ACT'S APPLICABILITY TO INTERNET GAMBLING CREATE A NEED FOR THE IGPA

Notwithstanding the jurisdictional and enforcement problems inherent in Internet regulation, both the federal government and several state governments have acted out of concern over what they see as the Internet's provision of dangerously easy access to gambling for minors, as well as adults susceptible to destructive behavior.¹²⁵ Of course, some commentators note that other motives may well be involved in the recent rash of legislative and judicial action against Internet gambling.¹²⁶ Even those skeptical of the purity of governmental interests, however, acknowledge the potentially detrimental effects on society, the moral threats to minors, and the dangers to consumers of wholly unregulated Internet gambling.¹²⁷

In 1961 Congress enacted the Wire Act, which prohibited the use of interstate wire communication facilities for any sports gambling,¹²⁸ to control that era's burgeoning, increasingly

123. See Fojut, *supra* note 18, at 171.

124. See *id.* at 169-70.

125. See *State v. Granite Gate Resorts, Inc.*, 576 N.W.2d 747 (Minn. 1998), *aff'd* 568 N.W.2d 715 (Minn. Ct. App. 1997); 144 CONG. REC. S8760 (daily ed. July 22, 1998) (statement of Sen. Kyl); *id.* at S8763 (statement of Sen. Bryan).

126. See, e.g., David Post, *Gambling on Internet Laws*, THE AMERICAN LAWYER (Sept. 1998, at 95), available in CENTER RIGHT, No. 28, Sept. 14, 1998. Post suggests that states might be concerned with protecting their lottery revenues from competition. See *id.*

127. See, e.g., Gorman & Loo, *supra* note 7, at 706 (suggesting as one alternative conditional legalization of tightly regulated Internet gambling); Montpas, *supra* note 28, at 184-85 (arguing that Internet gambling should be regulated via international treaty).

128. See Letter from Attorney General Robert F. Kennedy to Rep. Samuel Rayburn, Speaker of the House of Representatives (Apr. 6, 1961), (reprinted in H.R. REP. NO. 87-967 (1961), reprinted in 1961 U.S.C.C.A.N. 2631, 2633).

sophisticated interstate-bookmaking operations.¹²⁹ The Act exempted from prosecution those who transmit information between two states that both legalized the type of gambling at issue.¹³⁰ Because only Nevada had legalized sports-bookmaking operations or off-track betting, this exemption had little practical effect.¹³¹ Even today, when forty-eight of fifty states have some form of legalized gambling,¹³² legal sports books remain an anomaly outside of Nevada, Florida, and Atlantic City, New Jersey.¹³³ Thus, the Interstate Wire Act fails to control the forms of gambling that garner greater and greater participation.¹³⁴ Moreover, as wireless technology becomes more affordable for an increasing number of consumers, the Wire Act probably no longer will apply to the rapidly growing Internet market.¹³⁵

All gambling conducted in the United States is subject to a government-sanctioned regulatory regime that guards against concerns such as consumer fraud and access by minors.¹³⁶ Since the Wire Act does not apply to casino gambling, and the Internet continues to make this form of wagering accessible and desirable, some additional regulatory legislation is advisable, if not necessary.¹³⁷ Assuming, *arguendo*, that Internet gambling

129. A bookmaker is one "[whose] business is taking bets and paying out on winners." A bookmaker is often called a "bookie." *THE NEW LEXICON WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE* (1988 ed., Lexicon Publications 1987).

130. *See* H.R. REP. NO. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2633.

131. *See id.*

132. Only Utah and Hawaii prohibit completely all forms of gambling. *See* Montpas, *supra* note 28, at 166.

133. *See id.* at 166 & n.31.

134. *See supra* note 16 and accompanying text.

135. *See supra* notes 73-74 and accompanying text.

136. *See* 144 CONG. REC. S8689, S8760 (daily ed. July 22, 1998) (statement of Sen. Kyl).

137. *See* Montpas, *supra* note 28, at 169-70. Conducting a benefits-burdens analysis, Montpas found that while Internet gambling has minimal benefits, it creates substantial burdens. *See id.* In addition to the burdens associated with traditional gambling—"addiction, diminished job performance, crime, decreased spending on other forms of entertainment, and the regressive nature of gambling"—Internet gambling also brings burdens associated with "unsecured money transactions, unregulated operations, a detached environment, and usage by underage players." *Id.* at 170-71. Moreover, not only do the burdens outweigh the benefits, according to Montpas, but the two are dissociated—the burdens fall upon the local community of users, while the benefits accrue to the remote site operator's jurisdiction. *See id.* at 173.

should be regulated in some fashion, the issue becomes not whether, but how, governments should do so.¹³⁸

Its national accessibility and fundamentally nonterritorial nature make the Internet perhaps the quintessential subject of federal, as opposed to state, regulation.¹³⁹ No state truly would be able to effect its regulatory goals for a certain type of Internet gambling, so long as one state legalized that type of online wagering.¹⁴⁰

However, the Internet's nonterritorial nature fails to provide the strongest justification for Congress to enact new federal Internet gambling regulation.¹⁴¹ The same jurisdictional principle underlying the Wire Act most strongly favors federal, rather than state, regulation of Internet gambling.¹⁴² Assuming Internet gambling should be regulated, the Commerce Clause empowers Congress to do so because Internet gambling affects interstate commerce.¹⁴³

Perhaps largely because jurisdictional and enforcement concerns would render a regulatory scheme extremely difficult to establish and maintain, Congress instead appears poised to prohibit Internet gambling completely.¹⁴⁴

138. See Montpas, *supra* note 28, at 173-74.

139. See Post, *supra* note 126, at 3-4.

140. See Montpas, *supra* note 28, at 178.

141. See *supra* notes 121-22 and accompanying text.

142. See *supra* note 122 and accompanying text.

143. See Post, *supra* note 126, at 4. Post compares the Internet to the interstate railway system at issue in *Wabash St. L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886), and *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945). See *id.* "Where conduct takes place on an interstate 'network,' the Commerce Clause requires a 'cohesive national scheme of regulation' so that users can be 'reasonably able to determine their obligations' and can avoid becoming 'lost in a welter of inconsistent laws, imposed by different states with different priorities.'" *Id.*

144. See 144 CONG. REC. H7271 (daily ed. Aug. 5, 1998) (statements of Reps. Stearns, Goodlatte, and Gibbons).

IV. THE INTERNET GAMBLING PROHIBITION ACT

The IGPA represents a departure from the policies underlying existing federal interstate gambling regulation.¹⁴⁵ This section examines the necessity and desirability of outright prohibition versus strict regulation under the IGPA, along with some of the IGPA's problematic provisions.

A. The IGPA's Prohibition of All Internet Gambling

Although the Interstate Wire Act covers only sports wagering, the IGPA prohibits nearly all forms of gambling conducted over the Internet, with few exceptions.¹⁴⁶ Admittedly, no need for prohibitions on interstate casino gambling and lottery-type games existed until modern telecommunications technology made such forms of interstate gambling feasible.¹⁴⁷ Nevertheless, the IGPA's express prohibition of privately run lotteries,¹⁴⁸ while maintaining an exemption for state-run lotteries,¹⁴⁹ carries the appearance of an effort simply to exclude unwanted competition.¹⁵⁰

In addition to state lotteries, the IGPA exempts the following other well-established, traditional gambling activities:

145. See Tratos, *supra* note 11, at 106. "The rationale that underlies federal regulation of the use of interstate wire communications for gaming is that citizens of each state are entitled to make their own determination as to whether gaming is authorized within that state." *Id.*; see also discussion *infra*, Parts IV.A-D.

146. See S. 2260, 105th Cong. § 624 (1998), reported in 144 CONG. REC. S9302-04 (daily ed. July 29, 1998).

147. See 144 CONG. REC. S8689, S8760 (daily ed. July 22, 1998) (statement of Sen. Kyl) (acknowledging that "this is a relatively new phenomenon"); see also Rose I, *supra* note 14, at 146 (noting that Congress amended the federal lottery statutes, 18 U.S.C. §§ 1301-1307 (1998), in 1994, following the Third Circuit's decision in *Pic-A-State Pa., Inc. v. Commonwealth*, 42 F.3d 175 (3d Cir. 1994)). Congress amended § 1301 to prohibit the use of agents in other states buying out-of-state lottery tickets and § 1304 to restrict "broadcasting . . . any advertisement . . . or information concerning any lottery." *Id.*

148. See S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999); 144 CONG. REC. S9302 (daily ed. July 29, 1998).

149. See S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999); 144 CONG. REC. S9303 (daily ed. July 29, 1998).

150. See Post, *supra* note 126, at 1.

parimutuel betting¹⁵¹ on certain types of computer networks,¹⁵² horse- and dog-racing,¹⁵³ and fantasy sports leagues.¹⁵⁴ Further, the Senate bill excludes from prohibition certain types of Indian gaming,¹⁵⁵ provided participants gamble on Indian land.¹⁵⁶

The Senate added exceptions for state lottery and parimutuel betting on certain types of computer networks¹⁵⁷ during committee consideration of Senator Kyl's original 1998 bill,¹⁵⁸ and Senator Kyl included the exceptions in the 1999 Act.¹⁵⁹ Senator Bryan introduced the exception for participation in fantasy sports leagues¹⁶⁰ as a second-degree amendment¹⁶¹ to Senator Kyl's 1999 Appropriations Act amendment;¹⁶² Senator

151. A pari-mutuel is "1: a betting pool in which those who bet on competitors finishing in the first three places share the total amount bet minus a percentage for the management[,] 2: a machine for registering the bets and computing the payoffs in parimutuel betting." MERRIAM-WEBSTER'S COLLEGE DICTIONARY 845 (10th ed. 1998).

152. See S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999).

153. See S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999).

154. See S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999); 144 CONG. REC. S8689, S8758-64 (daily ed. July 22, 1998).

155. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2710 (1988), governs Indian gaming. Its purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* § 2702.

156. See S. 692, 106th Cong. (1999); 145 CONG. REC. S15,117, at S15,120. *But see* H.R. 3125, 106th Cong. (1999).

157. See S. 692, 106th Cong. (1999).

158. See 144 CONG. REC. S8689, S8759-61 (daily ed. July 22, 1998) (statement of Sen. Kyl).

[W]e have been able to work with the so-called horse industry and the parimutuel betting to assuage concerns they had originally expressed. . . . We essentially said with respect to that industry that this legislation does nothing to take away from any of the activity they can do today, and, in fact, given the fact that they are going to be using computers in their operation, and also in their advertising in the future, we make sure that activity is not prohibited.

Id. at S8759, S8761.

159. See S. 692, 106th Cong. (1999).

160. See *id.*

161. See 144 CONG. REC. S8689, S8758-64 (daily ed. July 22, 1998). A second-degree amendment is an amendment offered to an amendment that a legislative body is considering. See STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS 180 (2d ed. 1990), reprinted in OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND PROCESS 235-36 (2d ed., Michie Co. 1993). Smith and Deering assert that second-degree amendments constitute "a fairly constant 10 [to] 15 percent of all [Congressional] amendments." *Id.*

162. See 144 CONG. REC. S8689, S8758-64 (daily ed. July 22, 1998). Senator Bryan stated that "[s]ome have estimated that nearly 1 million Americans participate in fantasy or rotisserie sports teams on the Internet ranging from baseball to golf to auto racing." *Id.*

Kyl retained the exception in the 1999 bill.¹⁶³ The exemption for certain classes of Indian gaming conducted on Indian land seeks to protect gambling now legal under the Indian Gaming Regulatory Act.¹⁶⁴

The House bill contains all of the Senate bill's exclusions except for a provision exempting certain classes of Indian Gaming on Tribal land.¹⁶⁵

B. The IGPA's Applicability Against Casual Bettors

The IGPA passed by the Senate in 1998 subjected individual bettors who are not in the "business of gambling," or casual bettors, to criminal prosecution.¹⁶⁶ In so doing, the IGPA represented a striking departure from the policies underlying the Interstate Wire Act.¹⁶⁷

Congress enacted the Wire Act in 1961 to assist the states "in the enforcement of their laws pertaining to gambling,

at S8763. Stating his support for the Bryan amendment, Sen. Kyl noted that it protected those who are providing the games involving, for example, baseball where you get together with other people and you create your own baseball team and you then are judged by how well those teams and players do in the future. Sometimes there are prizes awarded, and sometimes there are not. But in any case, you usually pay a fee to do that, and if you win, you can win the prize. Now, the people who operate these kinds of activities on the Internet have variously claimed that it is not gambling or that no prizes are awarded. And if that is the case, then they have nothing to worry about under this legislation because both of those are requirements for it to be considered gambling. We also make it clear, if they charge administrative fees rather than collecting money to pay off bets, they would be exempt.

Id. at S8761.

163. See S. 692, 106th Cong. (1999).

164. 25 U.S.C. § 2710 (1998). See discussion *infra* Part IV.D.

165. See H.R. 3125, 106th Cong. (1999).

166. See S. 2260, 105th Cong. § 624(c) (1998), reported in 144 CONG. REC. S9279, S9303 (daily ed. July 29, 1998).

(5) PERSON.-The term 'person' means any individual, association, partnership, joint venture, corporation . . . (2) PENALTIES.-A person who violates paragraph (1) shall be-(A) fined in an amount that is not more than the greater of- (i) three times the greater of- (I) the total amount that the person is found to have wagered through the Internet or other interactive computer service; or (II) the total amount that the person is found to have received as a result of such wagering; or (ii) \$500; (B) imprisoned not more than 3 months; or (C) both.

Id.

167. See *United States v. Baborian*, 528 F. Supp. 324, 328-29 (D.R.I. 1981) (finding that "Congress never intended to include a social bettor within the prohibition of the statute").

bookmaking, and like offenses and to aid in the suppression of organized gambling activities.”¹⁶⁸ The Wire Act is not enforceable against individuals engaged in “social” or “casual” betting, but only against those engaged in the “business of betting or wagering.”¹⁶⁹ In response to the IGPA, one gaming law expert noted, “[f]or the first time in history, it will be illegal for a casual bettor to place a bet.”¹⁷⁰ In fact, however, various state laws have long applied to casual bettors.¹⁷¹ More precisely, the IGPA would for the first time make placing a single, friendly bet a federal crime.¹⁷²

Although neither 1999 IGPA legislation contains a provision subjecting individual bettors to criminal penalty,¹⁷³ the House Judiciary Committee’s ranking Democratic member intends to introduce an amendment creating such a provision.¹⁷⁴ Whereas some state gambling laws traditionally have targeted individual bettors, such a provision belies the reasoning behind federal regulation of gambling.¹⁷⁵ Proponents offer two justifications for federal gambling legislation. First, regulation at the federal level is meant to assist the states, which primarily control gambling as a traditional exercise of state police power.¹⁷⁶ Second, the Commerce Clause empowers Congress to regulate interstate

168. See H.R. REP. NO. 87-967, at 6 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2631.

169. See *Baborian*, 528 F. Supp. at 324; see also *supra* notes 65-66 and accompanying text.

170. Leibowitz, *supra* note 64, at B6 (quoting Anthony Cabot, partner at Lionel, Sawyer & Collins, Las Vegas; adjunct professor with the William F. Harrah College of Hotel Administration at the University of Nevada, Las Vegas; and author of the INTERNET GAMBLING REPORT III (3d ed. 1999)).

171. See TEX. PENAL CODE ANN. § 47.02 (1999) (providing that “A person commits an offense if he: (1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest; (2) makes a bet on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or (3) plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gaming device.”).

172. Compare Leibowitz, *supra* note 64 (quoting Anthony Cabot), with Anthony Cabot, *Internet Gambling in the Information Age*, NEV. LAW., Mar. 1999, at 20 (stating that “[t]he Kyl bill . . . would, for the first time, make it unlawful under federal law for a patron to place a wager with a gambling business”).

173. See S. 692, 106th Cong. (1999).

174. See MacMillan, *supra* note 53..

175. See *supra* notes 118-22 and accompanying text.

176. See *Martin v. United States*, 389 F.2d 895, 898 (5th Cir. 1968) (finding that “assistance to the states directly was . . . part of the reason for enactment of [the Wire Act]”).

gambling because of the effect it has on interstate commerce.¹⁷⁷ Thus, the federal government has an interest in regulating only the gambling activity either that states are unable to control or that affects interstate commerce.¹⁷⁸ This being the case, making casual bettors liable for criminal penalties under the IGPA fails to further the federal government's interests, because a state can control and regulate the activities of its own residents.¹⁷⁹ Moreover, to the degree that the activity of casual bettors affects interstate commerce, the regulation does not meet the government's interest, because the government can more effectively control the effect on interstate commerce by penalizing providers.¹⁸⁰ Finally, even if the House does not ultimately enact a provision penalizing persons not "in the gambling business," individual bettors may find themselves culpable under both bills' definitions of "gambling business," which include anyone who wins more than \$2000 in one twenty-four-hour period.¹⁸¹

C. The IGPA's Applicability to Internet Service Providers

As introduced in 1998, the Senate bill containing the Internet Gambling Prohibition Act would have placed an inordinate burden on Internet service providers; it possibly would have required ISPs to continually monitor active Web sites to ensure that known violators of the IGPA did not resurface on their systems.¹⁸² Such requirements inevitably would have restricted the function of ISPs, which provide important gateways to the Internet.¹⁸³

177. *See id.* (finding that "[the Wire Act] was part of an omnibus crime bill that recognized the need for independent federal action to combat interstate gambling operations").

178. *See id.*

179. *See supra* notes 58, 151, and accompanying text.

180. *See generally* *United States v. Lopez*, 514 U.S. 549 (1995).

181. *See* S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999); *see also* Bell, *supra* note 16, at 26.

182. *See* S. 474, 105th Cong. § 3(2) (1997) (amending the Wire Act, 18 U.S.C. § 1084, by adding the following section: "(2) INJUNCTIVE RELIEF—Any Federal, State, or local law enforcement agency acting within its jurisdiction, shall have the authority, . . . to seek an injunction or other appropriate relief from a Federal or State court of competent jurisdiction barring access to the communication facility at issue . . .").

183. *See* Butler Interview, *supra* note 57.

The version the Senate passed in 1999 was influenced by cooperative work between the ISPs and concerned legislators; the Act now contains safeguards that protect ISPs from such enormous monitoring burdens and enforcement requirements.¹⁸⁴ Nevertheless, the IGPA's civil enforcement provisions remain a vital element of the Act's enforcement scheme.¹⁸⁵ One commentator has argued that regulation of ISPs "saves" the IGPA because it would be virtually unenforceable without a provision allowing law enforcement personnel to force ISPs to stop carrying gambling Web sites.¹⁸⁶ Despite the improvements made during the legislative process, however, the Act's regulation of ISPs remains problematic.¹⁸⁷

While the legislation that the Senate ultimately passed does not force ISPs to function as the Internet's private policemen, once advised that a Web site is in violation of the Act, an ISP must cease providing service to that site and can be compelled to do so by court order.¹⁸⁸ Legislators worked closely with ISPs in committee to ensure that a "safety net" appeared in the Act's enforcement provisions involving ISPs, thus mitigating the "chilling effect" that such enforcement could have on developing Internet commerce.¹⁸⁹ Although ISPs would incur no liability for terminating a subscriber's service in compliance with a court order, an ISP might still face lengthy legal challenges from terminated subscribers.¹⁹⁰ Moreover, certain provisions of the Act that apply to ISPs remain unclear.¹⁹¹ For example, if a court orders an ISP to terminate access to a person or company suspected of violating the IGPA, how far must the ISP go towards eradicating that access before it can claim

184. See S. 692, 106th Cong. (1999); see also S. 2260, 105th Cong. § 624(d)(2)(C)(i)-(ii) (1998), reported in 144 CONG. REC. S9279, S9303 (daily ed. July 29, 1998).

185. See Fojut, *supra* note 18, at 166-73.

186. See *id.* at 155, 167-73.

187. See Butler Interview, *supra* note 57.

188. See S. 2260, 105th Cong. § 624(d)(2)(C) (1998), reported in 144 CONG. REC. S9303 (daily ed. July, 29, 1998).

189. See 144 CONG. REC. S8759 (daily ed. July 22, 1998) (statement of Sen. Kyl).

190. See *Tollin v. Diamond State Tel. Co.*, 286 F. Supp. 86, 89 (D. Del. 1968) (noting that in an action by a subscriber to enjoin the telephone company from terminating service on the ground that the subscriber was using the service for gambling purposes, the telephone company had the burden of proof as to facts forming the basis for termination).

191. See Butler Interview, *supra* note 57.

unfeasibility under the Act?¹⁹² Must it remove all known links to the offending site on other sites?¹⁹³ These unresolved questions demonstrate the need for caution as legislators attempt to regulate the Internet.¹⁹⁴

D. The IGPA's Rewrite of the Indian Gaming Regulatory Act

Federally recognized Native American tribes have the same legal status under federal law as foreign sovereigns.¹⁹⁵ The United States Supreme Court has held that such tribes enjoy the same sovereign immunity from suit under the Eleventh Amendment¹⁹⁶ as the individual states and thus cannot be sued without the tribe's consent.¹⁹⁷ Congress recognized this fact when it enacted the Indian Gaming Regulatory Act of 1988 (IGRA).¹⁹⁸ Congress enacted the IGRA to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments."¹⁹⁹ The IGRA consequently seeks to "ensure that the Indian tribe is the primary beneficiary of [authorized] gaming operation[s]"²⁰⁰ and to "protect such gaming as a means of generating tribal revenue."²⁰¹

192. *See id.*

193. *See id.*

194. *See generally* 143 CONG. REC. S6491-92 (daily ed. June 26, 1997) (statement of Sen. Leahy). "The Communication Decency Act was misguided and unworkable. It reflected a fundamental misunderstanding of the nature of the Internet, . . ." *Id.* Senator Leahy is a Democrat representing Vermont. *See Members of the United States Senate, available in* Westlaw LEGIS-DIR database.

195. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268-69 (1997) (citing *Blatchford v. Native Village of Notack*, 501 U.S. 775, 779-82 (1991)).

196. *See* U.S. CONST. amend. XI (providing that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State").

197. *See* *Rose I*, *supra* note 14, at 157.

198. 25 U.S.C. §§ 2701-2710 (1998).

199. *See id.* § 2702(1); *see also* *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1993).

200. 25 U.S.C. § 2702(2) (1998); *see also* *Cabazon Band*, 37 F.3d at 433.

201. 25 U.S.C. § 2702(3) (1998).

1. Regulation under the IGRA

The IGRA established three classes of Indian gambling, each with its own degree of regulation.²⁰² The IGRA defines Class I gaming as “social games solely for prizes of minimal value or traditional forms of Indian gaming” typically offered at tribal ceremonies or celebrations.²⁰³ The IGRA defines Class II gaming as “bingo”²⁰⁴ and “non-banking card games (i.e., card games in which the casino has no economic interest in the outcome)”²⁰⁵ and excludes banking card games such as “baccarat, chemin de fer, or blackjack,”²⁰⁶ or “any electronic or electromechanical facsimiles of any game of chance or slot machine of any kind.”²⁰⁷ Finally, [the] IGRA defines Class III gaming as all other forms of gaming, . . . particularly the lucrative casino-style games such as blackjack, slot machines, roulette[,] and baccarat.”²⁰⁸

The IGRA regulates each of the three defined classes of Indian gaming in a different manner.²⁰⁹ Class I gaming falls outside IGRA regulation because such gaming “on Indian lands is within the exclusive jurisdiction of the Indian tribes”²¹⁰ and not subject to the IGRA’s provisions.²¹¹ The IGRA provides that a tribe may engage in Class II gaming “on Indian lands,”²¹² so long as the state in which the tribe resides “permits such gaming.”²¹³ As with Class II gaming, the IGRA allows Class III gaming “on Indian lands”²¹⁴ if the state in which the tribe resides “permits such gaming.”²¹⁵ The IGRA also requires a tribe to negotiate a compact with the state in which it resides

202. See *Ysleta Del Sur Pueblo v. Texas*, 36 F.3d 1325, 1330-31 (5th Cir. 1994).

203. See 25 U.S.C. § 2703(6) (1998).

204. See *id.* § 2703(7)(A). “Class II gaming means . . . bingo (whether or not electronic, computer, or other technological aids are used . . .)” *Id.*

205. *Ysleta Del Sur Pueblo*, 36 F.3d at 1330.

206. 25 U.S.C. § 2703(7)(B)(i) (1998).

207. *Id.* § 2703(7)(B)(ii).

208. See *Ysleta Del Sur Pueblo*, 36 F.3d at 1331 (citing 25 U.S.C. § 2703(8) (1998) and S. REP. NO. 446, at 3, 7 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3073, 3077).

209. See 25 U.S.C. § 2710 (1998) (providing the regulatory scheme for each of the three classes of Indian gaming).

210. *Id.* § 2710(a)(1).

211. See *id.*

212. *Id.* § 2710(b)(1).

213. *Id.* § 2710(b)(1)(A).

214. *Id.* § 2710(d)(1).

215. *Id.* § 2710(d)(1)(B).

before it can engage in Class III gaming.²¹⁶ “Congress viewed tribal-state compacts as the most effective means of balancing tribal sovereignty with the states’ need to protect the public against the risks typically associated with Class III-type gaming.”²¹⁷ Evincing its belief in the effectiveness of tribal-state compacts, Congress included in the IGRA the provision that “[C]lass III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into.”²¹⁸ Furthermore, the IGRA requires a state to negotiate such a compact with a tribe seeking to conduct Class III gaming “in good faith.”²¹⁹

2. Interpretation of the IGRA

Federal courts’ interpretations of the IGRA are instructive in analyzing the IGPA’s possible effect on Indian gambling legislation.²²⁰ In *Oneida Tribe of Indians of Wisconsin v. Wisconsin*,²²¹ the Seventh Circuit held that a state may prohibit, but not regulate, Class II gaming activity.²²² The court held that states may both prohibit and regulate Class III gaming activity, but only pursuant to the tribal-state compact.²²³

In *Spokane Tribe of Indians v. United States*,²²⁴ a federal district court held that electronic lottery games did not qualify as Class II “games similar to bingo,” subject solely to federal or tribal law.²²⁵ Instead, the court categorized electronic lotteries as Class III devices that states could regulate as “electronic games of chance.”²²⁶

216. *See id.* at § 2710(d)(3)(A).

217. *Ysleta Del Sur Pueblo v. Texas*, 36 F.3d 1325, 1331 (5th Cir. 1994) (citing S. REP. NO. 446, at 13-14, *reprinted in* 1988 U.S.C.C.A.N. 3083-84).

218. 25 U.S.C. § 2710(d)(2)(C) (1998).

219. *Id.* at § 2710(d)(3)(A).

220. *See, e.g., Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 951 F.2d 757 (7th Cir. 1991); *Spokane Tribe of Indians v. United States*, 782 F. Supp. 520 (E.D. Wash. 1991).

221. 951 F.2d 757 (7th Cir. 1991).

222. *See id.* at 759.

223. *See id.*

224. 782 F. Supp. 520 (E.D. Wash. 1991).

225. *See id.* at 521-24.

226. *See id.*

Finally, in *Missouri v. Coeur d'Alene Tribe*,²²⁷ the Eighth Circuit reversed a federal district court's determination that the IGRA preempts state laws when Internet gambling "takes place" on tribal lands.²²⁸ The Eighth Circuit remanded, directing the district court to decide whether Internet gambling "takes place" on tribal lands when bettors use their home computers to access online lotteries via computer servers located on tribal lands.²²⁹

3. Effect of the IGPA on Indian gambling

During floor debate on the 1998 Internet Gambling Prohibition Act, Senator Craig sought to add an amendment²³⁰ that would have allowed various forms of Indian gaming to continue under the same regulatory regime that presently exists under the IGRA.²³¹ Senator Craig's amendment would have excluded "lawful gaming conducted pursuant to the Indian Gaming Regulatory Act"²³² and explicitly provided that the federal government would continue to have sole authority to enforce a violation of the IGPA that occurred on Indian lands.²³³

Proponents of the Craig amendment argued that "Congress established clear and precise laws governing all forms of Indian gaming"²³⁴ in the IGRA, in which Congress gave authority to regulate Indian gambling to the National Indian Gaming Regulatory Commission.²³⁵ Senator Craig argued that the IGPA placed new restrictions on tribal gaming, overrode existing tribal-state pacts negotiated under the IGRA, and prohibited some forms of Indian gaming the courts ruled legal under the

227. 164 F.3d 1102 (8th Cir. 1999), *vacating* No. 97-0914-CV-W-6, 1997 WL 829986 (W.D. Mo. Nov. 19, 1997).

228. *See* Rose I, *supra* note 14, at 157.

229. *See Coeur D'Alene*, 164 F.3d at 1109; *see also* Rose I, *supra* note 14, at 157.

230. Senator Craig's amendment, No. 3268, was offered as a second-degree amendment to the Kyl amendment, No. 3266, to S. 2260. *See* 144 CONG. REC. S8792 (daily ed. July 22, 1998).

231. *See* 144 CONG. REC. S8689, S8764-69 (daily ed. July 22, 1998); 144 CONG. REC. S8815, S8816-18 (daily ed. July 23, 1998).

232. 144 CONG. REC. S8792, S8803 (daily ed. July 22, 1998).

233. *See id.* "With respect to a violation of [United States Code] section 1085 . . . that is alleged to have occurred . . . in whole or in part, on Indian lands . . . , the United States shall have the authority to enforce that section." *Id.*

234. 144 CONG. REC. S8689, S8764 (daily ed. July 22, 1998) (statement of Sen. Craig).

235. *See id.*

IGRA.²³⁶ Thus, the IGPA disregarded established procedures dealing with Indian gambling²³⁷ and effectively rewrote the IGRA “without the input of the [Senate] Indian Affairs Committee or the National Indian Gaming Regulatory Commission.”²³⁸ After much debate, the Senate voted down the Craig amendment.²³⁹

In the 106th Congress, proponents of an Indian Gaming exemption again raised Senator Craig’s arguments in hearings before the Senate Indian Affairs Committee.²⁴⁰ As a result, Senator Ben Nighthorse Campbell introduced an amendment to the IGPA that excluded some forms of Indian Gaming on Tribal Lands.²⁴¹ Although the Committee accepted the amendment without objection,²⁴² the Senate-passed IGPA still intrudes on the rights afforded Indian Tribes under the IGRA because it requires “each person placing, receiving, or otherwise making” a valid bet under the IGRA to be “physically located on Indian lands.”²⁴³ Therefore, the IGPA still exercises some control over gaming on Native American land, regardless of what a tribal-state compact might provide.²⁴⁴ Adding to the uncertainty regarding the IGPA’s potential effect on existing regulation, the House version of the IGPA contains no provision about Indian Gaming.²⁴⁵ Should the 106th Congress pass a bill that intrudes too greatly upon existing IGRA provisions that allow Class III gaming pursuant to a tribal-state agreement, the IGPA would effectively rewrite the IGRA without the procedures guaranteed Indian Tribes by federal statute.²⁴⁶

236. *See id.*

237. *Id.*

238. *See id.*

239. *See* 144 CONG. REC. S8815, S8817 (daily ed. July 23, 1998).

240. *See Hearings Before the Subcomm. on Native American and Insular Affairs of Senate Comm. on Indian Affairs*, 106th Cong. (1999) [hereinafter *Native American and Insular Affairs Hearings*] (testimony of Ernest L. Stensgar, Chairman, Coeur D’Alene Tribe); *Native American and Insular Affairs Hearings, supra* (testimony of Frank Miller).

241. *See* 145 CONG. REC. S15,117, S15,120 (daily ed. Nov. 19, 1999); 145 CONG. REC. S14,863, S14,868-70 (daily ed. Nov. 19, 1999) (statement of Sen. Campbell). Senator Campbell is a Republican representing Nevada. *See Members of the United States Senate*, available in Westlaw LEGIS-DIR database.

242. *See* 145 CONG. REC. S14,863, S14,870 (daily ed. Nov. 19, 1999).

243. *See* S. 692, 106th Cong. (1999).

244. *See id.*

245. *See* H.R. 3125, 106th Cong. (1999).

246. *See* 144 CONG. REC. S8689, S8764 (daily ed. July 22, 1998) (statement of Sen. Craig).

CONCLUSION

In the waning hours of the 106th Congress's first session, the Senate passed unanimously and sent to the House Judiciary Committee the Internet Gambling Prohibition Act of 1999.²⁴⁷ At the same time, the House Judiciary Crime Subcommittee approved on a party-line vote similar legislation for consideration by the full Committee.²⁴⁸ Observers expect Congress to pass some form of the Act during the second session.²⁴⁹ As passed by the Senate, the IGPA would amend Chapter 50 of Title 18 of the United States Code, § 1085; it would prohibit almost all forms of gambling over the Internet.²⁵⁰ The IGPA's expansive scope represents a departure from existing federal gambling regulation under the Interstate Wire Act.²⁵¹

In some respects, the IGPA's prohibition of all forms of gambling except parimutuel betting, horse- and dog-racing, state lotteries, and fantasy sports leagues offers a reasonable compromise between prohibition and regulation. The IGPA originally attempted to prohibit all Internet gambling.²⁵² A scheme that legalizes, but tightly regulates, Internet gambling ensures consumer protection and protection of minors while benefitting the government in the form of tax revenue. However, as a middle ground between the opposite poles of outright prohibition and legalization, the IGPA's scheme is less than satisfactory. First, it prohibits the vast majority of Internet gambling, thus removing any tax benefit gained by regulation. Second, and more troublesome, Congress appears to have yielded to political pressure from the traditional gambling industry when it decided what forms of gambling activity the IGPA would allow. The exception to this rule, the fantasy sports league exclusion, has merit in its own right because it does not significantly affect interstate commerce and is better regulated, if at all, by the states. The remaining exclusions,

247. See 145 CONG. REC. S14,863, S14,870 (daily ed. Nov. 19, 1999).

248. See 145 CONG. REC. D1251 (daily ed. Nov. 3, 1999).

249. See H.R. 3125, BILLCAST, Dec. 31, 1999, available in Westlaw BC database.

250. See S. 2260, 105th Cong. § 624 (1998), reported in 144 CONG. REC. S9302-04 (daily ed. July 29, 1998).

251. See discussion *supra* Parts III, IV.

252. See *supra* notes 35-54 and accompanying text.

however—those for parimutuel betting, horse- and dog-racing, and state lotteries—reflect nothing more than the traditional gambling industry's influence—the “money and power” that one legislator lambasted Congress for acceding to when it passed earlier gambling legislation.²⁵³

Moreover, the policy choices implicit in the IGPA's more troublesome provisions lack the necessary link to any unique aspect of Internet gambling. The Act's potential expansion of the types of persons who may be prosecuted under federal gambling law²⁵⁴ is more troublesome than the IGPA's expansion of the types of gambling prohibited, because nothing concerning the Internet's nonterritorial nature requires subjection of casual bettors to criminal penalty. If Congress's primary concern is truly the social costs of Internet gambling, it makes little sense for it to create a loophole for horse-racing bets from a private computer.

Finally, perhaps the most egregious example of Congress's overzealousness in crafting the IGPA arises from the Act's failure to recognize the legality of some forms of Indian gaming currently authorized under the Indian Gaming Regulatory Act. In fact, by voting down an amendment intended to recognize the continuing authority of the regulatory regime established by the IGRA, the Senate in effect rewrote the IGRA without the benefit of hearings or Congressional findings of fact. Notably, the absence of such findings was among the factors that doomed Congress's previous attempt at vast Internet regulation, the Communications Decency Act.²⁵⁵

Beginning gamblers are often advised to bring into a casino no more than they can afford to lose; when you bottom out, you should just walk away. Faced with an enormous rise in gambling's popularity and the continued accessibility of gambling sites in foreign jurisdictions, Congress should simply walk away from its prohibitionist leanings. Instead, it should enact a strict regulatory regime that legalizes most forms of Internet gambling, so long as the regime includes proper age-verification, game-integrity verification, and fraud-protection mechanisms. Under such a scheme, casual bettors would not

253. See 142 CONG. REC. H3622 (daily ed. Apr. 18, 1996)(statement of Rep. Wolf).

254. See discussion *supra* Part IV.B.

255. See *Reno v. A.C.L.U.*, 521 U.S. 844, 879 (1997).

open themselves to risk of criminal penalty, ISPs would not face even the minimal burden of establishing the unfeasibility of court-ordered action that threatens burgeoning Internet commerce, and an independent regulatory body could form to face the expense of gaming enforcement, with the Justice Department playing an oversight role. Under such a regulatory regime, the marketplace would ensure that unreliable Internet gambling sites would wither away, while reputable companies would enjoy success providing legal, adult entertainment. Such a scheme would reinforce the principles of individual choice and federalism upon which the United States was founded. While the IGPA stands as one alternative to a wholly unregulated Internet, should Congress choose a plan that focuses on regulation rather than prohibition, both the government and the citizenry have the opportunity to walk away winners.

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