The Internet Gambling Prohibition Act of 1999: Congress Stacks the Deck Against Online Wagering But Deals In Traditional Gaming Industry High Rollers

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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, where he opened an account and wagered on several lottery-type drawings using a false name, Social Security number, and credit-card account number. 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. This minor’s access to the Idaho Coeur

3. See, e.g., Internet Gambling Prohibition Act: Hearings on H.R. 2390 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. 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.

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

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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-98-7CC (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 1108. The United States Supreme Court denied the Tribe’s petition for writ of certiorari. See 119 S.Ct. 2400 (1999).
prohibition. Some commentators have noted that the reality probably lies somewhere in the middle.

Gambling is a growth industry in America. A 1996 Washington Post article observed that gambling generates "six times the revenue of all American spectator sports combined." 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. The U.S. gambling industry's revenues totaled $550 billion in 1995, a figure three times that year's revenues for General Motors Corp; by 1999, the "combined handle" (total


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 (1998). 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 702-08.

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.


10. Id.

amount bet) of all legal U.S. gambling—state lotteries, race tracks, casinos, and Nevada sports betting—had grown to $640 billion a year.\textsuperscript{12} Illegal bets add tens of billions of dollars more to that number.\textsuperscript{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.\textsuperscript{14} In 1999, analysts projected that the Internet's World Wide Web ("Web") would account for $1 billion in gambling revenue that year,\textsuperscript{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."\textsuperscript{16} Most studies project an approximately $3 billion market by 2002,\textsuperscript{17} with some forecasting $100 billion by 2006.\textsuperscript{18}

101, 102 (1997).


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 ALI-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 TV and stand-alone Internet terminals that accept cash. Even the PC can be eliminated: MonCall 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 gambling is expected to mushroom." Id. at 148. 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").


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 varied 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

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19. \textit{See Rose I, supra note 14, at 135 (stating that sports betting "may still have the greatest dollar volume, though there are now more casino sites online").}

20. Bell, \textit{supra note 16, at 28; 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. \textit{See 144 CONG. REC. S8689, S8763 (daily ed. July 22, 1998) (statement of Sen. Bryan) ("[I]nternet 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 "approximately 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/Business and Economy/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. \textit{See Gorman \& Loo, supra note 7, at 697.}


23. \textit{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.")}

effects, especially on minors, and the unregulated nature of the burgeoning Internet gambling industry, some facets of which current federal law prohibits. 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.

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


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.

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.


INTERNET GAMBLING PROHIBITION ACT OF 1999

Gambling Prohibition Act (IGPA) by a vote of 90-10 on July 23, 1998. In the House of Representatives, a bill containing virtually the same provisions passed the Judiciary Crime Subcommittee; yet at the close of the 105th Congress, both the House and Senate measures awaited consideration by the full House Judiciary Committee. Thus, the IGPA fell victim to the legislative calendar.


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, the Committee sent a substitute bill to the full Senate. After two floor amendments that further altered the Act’s scope passed without objection, the Senate passed the IGPA upon unanimous consent on November 19, 1999.

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


43. See 145 CONG. REC. S14,883 (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).


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 49-50 and accompanying text.


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. Congressional observers predict the bill will pass the full House but remain skeptical about either body capitulating and passing a non-compromise version. 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; observers believe that the 106th Congress will enact some version of the IGPA. 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.

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

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.


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.


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. With some notable exceptions, the IGPA would criminalize under federal law all forms of gambling conducted over the Internet, including some forms of currently legal gambling. Moreover, in the current legislative climate, 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.” 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.

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. Part II discusses the nonterritorial nature of the Internet and corresponding issues of jurisdiction and enforcement of laws regulating Internet activity. Part III examines the applicability of the existing Internet Wire Act to the nonterritorial Internet and questions whether additional


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.
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regulation, such as the IGPA, is required. 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, possible criminal penalties for casual bettors, enforcement provisions involving Internet service providers, and the possible criminalization of some forms of gambling made legal by the Indian Gaming Regulatory Act of 1988 (IGRA).

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.” In both historical stages—prohibition and tightly regulated legalization—state law has chiefly regulated gambling in the United States. 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. One of the most significant federal gambling laws of the latter type, the Interstate Wire Act (“Wire Act”), “criminalizes the use of wire communications ... in placing a sports wager between states or between a state and a foreign nation.” United States Circuit

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72. See infra notes 125-44 and accompanying text.
73. See infra notes 140-65 and accompanying text.
74. See infra notes 166-78 and accompanying text.
75. See infra notes 179-91 and accompanying text.
77. Leibowitz, supra note 64, at B8 (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 45-48; see also Montpas, supra note 28, at 176 & n.90 (citing CAL. PENAL CODE § 337a(1) (West 1980)(declaring pool selling or bookmaking illegal); MINN. STAT. ANN. § 609.76(1) (West Supp. 1990) (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 supra note 18, at 155-56.

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.

Although Part III discusses in greater detail the scope of the Wire Act’s coverage and the policies underlying its enactment, 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.” Therefore, the Wire Act does not apply to other forms of gambling, such as the casino gambling currently popular on the Internet. Second, the Wire Act subjects to prosecution only those persons in the “business of betting or wagering”; 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.


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


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, 814 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. The Wire Act also exempts from prohibition the transmission of information used in news reporting and "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest" 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. 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. Part IV Section C discusses this provision, a controversial section of the IGPA in its original form that Congress modified during the legislative process.

Although individuals currently access the Internet primarily through telephone wires, as technology advances and wireless Internet access becomes commonplace, some commentators and legislators disagree on the Wire Act's continued application to Internet gambling. 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. Baborjan, 528 F. Supp. 324, 331 (D.R.I. 1981). 87. See 18 U.S.C. § 1084(a) (1994); see also Baborjan, 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).

90. See id.
92. See id.
93. The Federal Communications Commission, 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. 2280, 105th Cong. § 624(d)(2)(C) (1998).
95. 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").
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 prosecutors . . . .

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.

II. THE NONTERRITORIAL NATURE OF THE INTERNET

The myriad definitions that exist for the Internet exemplify the medium’s boundlessness. 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,” “one of the most influential developments in communication technology of the twentieth century,” “a collection of networks,” “a giant network which interconnects innumerable smaller groups of linked computer networks;” and “a decentralized, global medium of communications—or “cyber space.” 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”).
98. Goldsmith, supra note 97, at 476.
100. Montpas, supra note 28, at 174.
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.”

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

These definitions suggest that the Internet primarily functions as a concrete, technical communications tool—a medium through which users share information. 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. Some commentators argue that the Internet’s interactivity allows a user to perform tasks in a foreign jurisdiction while online. 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 333, 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.


105. See id.

106. Id. § 230(e)(1).


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; the user can in many ways be thought to perform the functions herself via the remote server.

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 corridors to an open, general-use research, entertainment, and communication facility. With the Web came increased development of commercial uses for the Internet, along with inevitable disputes over parties' economic rights.

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.\footnote{I. Nelson Rose, \textit{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, \textit{supra} note 64, at B6.}

111. \textit{See, e.g.}, Goldstein \textit{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." \textit{Id.} at n.32.

112. \textit{See discussion supra} note 110.

113. \textit{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. \textit{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.

\textit{Id.}

115. \textit{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." \textit{Id.} at 852-53.

INTERNET GAMBLING PROHIBITION ACT OF 1999

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" realm have created debate about the continued viability of traditional territorial concepts of jurisdiction. 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. In fact, the Internet "is indifferent to...physical location..., and there is no necessary connection between an Internet address and a physical jurisdiction." For these reasons, commentators have questioned the applicability to the Internet of an "effects test" of personal jurisdiction. 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.

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117. See Goldstein, supra note 97, at 10-18.
118. See, e.g., Goldsmith, supra note 97, at 476.
119. See Hearst 1997 WL 87097, 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)).
120. Fojut, supra note 18, at 168.
The Internet presents a final hurdle to the legal system—the problem of enforceability. 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.

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. Of course, some commentators note that other motives may well be involved in the recent rash of legislative and judicial action against Internet gambling. 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.

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

123. See Fojut, supra note 18, at 171.
124. See id. at 109-70.
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).
sophisticated interstate-bookmaking operations. The Act exempted from prosecution those who transmit information between two states that both legalized the type of gambling at issue. Because only Nevada had legalized sports-bookmaking operations or off-track betting, this exemption had little practical effect. Even today, when forty-eight of fifty states have some form of legalized gambling, legal sports books remain an anomaly outside of Nevada, Florida, and Atlantic City, New Jersey. Thus, the Interstate Wire Act fails to control the forms of gambling that garner greater and greater participation. 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.

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. 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. Assuming, arguendo, that Internet gambling

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.
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—"[a]ddiction, 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.\textsuperscript{138} Its national accessibility and fundamentally nonterritorial nature make the Internet perhaps the quintessential subject of federal, as opposed to state, regulation.\textsuperscript{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.\textsuperscript{140}

However, the Internet's nonterritorial nature fails to provide the strongest justification for Congress to enact new federal Internet gambling regulation.\textsuperscript{141} The same jurisdictional principle underlying the Wire Act most strongly favors federal, rather than state, regulation of Internet gambling.\textsuperscript{142} Assuming Internet gambling should be regulated, the Commerce Clause empowers Congress to do so because Internet gambling affects interstate commerce.\textsuperscript{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.\textsuperscript{144}

\textsuperscript{138} See Montpas, supra note 28, at 173-74.
\textsuperscript{139} See Post, supra note 128, at 3-4.
\textsuperscript{140} See Montpas, supra note 28, at 178.
\textsuperscript{141} See supra notes 121-22 and accompanying text.
\textsuperscript{142} See supra note 122 and accompanying text.
\textsuperscript{143} See Post, supra note 126, at 4. Post compares the Internet to the interstate railway system at issue in Wabash R. 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.
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:

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145. *See* Tratos, *supra* note 11, at 108. "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.


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

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

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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).


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.


[W]e have been able to work with the so-called horse industry and the parimutuel betting to assure 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 S9759, S9781.


160. See id.


162. See 144 Cong. Rec. S8689, S8758-84 (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. The exemption for certain classes of Indian gaming conducted on Indian land seeks to protect gambling now legal under the Indian Gaming Regulatory Act.

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

**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. In so doing, the IGPA represented a striking departure from the policies underlying the Interstate Wire Act.

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 S8771.


(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." 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." 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." In fact, however, various state laws have long applied to casual bettors. More precisely, the IGPA would for the first time make placing a single, friendly bet a federal crime.

Although neither 1999 IGPA legislation contains a provision subjecting individual bettors to criminal penalty, the House Judiciary Committee's ranking Democratic member intends to introduce an amendment creating such a provision. Whereas some state gambling laws traditionally have targeted individual bettors, such a provision belies the reasoning behind federal regulation of gambling. 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. Second, the Commerce Clause empowers Congress to regulate interstate

169. See Babarian, 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").
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{181}

\textbf{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.\textsuperscript{182} Such requirements inevitably would have restricted the function of ISPs, which provide important gateways to the Internet.\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{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”).
\item \textsuperscript{178} See id.
\item \textsuperscript{179} See supra notes 58, 151, and accompanying text.
\item \textsuperscript{180} See generally United States v. Lopez, 514 U.S. 549 (1995).
\item \textsuperscript{181} See S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999); see also Bell, supra note 16, at 26.
\item \textsuperscript{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 . . . “).
\item \textsuperscript{183} See Butler Interview, supra note 57.
\end{itemize}
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.\textsuperscript{184} Nevertheless, the IGPA's civil enforcement provisions remain a vital element of the Act's enforcement scheme.\textsuperscript{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.\textsuperscript{186} Despite the improvements made during the legislative process, however, the Act's regulation of ISPs remains problematic.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{190} Moreover, certain provisions of the Act that apply to ISPs remain unclear.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{185} See Fojut, supra note 18, at 166-72.
  \item \textsuperscript{186} See id. at 165, 167-73.
  \item \textsuperscript{187} See Butler Interview, supra note 57.
  \item \textsuperscript{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).
  \item \textsuperscript{191} See Butler Interview, supra note 57.
\end{itemize}
unfeasibility under the Act?\textsuperscript{192} Must it remove all known links to the offending site on other sites?\textsuperscript{193} These unresolved questions demonstrate the need for caution as legislators attempt to regulate the Internet.\textsuperscript{194}

\textbf{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.\textsuperscript{195} The United States Supreme Court has held that such tribes enjoy the same sovereign immunity from suit under the Eleventh Amendment\textsuperscript{196} as the individual states and thus cannot be sued without the tribe’s consent.\textsuperscript{197} Congress recognized this fact when it enacted the Indian Gaming Regulatory Act of 1988 (IGRA).\textsuperscript{198} Congress enacted the IGRA to “promot[e] tribal economic development, self-sufficiency, and strong tribal governments.”\textsuperscript{199} The IGRA consequently seeks to “ensure that the Indian tribe is the primary beneficiary of [authorized] gaming operation[s]”\textsuperscript{200} and to “protect such gaming as a means of generating tribal revenue.”\textsuperscript{201}

\begin{flushright}
\textsuperscript{192} See id. \\
\textsuperscript{193} See id. \\
\textsuperscript{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”). \\
\textsuperscript{197} See Rose I, \textit{supra} note 14, at 157. \\
\textsuperscript{199} \textit{See id.} § 2702(1); \textit{see also} Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 433 (9th Cir. 1993). \\
\textsuperscript{200} 25 U.S.C. § 2702(2) (1998); \textit{see also} Cabazon Band, 37 F.3d at 433. \\
\end{flushright}
1. Regulation under the IGRA

The IGRA established three classes of Indian gambling, each with its own degree of regulation. 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. The IGRA defines Class II gaming as “bingo” and “non-banking card games (i.e., card games in which the casino has no economic interest in the outcome)” and excludes banking card games such as “baccarat, chemin de fer, or blackjack,” or “any electronic or electromechanical facsimiles of any game of chance or slot machine of any kind.” “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.”

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

204. See id. § 2703(7)(A). “Class II gaming means . . . bingo (whether or not electronic, computer, or other technological aids are used . . .)” Id.
205. Id. § 2703(7)(B)(ii).
206. See Ysleta Del Sur Pueblo, 36 F.3d at 1326.
208. See id. § 2710(b)(ii).
209. See 25 U.S.C. § 2731 (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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{218} Furthermore, the IGRA requires a state to negotiate such a compact with a tribe seeking to conduct Class III gaming "in good faith."\textsuperscript{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.\textsuperscript{220} In \textit{Oneida Tribe of Indians of Wisconsin v. Wisconsin},\textsuperscript{221} the Seventh Circuit held that a state may prohibit, but not regulate, Class II gaming activity.\textsuperscript{222} The court held that states may both prohibit and regulate Class III gaming activity, but only pursuant to the tribal-state compact.\textsuperscript{223}

In \textit{Spokane Tribe of Indians v. United States},\textsuperscript{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.\textsuperscript{225} Instead, the court categorized electronic lotteries as Class III devices that states could regulate as "electronic games of chance."\textsuperscript{226}

\begin{footnotesize}
\begin{enumerate}
\item[216] See id. at § 2710(d)(3)(A).
\item[219] Id. at § 2710(d)(3)(A).
\item[221] 951 F.2d 757 (7th Cir 1991).
\item[222] See id. at 759.
\item[223] See id.
\item[225] See id. at 521-24.
\item[226] See id.
\end{enumerate}
\end{footnotesize}
Finally, in *Missouri v. Coeur d'Alene Tribe*, the Eighth Circuit reversed a federal district court’s determination that the IGRA preempts state laws when Internet gambling “takes place” on tribal lands. 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.

3. Effect of the IGPA on Indian gambling

During floor debate on the 1998 Internet Gambling Prohibition Act, Senator Craig sought to add an amendment that would have allowed various forms of Indian gaming to continue under the same regulatory regime that presently exists under the IGRA. Senator Craig’s amendment would have excluded “lawful gaming conducted pursuant to the Indian Gaming Regulatory Act” 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.

Proponents of the Craig amendment argued that “Congress established clear and precise laws governing all forms of Indian gaming” in the IGRA, in which Congress gave authority to regulate Indian gambling to the National Indian Gaming Regulatory Commission. 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

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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. 3286, to S. 2260. *See* 144 CONG. REC. S8792 (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.*
235. *See id.*
IGRA. Thus, the IGPA disregarded established procedures dealing with Indian gambling and effectively rewrote the IGRA "without the input of the [Senate] Indian Affairs Committee or the National Indian Gaming Regulatory Commission." After much debate, the Senate voted down the Craig amendment.

In the 106th Congress, proponents of an Indian Gaming exemption again raised Senator Craig's arguments in hearings before the Senate Indian Affairs Committee. As a result, Senator Ben Nighthorse Campbell introduced an amendment to the IGPA that excluded some forms of Indian Gaming on Tribal Lands. Although the Committee accepted the amendment without objection, 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." Therefore, the IGPA still exercises some control over gaming on Native American land, regardless of what a tribal-state compact might provide. 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. 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.

236. See id.
237. Id.
238. See id.
240. See Hearings Before the Subcomm. on Native American and Insular Affairs of Senate Comm. on Indian Affairs, 108th 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).
244. See id.
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,

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 law 254 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

254. See discussion supra Part IV.B.
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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