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U.S. DEPARTMENT OF JUSTICE OPINION ON INTERNET GAMING: WHAT'S AT STAKE FOR TRIBES?

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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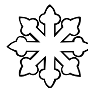

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U.S. DEPARTMENT OF JUSTICE OPINION ON INTERNET GAMING: WHAT'S AT STAKE FOR TRIBES?

THURSDAY, FEBRUARY 9, 2012

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

The CHAIRMAN. The Committee will come to order.

Aloha. Today, the Committee will hold an oversight hearing on the Department of Justice opinion on Internet gaming and examine what impact this decision may have on Tribes.

This issue is of great importance to Tribes. Indian gaming is currently the only form of federally-authorized and regulated gaming in the United States. In total, Tribal gaming revenue makes up 40 percent of the total casino gaming market in the United States.

Gaming has been the single most effective form of economic development for Indian Country. That is why, when court administrative or legislative decisions are made, Tribal concerns and priorities must be considered as part of the dialogue.

Tribal gaming revenue provides for the education, housing, infrastructure and health needs of our Tribal members. In addition, Tribal gaming provides economic opportunities and jobs in the surrounding communities.

I would like to call your attention to the charts in the room which illustrate that Tribal gaming occupies a unique status in the framework of Federal law. As you can see, Tribal gaming represents an overwhelming percentage of total U.S. casino revenues.

The Committee held a hearing on Internet gaming in November. Since that time, the Department of Justice issued an opinion on the scope of the Wire Act. That decision raises many questions for Federal, State and Tribal governments. Today we will hear from our witnesses on the potential impact that decision could have on the current framework of Tribal gaming.

In this session, Congress may consider proposals that would expand Federal authorization and regulation of gaming activities in this Country. The Committee will provide a legislative forum where

everyone, especially Tribal governments, are able to provide their perspective on an issue that is so vital to Tribal self-sufficiency. We also want to continue to hear from other affected stakeholders.

The record for this hearing will remain open for two weeks from today. So I encourage all interested parties to submit written testimony.

I would like to now ask our Vice Chairman for his opening statement.

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you very much, Mr. Chairman. I do appreciate your holding this hearing today.

We all recall that last November the Committee held an oversight hearing on Internet gaming in Indian Country. About a month later, the Department of Justice issued an opinion regarding Internet gaming. So today we are going to hear from the witnesses what that opinion means for the Indian Tribes.

I realize that this is a subject of great importance to Tribes across the Country, so I just want to thank you, Mr. Chairman, for your leadership in examining this matter. I appreciate and thank the witnesses who have traveled great distances to be here to testify today.

So thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Senator Udall?

STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you very much, Chairman Akaka. I really appreciate being here with you today, and I want to thank you for holding this important hearing on Internet gaming and the Department of Justice's recent opinion.

And thank you for remaining engaged in this issue. It is very appropriate that the Indian Affairs Committee take up the issue of Internet gaming. This is an issue that may have significant impact on Indian Country. So the Committee and Tribal leaders need to be an active part of the debate over any possible legislation.

Beyond this hearing, it is my hope that my colleagues in the Congress who are proposing related legislation will engage Tribes in the development of any gaming proposals. And while I am at it, Mr. Chairman, I would also like to welcome Mr. Kevin Washburn, who is the Dean of the University of New Mexico Law School. Mr. Washburn is a citizen of the Chickasaw Nation of Oklahoma. He is the first Native American to serve as a dean, as the Dean of the UNM Law School. He has a strong background in Indian law, gaming and criminal law. And I am sure we will learn a lot from him today.

Mr. Washburn is also a former Federal prosecutor in New Mexico and a trial attorney with the DOJ. He has served as the General Counsel of the National Indian Gaming Commission. I look forward to Mr. Porter's testimony and Mr. Washburn's and the other panelists. I want to thank Mr. Washburn very much for participating today and making the trip here. I also want to applaud the Na-

tional Indian Gaming Association and the gaming Tribes for getting out on front of this issue. This is the most important thing you could do.

Thank you, Mr. Chairman, and with that, I look forward to hearing the witnesses.

The CHAIRMAN. Thank you very much, Senator.

Now I would like to invite our first panel. Let me welcome you, the Honorable Robert Odawi Porter, President of the Seneca Nation of Indians. President Porter, will you please proceed with your remarks?

STATEMENT OF HON. ROBERT ODAWI PORTER, PRESIDENT, SENECA NATION OF INDIANS

Mr. PORTER. Nya-weh Ske-no. Mr. Chairman, Mr. Vice Chairman, Senator Udall, thank you for having me today. I am thankful that you are well.

I am honored today to testify on this subject before this well-credentialed panel of law professors and deans and scholars. They do what I used to do for many years before I became the president of my nation.

I have read their testimony and they make very good points. But as a Tribal leader I must say that there are two questions that must frame our discussion as we move forward. First, will the decisions of the Congress in Internet gaming support or destroy the Indian gaming jobs held by our Tribal citizens and our neighbors? And two, will your decisions support or erode the gaming revenue that Tribal nations use to fund essential governmental programs and services?

In my written testimony, I have set out a number of reasons why it is in the political interest of every member of Congress, including Senators Schumer and Gillibrand from New York, and every Governor, including New York Governor Cuomo, to join with the Seneca Nation and other Indian Tribes to protect the existing jobs that exist at our bricks and mortar Tribal government gaming facilities, and to preserve our right, if new Internet gaming is authorized, to participate as equal partners.

In recent years, big gaming and State regulatory interests in Nevada and New Jersey have pushed for Federal Internet gaming legislation that would give them monopolistic control of Internet gambling operations throughout the United States. This brazen power grab is based on a lie, a fiction that big Nevada and New Jersey interests alone are sophisticated enough and strong enough to operate Indian gaming businesses. They are determined to shove Indian gaming away from the table or at best, to deal Indian gaming a short hand.

But the fact of the matter is that the Seneca Nation and dozens of other Indian nations are at least as sophisticated, if not more so, in terms of management, security, oversight and regulation than the biggest and best operators in Atlantic City and in Las Vegas. Tribal job creation and economic diversification in our regions should be respected, protected and cultivated, not attacked, undermined or assaulted.

The Seneca Nation, like dozens of other Indian Tribes, is one of the largest employers in our geographic region. Collectively, Tribal

government gaming injects billions of dollars into the regional economies that surround Indian Country. Tens of thousands of American workers, both Indians and non-Indians who are our neighbors, depend on the health and vitality of Tribal government gaming operations for their jobs. These jobs exist directly or indirectly, such as through the contractors and vendors who rely upon our gaming enterprises for their livelihoods. These family breadwinners have invested their lives in Indian gaming as chefs, as slot machine technicians, as construction workers and suppliers and so on. In an unbelievable and ironic twist of fate, it could literally be said that many Indian nations and Tribes carry the responsibility of feeding and clothing our non-Indian neighbors along with our own citizens.

The interests of the Seneca Nation and our neighbors in New York are aligned and congruent when it comes to the threat of Internet gaming and lottery operations. Our common interests are to protect local jobs and local commerce that will create more local jobs. Internet gaming, if not tied to local facilities and local operations that trade in ancillary local entertainment and local commerce, does not create local jobs and local economic activity within a State. Internet gaming, if it is not controlled locally, and connected to local commerce, will bleed dry the regions surrounding Indian Country and cause great injury to all of us who depend upon our existing businesses.

My request today is simple. Send your colleagues a message that you will not tolerate any new legal authority that will result in job losses in Indian Country or that shoves aside large and successful Tribal gaming operations from any new Internet gaming table. Indian nations not only demand a seat at the table, we insist that we already own our own table and that we should not have it stolen from us, as has too often been the case in the past.

American history is littered with predatory Federal Indian policies and illegal and immoral confiscations of Native property and wealth. Whenever non-Indians have discovered that the Indians have possessed something of value, the non-Indians have tried to grab it for themselves and too often succeeded. Recently, Indian gaming slipped through the cracks of this sordid history and for the last 30 years, a rare economic revitalization has occurred for some Indian nations located in population centers in States that did not authorize gambling otherwise.

But now these cash-starved States are embracing casino gaming with great enthusiasm. These predatory actions are eroding Tribal exclusivity interfering with existing compacts and threatening the jobs that Indian gaming has created.

I will leave it to others on the panel to pick apart the Wire Act. And if I could, Mr. Chairman, I realize my time has expired. I would like to take a moment to conclude.

If the New York lottery, for example, offers electronic gaming, without the participation of the Seneca Nation and other Tribal casinos, it will violate our existing compact and undermine our bricks and mortar business. We cannot stand for the disruption of these compacts either in New York or anywhere in Indian Country. There is much that we can do together, there is much that we can do collaboratively that will benefit all.

In conclusion, we have serious concerns that Internet gaming will undermine our efforts to lift ourselves up as a people after centuries of economic deprivation. This will imperil our jobs and revenues that we have created for ourselves and for our neighbors. Should this Congress authorize some form of Internet gaming, the Seneca Nation insists that it be done in a way that protects our inherent and treaty-recognized sovereign right to engage in Internet gaming activity on terms that reflect the economic interests of ourselves and that of our neighbors in western New York.

Nya-weh, and I would be glad to take any questions.

[The prepared statement of Mr. Porter follows:]

PREPARED STATEMENT OF HON. ROBERT ODAWI PORTER, PRESIDENT, SENECA NATION OF INDIANS

Introduction

Nya-weh Ske-no. Mr. Chairman and members of the Committee, I am thankful that you are well and I am pleased to appear today to discuss the testimony I am submitting for the record on behalf of the Seneca Nation of Indians.

My purpose in testifying is this—I believe it is in the interest of each member of this Committee, as well as the other senators representing Indian Country, like our Senator Schumer and Senator Gillibrand, to join with the Seneca Nation and with other Indian tribes in protecting the existing jobs at tribal brick-and-mortar gaming facilities and in preserving the right of Indian nations to meaningfully and substantially participate, from the outset, in any new Internet gaming authorized under federal or state law.

Cultivating job creation within Indian country and ensuring meaningful, substantial, early and fair participation by Indian nations in Internet gaming, be it poker, lottery, or other games, is in the mutual self-interest of Indian nations, of our neighbors and of the states whose lands adjoins ours. It is also sound federal Indian policy.

The Seneca Nation, like dozens of other Indian tribes, is one of the largest employers and economic enterprises in our region. The ancillary impact of tribal gaming operations on regional economies surrounding Indian tribes is in the millions if not billions of dollars each year. Tens of thousands of American workers—our neighbors—depend on the health and vitality of tribal gaming operations for their jobs, either directly with Indian nations as their employers or as vendors or nearby enterprises who rely on our gaming casino activity for their upstream or downstream business activity.

We ask that you join with Indian tribes to protect against any move by powerful gaming interests who will try to force Nevada-only or New Jersey-only control over Internet gaming. This is not idle speculation. Last year, some senators released draft legislation which would have shut out Indian tribes from any competitive involvement in Internet gaming, as if we are inferior and irrelevant gaming operations who are incapable of meeting or exceeding Nevada or New Jersey regulatory standards. The approach embodied in the draft bill was certainly short-sighted, as it would have threatened existing jobs.

The governors of New York, and Arizona, California, Florida, Connecticut, Michigan, Minnesota, Oklahoma, Oregon, Washington, Wisconsin, all know full well how robust and capable and sophisticated Indian gaming is today. This Committee certainly knows it. And I am confident this Committee will not tolerate anyone in the United States Senate giving serious consideration to a power grab by Nevada and New Jersey gaming interests that would result in job losses in Indian country and would shove aside our large and successful tribal gaming operations from the Internet gaming table. Far too much is at stake, in terms of the interests of tribal nations, our employees, our business partners and our neighbors. And while history does sometimes repeat itself, we know one of the missions of this Committee and of you, Mr. Chairman, is to avoid repeating the errors of previously misguided federal Indian policy. More on that later. But first, I wish to describe my Nation, where we've been and where we are going.

Background on the Seneca Nation of Indians

Our Nation was one of America's earliest allies, historically aligned with the other members of the historic Haudenosaunee (Six Nations Iroquois) Confederacy and living in peace with the American people since the signing of the Canandaigua Treaty

nearly 217 years ago on November 11, 1794, 7 Stat. 44. In that Treaty, the United States promised that it would recognize the Seneca Nation as a sovereign nation and that the title of our lands would remain forever secure and that we would retain the "free use and enjoyment" of our lands. This promise has served as the basis for a level of freedom possessed by the Seneca people that we believe is unmatched by other indigenous peoples in the United States.

Because of this treaty-protected freedom, our Nation has been able to achieve success in recent years as we continue to strive towards recovering from nearly 200 years of economic deprivation inflicted upon us by the United States due to devastating losses of our lands and resources. Both our Seneca Nation government and individual Seneca citizens have benefited from the opportunity to expanding into economic trade with non-Indians during the last 40 years, focusing primarily on the tobacco and gaming businesses. We have fought hard for our recent economic success—just as we have fought hard to protect our lands—but the fact remains that we are under constant assault from hostile forces such as the State of New York and private sector predators who seek to deprive us of economic prosperity and return us to the poverty of a prior era. This Internet gaming and lottery issue is merely the latest in a long line of battlefronts. Like most threats, it also offers great opportunities.

The Seneca Nation of Indians Enforces Its Own Comprehensive Laws Within Its Own Territory

The Seneca Nation has a rich history of actively regulating and enforcing economic activity within our Territories. For example, our Council enacted a comprehensive Import-Export Law in 2006 to regulate sales of tobacco and other products from its Territories. The Nation's Import-Export Commission regulates all aspects of tobacco sales and distribution on our Territories. As a result of the enactment and enforcement of our own tribal law, the Nation has gained regulatory control of tobacco and other sales activities on its Territories. The Nation's aggressive implementation of its Import-Export law has greatly enhanced its capacity to enforce the law on our Territories.

We also have comprehensive ordinances governing class II and class III gaming activities at our bingo halls and casinos on our Territories. Under these tribal laws, the Nation's gaming regulatory body, the Seneca Gaming Authority, oversees and ensures the integrity of our highly successful gaming enterprises. And the Seneca Gaming Authority works closely with its federal counterpart, the National Indian Gaming Commission, in the regulation of our class II gaming and with both the National Indian Gaming Commission and the New York State Racing and Wagering Board in the regulation of our class III casino gaming activity.

I raise these examples to remind everyone that Indian tribes, like the Seneca Nation, are *governments*. We govern the people and activity within our own Territories. This is reflected in the U.S. Constitution that governs how the United States government is supposed to deal with us—nation to nation. How America has actually dealt with Indian nations, however, is twisted into unconstitutional shapes.

Seneca Nation History Is Replete With Irony

If you look at American history from the perspective of a Seneca Nation citizen—or of any American Indian for that matter—it is filled with many cruel ironies.

American economic development has chronically and habitually by-passed Indian Country or has extracted value and then abandoned Indian Country like a mere colony.

Native American history is one of nearly complete loss of what we once had. We have lost most of our lands and nearly everything of value and significance associated with them. We have lost most of our natural resources, such as the beaver belt and the buffalo herds. We have lost most of our stockpiles of gold, uranium, oil, gas, salt, and gravel. We have had the use of most of our remaining lands taken for railroads, highways, non-Indian homes and reservoirs for hydroelectric dams. In the late 19th Century, the United States forced upon the Seneca Nation long-term leases for nominal payment to accommodate the establishment of the City of Salamanca on the Allegany Territory and to legitimize the leases obtained by railroad corporations through unsavory means. And just 45 years ago, the United States again broke the Canandaigua Treaty and took 10,000 acres of our Allegany Territory for the Kinzua Dam and Allegheny Reservoir so that a license could be granted to a private mega-corporation to make millions of dollars from the sacrifice of our lands and the burning of our homes.

Even when Indian nations were paid for our property, it was often at confiscatory prices under coercive agreements pushed down our throats for only pennies on the dollar of the actual value taken by outsiders.

Whenever I read the founders of American capitalism, and the great treatises defending the fundamental sanctity of property rights in American law, I cannot help but recall how Indian property is the glaring exception to the rule of property law. Any unvarnished view of American history will reveal that, when it comes to the property of indigenous people, federal and state law has subverted the natural order of property ownership. All too often the United States has appropriated, or has allowed states and others to steal, like common thieves, valuable property held by Native Americans. This, whether anyone likes it or not, is the common strain of American history towards the aboriginal occupants of this land. And, just a few years ago, the federal courts legitimized theft of Indian property by adopting the theory that if the stealing happened long enough ago, it's okay. We ask that you not tolerate any further repetition of this history.

Discovery Has Led to Confiscation

The storyline of American Indian history has been the same, time after time. When non-Indians "discover" that the Indians possess something of value to the non-Indians . . . then the non-Indians grab it for themselves. No money can adequately compensate Indian Country for these takings, and precious little money has ever been offered.

Recently, Indian gaming slipped through the cracks of this history and for the last 30 years a thousand flowers bloomed for Indian Nations with territories near large population centers in states where the law frowned upon gambling. Because gambling was disfavored by state law but craved by state citizens, neighboring Indian gaming markets thrived. The recognition by the U.S. Supreme Court of tribal sovereignty in the pivotal *Cabazon* case, although constrained soon thereafter by the Indian Gaming Regulatory Act, resulted in a temporary but tangible advantage for some tribal economies.

But now big casino industry and cash-starved states are embracing casino gaming in nearly every state market. This is eroding tribal exclusivity and thus, tribal gaming market share, and threatening the jobs that Indian gaming has created directly for our employees and indirectly for vendors and our neighbors whose businesses our employees and customers frequent. Once again, Indians have been discovered to possess something the non-Indian economic interests want for themselves. As inevitable as the sun's rising in the East, discovery of tribal government gaming is leading to its confiscation. Once again, Indian nations possess something our neighbors covet.

In New York, as in some other states, the governor has decided to try to grab gaming exclusivity away from the Indian tribes, tearing up the agreement his predecessors struck with us. Governor Cuomo can expect a fight this time. And we have lots of allies this time who are not simply going to let Albany pull the rug out from under us and them.

The Seneca Nation is one of the largest employers within the borders of western New York State. If the governor kills our gaming enterprises by breaking the exclusivity agreement we negotiated with the State of New York, thousands of people will be put out of work and the economy of our entire region will be disrupted.

With the request it made to the U.S. Department of Justice last year, it appears that the New York Lottery is seeking to offer an electronic lottery gambling to customers over the Internet within New York. If—instead of working with the Seneca Nation and other existing tribal casinos within the borders of New York—the New York Lottery seeks to directly compete with our brick-and-mortar casinos by putting the equivalent of slot machines in every living room in New York—we will make every effort to see that its effort is a commercial failure.

There is much that we can do together—New York State and the Indian nations with whom New York shares borders—that will be in our mutual self-interest and help us together, as neighbors, withstand the competitive influences of New Jersey and other surrounding states. But if New York will not join with us, we are all the weaker. The tobacco trade is a fresh example of how not to respond; of how shortsighted New York interests combined with (Big Tobacco) interests outside New York to short-change the interests of New York taxpayers.

Can Indian Diversification Outpace the Tidal Waves of Non-Indian Confiscation?

Until last year, the Seneca Nation had a robust and diversified trading economy based in large part on the sale of tobacco and fuel products to non-Indians. Unlike many other places in Indian Country, Seneca Nation Territories had a decades-old, private sector economy comprised of competitively-driven Seneca entrepreneurs. Our Seneca entrepreneurs traded products for years in bricks and mortar, over the counter transactions and, when the World Wide Web offered additional avenues for

trade and commerce, they expanded their market reach into the Internet tobacco trade and they created many, many jobs for Indians and non-Indians alike.

Like with gaming, our Indian Internet trade in tobacco slipped through the cracks of history and for a time it blossomed, and the entire Western New York region was the beneficiary of the successes of our Seneca entrepreneurs. Because tobacco use was disfavored by state law but craved by state citizens, the Indian Internet tobacco trade thrived. But when jealous Big Tobacco industry interests combined with the avaricious appetites of state taxing authorities, their envy colluded to persuade the U.S. Congress that they alone, not Indian Nations, and their terms, not ours, should govern trade in tobacco products.

Two years ago, the U.S. Senate and the U.S. House of Representatives chose to over-ride strenuous objections from the Seneca Nation and enact the Prevent All Cigarette Trafficking Act of 2010, the so-called PACT Act. The PACT Act single-handedly destroyed our Internet tobacco trade. It levied prohibitively costly fines and penalties on anyone connected with the common carriers and the U.S. Postal Service from moving our trade in tobacco products. It brought Seneca Nation's booming e-commerce tobacco trade to a grinding halt and threw hundreds of families out of work.

Is Internet Gaming the New American Frontier?

Some Senators, as well as many other observers of the American economic future, appear to believe that Internet gaming is the new American economic "frontier". If it is, what warning signals can we learn for Indian Country and our allies on this Committee and in Congress and the Administration? What lessons can we draw from the history of how the United States, and the various states, and American economic interests, have shaped the American frontier, from timber and gold and water to gaming 25 years ago and to the Indian tobacco trade two years ago?

One lesson is unavoidable. Isn't it time the property rights of Indian Nations are respected and protected? If not now, when? Isn't it time non-Indians respect the inherent and treaty-recognized rights of Indian Nations to control what happens on and from our own land? That's exactly what the Treaty of Canandaigua promised the Seneca Nation and the Seneca people.

I and many tribal leaders have no patience for the empty lip-service being paid in these hallways to a pseudo concern for Indian country jobs and the diversification of Native economies.

If that concern is real, then honor Indian treaties. Respect tribal sovereignty. Let Indian nations trade as sovereigns. Stop undermining Indian casino gaming with Internet gaming proposals, or Internet gaming proposals that preclude Indian nations from participating on fair terms.

Internet Gaming—A 21st Century Gold Rush

In recent years the Big Gaming interests, not unlike Big Tobacco, have allied themselves with state regulatory interests in Nevada and New Jersey and pushed for federal Internet gaming legislation that would bestow upon them a monopolistic control of Internet gambling operations. That brazen power grab is premised on the fiction that the big Nevada and New Jersey interests are alone sophisticated enough to operate Internet gaming in the first wave.

Like land homesteaders and gold stake claimers before them, these Nevada and New Jersey moguls see Indian gaming as a competitive threat and are determined to shove Indian gaming away from the table or, at best, deal Indian gaming a short hand. Make no mistake about it. Internet gaming in the sole hands of these Big Gaming moguls absolutely threatens the jobs that Indian country has created at its brick-and-mortar gaming facilities through years of innovation and investment in Indian country. And it further threatens to undermine the regional economies that Indian gaming has created.

Moreover, the Seneca Nation and dozens of other tribal gaming operations are as or more sophisticated in terms of management, security, oversight and regulation than the biggest and best operators in Atlantic City and Las Vegas. In addition, until this Congress and this Administration recently shut it down with enactment of the PACT Act, the Seneca Nation regulated one of the most robust Internet commerce operations in America—the tobacco trade. It is an affront to our dignity for the Congress to give any credence to the insulting notion that the Seneca Nation is somehow "not ready" or inexperienced or otherwise ill-equipped to conduct Internet gaming from Nation Territory, according to Nation laws and regulations, anywhere the Internet markets take our game and our trade.

Our treaty rights to conduct commerce—from our land, on our own terms, and without restraint by any outside power—must be respected and honored. That must apply to both over-the-counter trade and Internet commerce like Internet gaming.

And our job creation and economic diversification in our regions should be both respected and cultivated, not attacked.

This Congress and this Administration bowed to Big Tobacco and Big State interests last year with the PACT Act and devastated the Seneca economy. I urge this Committee, to find its true identity—as a strong ally of tribal sovereignty and as a stalwart defender of Indian treaties—and fight to the death to ensure that no Internet gaming legislation is enacted unless it guarantees to Indian Nations the right to set all terms and reap all benefits of all e-commerce that originates on Indian Country.

Internet gaming developments are the most recent, modern-day threat to tribal sovereignty. I must ask this Committee—will Congress roll over once again and, PACT-like, squash tribal sovereignty and tribal ingenuity by acquiescing to the powerful Internet gaming interests in Nevada and New Jersey and the cash-envious state and federal treasuries?

I don't think you will. Your hearing today heartens me. It is exposing the mutual interests that best define what Indian tribes and state governments can do together. Our common interests are to protect *local* jobs and *local* commerce that creates more *local* jobs. Internet gaming, if not tied to *local* facilities and *local* operations that trade in ancillary *local* entertainment and *local* commerce, does not create *local* jobs and *local* economic activity within a state. Internet gaming, if it is not controlled locally and connected to *local* commerce, will bleed our region dry. Internet gaming, and the new technologies that make it possible, actually is the occasion for combining the *local* interests of states like New York and nations like Seneca and the interests we hold in common as neighbors. The interests of the Seneca Nation and our neighbors in New York are aligned and congruent when it comes to Internet gaming and lottery operations. We are sending this message here today because we are convinced that our New York senators will sooner or later recognize, like Speaker Tip O'Neill is said to have said years ago, that all politics is *local*.

Conclusion

The Seneca Nation asks that this Committee to avoid taking action that does anything other than cultivating the job creation and economic diversification that Indian gaming has created in our respective regions. We have serious concerns that Internet gaming will undermine our efforts to-date to lift ourselves up from centuries of economic depression and will threaten many of the existing jobs that our Indian gaming enterprises have created.

Should this Committee believe that Internet gaming is nevertheless the right answer for Indian country and the American people, the Seneca Nation asks that this Committee ensure that the U.S. Congress, in conformity with its responsibility under the U.S. Constitution, honor our treaties and protect our inherent, sovereign right to engage in Internet gaming activity on terms that reflect the economic interests of ourselves and that of our neighbors in New York.

We believe it is in the interest of Senators to join with the Seneca Nation and with other Indian tribes in protecting the right of Indian nations to meaningfully and substantially participate, from the outset, in any new Internet gaming authorized under federal or state law.

Specifically, and urgently, we ask that you join with Indian tribes to protect against any move by powerful gaming interests who are trying to force Nevada-only or New Jersey-only control over Internet gaming.

Thank you for this opportunity to provide testimony and we ask that it be made part of the record of this hearing.

Nya-weh.

The CHAIRMAN. Thank you very much, Mr. President.

In your testimony, you state that it is mutually beneficial for the Tribe and the State to ensure that local jobs and local commerce are protected. My question to you is, what impacts do you think the DOJ opinion could have on New York State generally and the Seneca Nation specifically?

Mr. PORTER. Mr. Chairman, our nation is fortunate enough to employ almost 4,000 Natives and non-Natives in our gaming business in New York. We are the fifth largest employer. If Internet gaming is allowed to commence and proliferate, I strongly believe that we will lose jobs and economic resources from our businesses

in an area of the United States that is very under-served economically.

So to us, it portends a great threat that we have to be very cautious about and be very concerned that the Congress would injure our existing business.

The CHAIRMAN. Do you think other commercial gaming entities have a level of expertise in the area of Internet gaming different from Indian Tribes that should allow them to have first access into this market?

Mr. PORTER. Mr. Chairman, I do not believe that non-Indian gaming businesses have any technological or business savvy beyond what we have. I believe that our businesses are more regulated than other businesses. I believe our technical expertise is superior. And I am absolutely confident that we can provide high quality services, we can provide opportunity in this area no differently than we have with bricks and mortar businesses.

The CHAIRMAN. Thank you.

Let me now call on our Vice Chairman for his questions.

Senator BARRASSO. Thank you, Mr. Chairman.

Thank you, Mr. Porter, I appreciate your being here. As you said, you have read the testimony of the next group. I was just noting that in the next panel Mr. Rose is going to talk about in the wake of the Department of Justice opinion that the States are going to be moving, or they will move quickly in light of this opinion, to legalize and establish different regulatory approaches or schemes for Internet gaming.

So what do you specifically feel will be the biggest challenges for the Tribes if Internet gaming is then left to State regulation?

Mr. PORTER. Mr. Vice Chairman, I believe the significant problem is that many of our business agreement are tied to a geographic exclusivity. They are obviously not tied in many cases to our territory, per se, but are tied to a region of the State, for example.

So that is what we have negotiated for. We have paid for that, we have invested, in our case, nearly a billion dollars on physical infrastructure tied to that geographic area. Opening up Internet gaming beyond those geographic borders, and allowing, whether in the case of the particular Wire Act opinion, the New York State lottery, to prey upon and seize business opportunity from patrons in our exclusivity zone I think is the greatest threat and presents the greatest challenge for the Congress in marshaling a solution to protecting our geographic based businesses. I think it is a very difficult problem, but it is something that needs to be addressed.

Senator BARRASSO. And it is not just in your home State, but you are looking at it in each individual State?

Mr. PORTER. Exactly.

Senator BARRASSO. Because of the geographic component, and then the bricks and mortar location and the impact on the people who are there working. Thank you. Do you want to add to that?

Mr. PORTER. No, that is fine.

Senator BARRASSO. Okay, thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Barrasso.

Senator Udall?

Senator UDALL. Thank you, Chairman Akaka.

The Seneca Nation's history and success with Internet commerce is very impressive. And your experience with how Internet commerce can aid local development and local economies I think is an important piece of the discussion.

What do you see as the future of Tribal gaming and should it involve Internet gaming? Could you explain a little bit more when you talk about the exclusivity zone and the geographic components to this?

Mr. PORTER. Certainly, Senator. I think that in terms of just capability, as I mentioned before, our ability to participate in an Internet economy exists. But it can't do so in a way that undermines our existing businesses. In our case, the compact that we have entered into with New York State defines a 16-county geographic region in western New York that is our exclusive zone for the offering of slot machines. And we pay for that right, 25 percent off the top is otherwise due to the State and local government associated with that right.

Everything associated with our business model that we have under our 21-year compact is tied to that geographic region. The Congress, in very many ways, if we are to just simply open up this opportunity of Internet gambling without regard to that existing platform, which is common in Indian Country, I believe would produce serious injury and impairment to our contractual relationships with not just the State, but with our creditors, with our business partners and would inflict a tremendous degree of economic injury to us that could significantly destabilize, if not destroy, our businesses.

So finding that solution, if the Internet gaming legislation moves forward, is a critical one to assure that in many ways, Indian Country is held harmless from the consequences.

Senator UDALL. Do you believe the ongoing Internet poker that is conducted through international sites has already been a deterrent or a benefit to gaming Tribes, and how specifically has it impacted the Seneca Tribe?

Mr. PORTER. In our particular instance, I am not sure that we can say that the Internet poker has induced tremendous harm. Our businesses remain strong and because of the integrity of the compact and the geographic exclusivity, we are able to create and have created resort destinations that bring in patrons from Canada and other States.

But obviously, it has a certainly slippery slope element to it, that if it simply opens up in all forms of gaming, that is where we have to be concerned about how it will affect our business.

Senator UDALL. Thank you, President Porter. Thank you, Chairman Akaka.

The CHAIRMAN. Thank you very much, Senator Udall.

President Porter, currently Tribal gaming is the only federally-authorized and regulated gaming in the United States. If Federal legislation is enacted, some of that exclusivity would be threatened. As we have seen in IGRA, it is important to ensure that Federal and Tribal interests are balanced in any legislation. In your opinion, what would Tribes need to see in the Federal legislation to ensure that this exclusive right is maintained?

Mr. PORTER. Mr. Chairman, I have long held troubled feelings about this notion that should be balancing the interests of Indian sovereignty and our treaty rights. We paid for the freedoms of our land and our sovereignty 200 years ago. Unfortunately, in our view, in my view, the Indian Gaming Regulatory Act reflects once again a restriction and a curb on our rights as sovereign Indian nations.

As the Congress moves forward to deal with this issue of Indian gaming, I would ask that we no longer have to pay again for the freedoms that we have already paid for. This gaming business has done very well for us in many places in Indian Country, and it has provided resources to help our people and provide services that never before existed.

So the simple ask would be to hold us harmless, ensure that we are not paying again for something that we have already paid for more than once.

The CHAIRMAN. Thank you very much, Mr. Porter.

Are there any further questions of Mr. Porter?

Well, I want to thank you very much for your responses. Without question, it will be helpful to us as we move forward in possible legislation that we have. I thank you very much for being part of this hearing, Mr. Porter.

Mr. PORTER. Nya-weh. Thank you very much.

The CHAIRMAN. I would like to invite the second panel to the witness table. Serving on our second panel is Mr. Kevin Washburn, the Dean of the School of Law Administration at the University of New Mexico; Mr. I. Nelson Rose, Senior Professor at the Whittier School of Law; and Mr. Alex Skibine, Professor at the S.J. Quinney College of Law at the University of Utah.

Mr. Washburn, would you please proceed with your testimony?

STATEMENT OF KEVIN K. WASHBURN, DEAN, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW

Mr. WASHBURN. Thank you, Mr. Chairman and Mr. Vice Chairman and Senator Udall. And thank you, Senator Udall, for those kind words.

Senator Udall is one of the alums that we are most proud of at the University of New Mexico.

The OLC opinion that was issued just before Christmas created kind of a chaotic atmosphere. Professor Rose has noted this in his own testimony. It created kind of a wild west type situation, and it is has really forced, I think, Congress' hand. I think Congress does need to act here.

And I think I have two points to make today. One is that there is a strong Federal interest in Indian gaming. This was viewed as a very important resource for Tribes by the Federal Government. When the Indian Gaming Regulatory Act was passed in 1988, it had bipartisan support. Senator Udall's uncle, Mo Udall, was a big Democrat who was very involved in its passage.

But the Reagan Administration also was very supportive of the Indian Gaming Regulatory Act. Ronald Reagan signed the bill. And keep in mind that they might have had slightly different reasons for being supportive of this bill, but they were both supportive. Reagan wanted to foster Indian gaming as a means of self-sufficiency for Tribes. I think on the other side of the aisle, the idea

was just to increase Tribal resources to improve self-governance and self-determination. But there was tremendous bipartisan support for the idea of Indian gaming.

And Indian gaming has provided incredibly well for the needs that otherwise, and for many Tribes, the Federal Government might well be providing. So Indian gaming is getting the Federal Government off the hook in a great measure for funds that would otherwise need to be expended by the Federal Government, at least in some measure.

So that is an important background principle, as this Internet gaming boom begins. We have to protect this Federal resource, really, for Tribes. Tribes need to have access to this resource that has been so important for their self-determination and self-governance.

Now, I think Congress needs to get involved, and I think OLC at the Justice Department has largely forced your hand. I think it is very, very important. We have long had a schizophrenic approach to gambling in the United States. Why is that? It is not entirely clear. But one of the things is that we have these 50 State laboratories that get to decide gaming policy each on their own. And it is very important that States be able to decide their own views toward gambling. There is a question about how much their own views ought to apply on the Indian reservation.

But it is true that States do have differing views on gambling. We still have a couple of States that largely prohibit gambling. We do have, though, broad agreement that if gambling is going to exist, it should be a public resource. One of the areas, when we look at these charts, we see between lotteries and VLTs and Indian gaming, those are all *governmental* forms of gaming, in essence. That is almost 60 percent of the gaming on this chart.

So there is common belief that gaming should be a public resource. It should help develop governmental resources, and that is what we have used it for.

I think that States should be able to opt out of gaming, if they wish. But if they wish to have gaming, most States agree on all the things that are harmful about gaming. The regulatory interests that all States have about gaming are largely the same. They want to try to minimize compulsive gambling, for example. They want to prevent money laundering and prevent organized crime from infiltrating casinos or gambling. They want consumer protection. They want the gambling to be fair to the people who do it. And they want to ensure, of course, that the governmental fees that are large underpinning of all this gaming, that taxes or fees are paid.

So they all have the same interest in how we regulate gaming. So I think that tells us to some degree we don't need each State doing it individually, because they all have the same interest. It would be far more efficient to have one entity at the Federal level that does that, that handles that regulation of gaming. And that entity at the Federal level should be keenly focused on protecting the importance of Indian gaming to Indian Tribes. Because we have created a resource here, $30 billion in 2009, that is being used by Tribal governments all over the Country, and it is absolutely fundamentally important. Internet gaming causes some risk to that

very strong revenue source. And if that revenue source goes away, that is going to be Federal responsibility to meet those needs.

So I think Congress should act. I think Congress should get right in the middle of this and Federalize the regulation of Internet gaming.

Thank you.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF KEVIN K. WASHBURN, DEAN, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW

Indian casinos constitute 40% of the American gaming market. For a large number of American Indian nations, Indian gaming has been a key resource in facilitating tribal self-governance and self-determination. Approximately 237 tribes operate 442 Indian gaming facilities in the United States.[1] Given the importance of Indian gaming to tribal governments, Congress must consider how online gaming will affect Indian tribes and insure that any federal laws enacted to regulate Internet gaming give Indian tribes a fair opportunity to share in the Internet gaming boom.

The Supreme Court recognized that tribes had inherent powers to regulate gaming on their own lands in *California v. Cabazon Band of Missions Indians*[2] in 1987. That decision produced a nationwide debate on Indian gaming that was largely resolved the next year when President Ronald Reagan signed the Indian Gaming Regulatory Act into law. The Reagan administration was strongly supportive of Indian gaming even before the *Cabazon* decision. The Reagan Administration believed that revenues from Indian gaming could increase tribal self-sufficiency and reduce tribal dependence on federal appropriations. When it enacted IGRA, Congress recognized the exclusive right of tribes to regulate gaming on their lands and sought to promote tribal economic development, self-sufficiency and strong self government.[3] Moreover, Congress refused to privatize the benefits of Indian gaming. It mandated in IGRA that gaming revenues

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[*] Dean, University of New Mexico School of Law. The author provides his title for identification purposes only. The remarks made herein are made only in his role as an academic providing independent commentary, and are not made in any official capacity. The author thanks his research assistant, Anne Illanes-Meyers for her help in preparing this testimony.

[1] *2009 Economic Impact Report*, NAT'L INDIAN GAMING ASS'N (NIGA) 6 http://www.indiangaming.org/info/NIGA_2009_Economic_Impact_Report.pdf.

[2] 480 U.S. 202 (1987).

[3] Indian Gaming Regulatory Act, 25 U.S.C.§ 2701 *et seq.* (1988).

must be used primarily for public purposes, naming five authorized uses: "(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies."[4]

The legal regime set forth in IGRA has allowed many tribes to prosper. The Reagan Administration's hopes for Indian gaming have been realized, probably beyond their wildest expectations. Indian gaming has been the greatest economic engine on Indian reservations that the United States has ever seen. From 1998 to 2010, Indian Gaming grossed more than $246.2 billion nationwide.[5] Consistent with the purposes specified by Congress, most of these have been used to fund tribal operations and promote the economic development and welfare of tribes and Indian people.

For instance, according to the National Indian Gaming Association's (NIGA) Economic Impact Report for 2009, 237 Indian tribes in 28 states had used Indian gaming to create new jobs, fund essential government services and rebuild communities. In 2009 tribal governments generated $26.2 billion gross revenue from gaming alone - 20% of that net revenue was dedicated to education, children and elders, culture and charity, 19% to economic development, 17% to health care, 17% to police and fire protection, 16% towards infrastructure and 11% towards housing.[6] While tribal revenues allocation plans that provide for per capita payments to individual tribal members have been approved by the Secretary of the Interior and have earned a great deal of press attention, most of these payments have done little more than to increase household income and lift some Indian citizens out of poverty. In addition to gaming revenues, tribes generated $3.2 billion in gross revenue from related hospitality and entertainment services such as resorts and entertainment complexes.[7] As of 2009, tribal governments had directly or indirectly generated 628,000 jobs nationwide for American Indians and others.[8] As a result of gaming, tribes have experienced extensive economic development and built strong governmental infrastructures.

In sum, gaming has assisted in producing strong tribal governmental infrastructures. Tribal gaming revenues have been a boon to the federal government as well. In light of the federal government's trust responsibility to the tribes, it would likely have had to spend more on federal

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[4] 25 U.S.C. § 2710(2)(B)(i) – (v).

[5] *See Gaming Revenue Reports*, NAT'L INDIAN GAMING COMM'N (NIGC), http://www.nigc.gov/Gaming_Revenue_Reports.aspx.

[6] *Economic Report*, *supra* note 1 at 11.

[7] *Id.*

[8] *Id.* at 7.

Indian programs in the absence of Indian gaming. In addition, Indian gaming revenues have produced tax revenues for the federal government, both directly and indirectly, and revenue shares for state governments.

Although predictions are difficult, especially about the future, Internet gaming poses some magnitude of threat to the brick and mortar casino industry, including tribal casinos. Federal policy toward Internet gaming going forward should recognize the significant risk to the stable revenue stream upon which many tribes have been able to depend. Under the worst case scenario, a shift in the market for gaming away from land-based casinos and toward Internet gaming could vastly increase revenues to private and even off-shore Internet gaming companies and decrease tribal governmental revenues, plunging some tribal nations back into poverty. Federal policy must recognize and seek to mitigate this risk, so as to preserve gaming as a viable means of raising governmental resources for tribal governments.

I. The Demand for Internet Gaming Should be Recognized and Internet Gaming Should be Legalized and Regulated

The popularity of Internet gaming has been growing, both globally and in the United States. According to H2 Gambling Capital, global online gambling revenue in 2010 was nearly $30 billion, and less than 15 percent of that came from the U.S.[9] In light of the strong public demand for Internet gaming, such gambling activity is bound to occur. If it is not regulated, it will present all of the risks inherent to unregulated gaming, such as compulsive gambling, money laundering, unwise extension of credit, and other ills. Indeed, the greatest threat is not legalizing and regulating Internet gaming.

While the recent opinion by the Office of Legal Counsel at the Department of Justice has produced chaos, it has forced a discussion that is due. It is long since time for policy makers in the United States to address Internet gaming. While our model of government with its separation of powers has been generally successful in preventing governmental tyranny, it has produced a very uneven approach toward Internet gaming. Indeed, the approach toward Internet gaming in the United States has vacillated between prohibition and Ostrich-style avoidance. Congressional policy makers, apparently lacking the will to address Internet gaming head on, have sought to place barriers in its path by, for example, prohibiting the use of credit cards. Prosecutors, representing the Executive Branch, have sometimes ignored Internet gaming, and have at other times brought their most significant prohibitory powers to bear, seeking to incarcerate purveyors

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[9] *Online Gambling*, AMERICAN GAMING ASSOCIATION (AGA), http://www.americangaming.org/government-affairs/key-issues/online-gambling.

of Internet gaming. If history is any guide, prohibition undermines governmental control and places such control and profits in black market entities. This has produced a haphazard approach. One of the problems in the current federal approach is that it has fallen very unevenly on Internet providers, scaring away legitimate companies and rewarding with great riches some individuals who are willing to take the significant legal risks involved. It is time for the United States to formulate a coherent approach toward Internet gaming.

Through appropriate regulation, approximately 85 countries have been able to provide their citizens with consumer protections while reaping the economic benefits of online gaming.[10] The potential revenues are significant. Rick Bronson, Chairman of U.S. Digital Gaming, has estimated that online poker could generate $12 billion annual revenue in the U.S.[11] With the prospect of generating more governmental revenue through taxation, the support to legalize online gaming is rapidly mounting. California has estimated that legalizing online poker would net the state $100 to $250 million a year which could help address its $9.2 billion budget shortfall.[12] The state of Iowa released a study in December 2011 which predicted online poker alone could net the state $3 million to $13 million annually.[13]

If legalized and regulated, Internet gaming would no longer pose the societal threat that many believe it does. Internet gaming can be regulated. In fact, the AGA has stated, "our concerns about technology have been eliminated by advancements in the field, and [we] believe that the technology now exists to properly regulate Internet gambling [and] provide appropriate consumer protections for individuals..."[14] With increased consumer protection and the possibility of new revenue for governments, online gaming in the United States is inevitable. In fact, Professor I. Nelson Rose has predicted that, in light of the Department of Justice's new interpretation of the Wire Act, states are going to move faster to approve online gaming than they did lotteries. I concur with his prediction. It is imperative that Congressional policy makers address Internet gaming. The United States should enact legislation at the federal level to create an efficient, uniform regulatory system that can protect consumers, address potential social

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[10] Testimony of Hon. Alfonse D'Amato, U.S. Senate Committee on Indian Affairs, Nov. 17, 2011, *available at* http://indian.senate.gov/hearings/upload/Alfonse-D-Amato-testimony.pdf.
[11] Enjoli Francis, *Online Gaming Casinos to 'Sweep' U.S. in 2012*, ABC NEWS, Dec. 28, 2011, *available at* http://abcnews.go.com/blogs/headlines/2011/12/winning-online-gambling-casinos-to-sweep-u-s-in-2012/.
[12] Michael Cooper, *As States Weigh Online Gambling, Profit May be Small*, N.Y. TIMES, Jan. 17, 2012, *available at* http://www.nytimes.com/2012/01/18/us/more-states-look-to-legalize-online-gambling.html.
[13] *Id.*
[14] *Online Gaming*, *supra* note 11.

harms of Internet gaming, and provide needed regulatory structure and oversight of this growing industry.

II. Regulation of Internet Gaming Should be Federalized

The Internet has fundamentally changed commerce in the United States and throughout the world. Electrons simply do not know political boundaries. As a result, the Internet undermines efforts to preserve the salience of political borders in an increasingly global world. The Department of Justice's most recent interpretation of the Wire Act allows intrastate online gaming, which further dissolves geographic boundaries and complicates regulation. It is inevitable that a gambler in State X may seek to gamble at his favorite casino located in State Y. While it is possible to declare such action illegal, it is much more difficult to stop it. Moreover, it is not clear why it should be stopped. If an action is legal in both states, why shouldn't an American be able to gamble in either location? The only entity that can effectively regulate both situations, however, is the United State government. Presumably, this is the reason that the drafters included the Interstate Commerce Clause in the Constitution, giving the federal government the exclusive authority to regulate commerce between people in different states.

Federal regulation is justified for other reasons as well. Individual states simply are not equipped to regulate online gaming and it would be highly inefficient for companies and taxpayers to have 51 different American regulatory regimes. Moreover, in a field in which the technology is rapidly advancing, the federal government has greater resources and fewer jurisdictional hurdles to regulating this expansive industry. The federal government should take action before 30 to 40 states begin investing valuable public resources to build regulatory regimes.

The AGA is also concerned with state regulation of online gaming and believes that existing laws do not adequately protect the millions of Americans who gamble online every day. In advocating for an encompassing legal framework to regulate Internet gambling, the AGA explained,

> "[a]lthough each state should have the discretion to decide whether or not to permit online gambling within its borders... individual states should not be able to create their own online gambling regimes. The result would be a legal patchwork that would make little economic sense, with online poker permitted in one state, a state lottery offering casino games in a second state, and a third state authorizing only Internet blackjack. The result would be confusion for consumers and an inefficient overlap in regulatory effort.

> Thus the only proper way to regulate such an expansive industry is through a federal agency."[15]

I agree. This potential regulatory calamity has already begun to unfold among states on the East Coast. When New Jersey Governor Chris Christie announced that he wanted New Jersey to be the online gaming capital of the word, Massachusetts quickly announced plans for increased gaming opportunities. Upon hearing rumors of increasing competition, Connecticut Governor Dannel Malloy began talks with the state's two largest tribes to put them in charge of Connecticut's new online gaming enterprise.[16] The result could be a "race to the bottom" with commerce moving toward the state with the weakest regulatory controls. In sum, we can already see complex problems emerging if we allow individual states to regulate a borderless industry.

For purposes of gaming regulation, the risks associated with gambling are similar throughout the country. The risks include compulsive gambling, organized crime, embezzlement, tax evasion and money laundering. Given the uniformity of the risks, it makes little sense to have a New Jersey approach to Internet gaming regulation and a Massachusetts approach. With its broad reach, significant resources, and existing infrastructure to monitor and address financial risks, the federal government should occupy the field. Indeed, without a systematic, federal regulatory scheme, laws will vary nationwide likely spurring discrimination or market domination issues and increase the number of diversity suits filed in federal court.

III. To Preserve Socioeconomic Gains that Have Occurred During the Past Quarter Century, Tribes Must Have an Equal Opportunity to Engage in Internet Gaming

The story of Indian Nations is a story of survival. Without equal opportunity to participate in the next frontier in gaming, tribes are at risk of falling back into pre-Indian gaming socioeconomic conditions.

Prior to the introduction of gaming, American Indian communities had been correctly likened to Third World countries operating within state borders.[17] Nationally, American Indian families

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[15] David O. Stewart, *Online Gaming Five Years After UIGEA*, AGA, 18 (2011). http://www.americangaming.org/files/aga/uploads/docs/final_online_gambling_white_paper_5-18-11.pdf.

[16] Lucy Nalpathanchil, *Conn. Tribes Hope to Win Big With Online Poker*, NPR, Jan. 24, 2012, *available at* http://www.npr.org/2012/01/24/145654870/in-conn-tribes-hope-to-win-big-with-online-poker.

[17] James I. Schaap, *The Growth of the Native American Gaming Industry What Has the Past Provided, and What Does the Future Hold?*, 34 AMERICAN INDIAN Q. 365, 368 (Summer 2010).

lived below the poverty line at a rate nearly three times the national average.[18] For example, in New Mexico nearly half of the Indians lived below the poverty level and one-quarter lived in homes without plumbing.[19] Approximately 90,000 American Indian families in Indian country were homeless or "under housed."[20] Before Indian gaming, American Indians suffered from diabetes at two and a half times the national rate and suicide rates were between two and three times the national average.[21]

Indian gaming has not solved these problems, but it has improved them. Indian gaming has not only had a positive economic and social impact on the tribes themselves, but also on the surrounding communities.[22] Unemployment rates and poverty percentages have dramatically decreased, as have instances of suicide, domestic violence and crime, while graduation rates of tribal members have increased.[23]

Despite the success of Indian gaming in improving life on the Reservation, much remains to be done. As of 2010, the poverty rate among American Indians was 25.3 percent compared to the national average of 12.6 percent.[24] Only 13.6 percent of American Indians have attained a bachelor's degree or higher compared with 27.2 percent of the general public.[25] About 2.6 percent of homes in tribal areas lack complete plumbing facilities compared with .42 percent nationwide.[26] It is imperative that Indians be given equal opportunity to compete on the same level as commercial casinos in order to continue combating these and other socioeconomic problems endemic to their tribes.

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[18] *American Indian Gaming Policy and Its Socio-Economic Effects – A Report to the National Gaming Impact Study Commission*, NIGA,, July 1998 *available at* http:ww...indiangaming.org/library/resource-center/index.html.
[19] Jonathon Taylor & Joseph Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, Harvard Project on American Indian Economic Development, Harvard University, Cambridge, MA, January 2005.
[20] *American Indian Gaming Policy*, *supra* note 18.
[21] *Id.*
[22] *The Growth of the Native American Gaming Industry*, *supra* note 17 at 374 (*citing* Jonathan Taylor, Matthew Krepps & Patricia Wang, *The National Evidence on the Socioeconomic Impacts of American Indian Gaming*, April 2000, Harvard University/Lexecon, http://www.indiangaming.org/library/articles/the-economic-development-journey.html, explaining that "this effect is driven by the fact that Indian casinos are more likely to be located in relatively economically depressed areas displaying lower average incomes prior to casino introductions.")
[23] *Id.* at 375.
[24] *The Growth of the Native American Gaming Industry*, *supra* note 17 at 377.
[25] *Id.*
[26] *Id.*

Some members of the gaming industry agree that tribes have an important role to play in our Internet gaming future. In November of 2011, the Honorable Alfonse D'Amato, Chairman of the Poker Players Alliance, testified before this committee that, "Indian Country should be substantial players in a regulated U.S. market. We would like to see Tribal governments as federally-recognized licensing bodies...as licensed operators, as well as affiliates and network partners for other licensed operators."[27] To further progress in difficult socio-economic conditions on Indian reservations, and to prevent backsliding toward poverty for those tribes who have escaped it, it is imperative that tribes are given equal access to online gaming. Implementing a federal approach toward Internet gaming can facilitate this goal.

Conclusion

Online gaming is the next frontier in gambling for both commercial and tribal casinos. While the United States should recognize the demand for online gaming and create legal avenues for this demand to be satisfied, the federal government and tribal nations must preserve the great progress made in Indian communities. Just as the Internet revolutionized the sale of retail goods, it will change gambling dramatically. While online sales have had a profound impact on retail stores, existing brick and mortar retailers, just as shopping malls and small retailers, will continue to thrive. Internet gaming will not end the market for brick and mortar casinos, but it will have an impact. Tribes must have an opportunity to participate in online gaming to preserve strong governmental revenue streams that are crucial to the success of Indian people.

Thank you for requesting my views.

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Dean Kevin Washburn is the author of a law school casebook, GAMING AND GAMBLING LAW: CASES AND MATERIALS (WolterKluwer/Aspen 2011), and executive editor and principal author of the Indian Gaming chapter of the forthcoming 2012 edition of FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (LexisNexis). Additional scholarship and testimony by Dean Kevin Washburn on Gaming and Indian gaming can be viewed on the web at http://ssrn.com/author=334714.

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[27] Testimony of Hon. Alfonse D'Amato, *supra* note 10.

The CHAIRMAN. Thank you very much, Mr. Washburn.

Mr. Rose, will you please proceed with your testimony?

STATEMENT OF I. NELSON ROSE, DISTINGUISHED SENIOR PROFESSOR, WHITTIER LAW SCHOOL

Mr. ROSE. Thank you and good afternoon, Chairman Akaka, aloha, and Senator Udall, thank you for inviting me.

My name is I. Nelson Rose. I am a distinguished senior professor at Whittier Law School and the author of Gambling and The Law and Internet Gaming Law.

I prepared a written statement, but what I want to do here is focus on the two big questions: what did that announcement by the Department of Justice mean for State legal gambling and what does it mean for the Tribes?

We are in what I call the third wave of legal gambling. This is the third time in American history that gambling has spread everywhere. Historically, it has always been up to the States to decide their own public policy toward gambling. And the role of the Federal Government has simply been to help the States. Federal laws can be seen as basically enforcement statutes.

So if you look over all the Federal statutes, they all require that the gambling be illegal for the Federal statute to apply. The only two exceptions are the Federal anti-lottery statutes, which have express exemptions for State lotteries, and the Wire Act. The Wire Act was the main weapon that was used by the Department of Justice in its war of intimidation, to try to scare players, payment processors and operators out of the American market.

That weapon is now gone. There basically is now no Federal statute that would prevent a State from legalizing virtually any form of Internet gambling with the exception of sports betting. And even that is under attack in the court. States can legalize, they can form compacts for interstate and even international to create pools of players. They can take bets from each other.

The first to act, and they are already starting, are the State lotteries. Because they don't need the statutes, they can pass regulations. There are at least six State lotteries that are already selling lottery tickets through the Internet by subscription. They now can sell individual tickets.

The big question is, will they go with instant lottery. Because if you put a scratcher on a video screen, it becomes almost indistinguishable from a slot machine.

But we are not going to be just limited to lotteries. Every State looks at gambling as a painless tax. They are all desperate for revenue. So they are all looking to get into Internet poker, Internet casinos if they can. They are doing this to raise money, which means if the big players are the local operators, then they are the ones who are going to get the licenses.

In New Jersey, where there are no Tribes, New Jersey will be legalizing Internet casinos this year, and all of the licenses will go to Atlantic City casinos. If Connecticut legalizes, then the two licenses will go to the two large Indian gaming Tribes. But in every other State, what the Tribes are going to be forced to do is basically compete for a very limited number of licenses.

The problem is, and I have looked at this law very carefully, under Cabazon and IGRA, the Tribes have two tests. You look to see what is permitted in the State and then the Tribes can do it. But it seems to me pretty clear the courts are going to say they are limited to taking bets from people who are physically on their land.

Now, they can take bets off-reservation. But that is if and only if the States agree. In other words, for a Tribe to do Internet gambling and take patrons who are off reservation, that is a privilege, not a right.

So the question is, what is this going to mean for the Tribes, and in some cases, the big Tribes, the ones that are well-established, can protect themselves. They have the political power, they have compacts in place.

But it is really up to Congress to protect the rest, particularly small Tribes that are not near cities that are basically not going to be getting the licenses and are now going to have this additional competition with no reason to go onto their reservation to gamble.

In fact, one point that I want to raise that hasn't been raised, it is not even clear that Tribes can keep Internet gambling off their land if a State legalizes. There are some precedents that say State lotteries can sell on Indian land.

Of course, any attempt to expand Indian gaming rights is obviously going to meet with strong opposition from most of the States. The problem is, it is a problem that has to be resolved now. In 1962, there were no State lotteries in the United States. Half a century later, we have State lotteries in every State, with only a half a dozen that don't have State lotteries. But the Internet, the speed of change on the Internet is like dog years. It is not going to take four or five decades. Within much less than one decade we are going to see Internet gambling legalized by all the States. And unless Congress figures out a way to protect particularly the small Tribes, I think that a lot of the Tribes are going to be out of luck.

I want to thank you, mahalo, and I am looking forward to your questions.

[The prepared statement of Mr. Rose follows:]

PREPARED STATEMENT OF I. NELSON ROSE, DISTINGUISHED SENIOR PROFESSOR, WHITTIER LAW SCHOOL

As a completely unexpected gift to the states, announced two days before Christmas, the United States Department of Justice (DoJ) declared that states are now free to legalize almost every form of Internet gambling, and not be worried about federal laws. This might not have been the intent—the ruling dealt with state lottery subscription sales—but the result will be an explosion of poker, instant lotteries and casino games on the Internet, run or licensed by the states. And, although the DoJ was careful to say the opinion is limited to intra-state gambling, there is now nothing stopping states from entering into compacts for online gambling with other states, and even foreign nations.

Many tribes, especially those with established landbased gaming operations, are worried that they might not be included in this coming proliferation of state-operated and -licensed Internet gambling. And they have every reason to worry.

Although tribes have the right to operate any form of gambling permitted under the laws of the state where the tribe is located, it seems likely that courts would limit that right to patrons who are physically on Indian lands. Tribes are not prohibited from taking bets from throughout a state. But that would be a privilege granted by a state, not a right. And, the state could not be sued for bad faith if it refused to let tribes accept off-reservation wagers. This puts tribes in the position of having to compete for a limited number of Internet gambling licenses, to be issued by not always friendly state governments.

The tests for Indian gaming seem clear, based on the decision of the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987), and the declarations of Congress in the subsequent Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § § 2701–21 and 18 U.S.C. § § 1166–68. First, what is permitted in the state? This is a shorthand for requiring tribes to follow the public policy of the state toward specific forms of gambling. Second, tribes regulate, sometimes with, sometimes without, state or federal governments, but only if the gambling is conducted on Indian lands. Tribes in Nevada can operate casinos and sports books; tribes in Utah have none.

This limit on tribal gaming to Indian lands is particularly true with Class II gaming. So, if a state legalized Internet bingo or poker, tribes could also conduct those

games online, and would not need a tribal-state compact. But players would have to be physically present on Indian lands. There might be ways around this—proxy play for bingo has been tried—but that would not work with poker.

The argument for limiting Class III gambling to Indian lands is weaker. There is an express exemption in IGRA for tribal lotteries from the federal anti-lottery statutes, 18 U.S.C. §§1301–1304 (IGRA §2720). But this only proves Congress intended to allow tribes to send lottery tickets across state lines and through the U.S. Mail. The lottery would have to be conducted pursuant to a tribal-state compact, and the statutes do not necessarily indicate Congress intended to allow sales off-reservation. Tribes also can clearly operate off-track betting (OTB), even though the races are taking place on non-Indian lands. But even though states have to agree to compacts allowing their tribes to operate OTBs, it is not clear that states would have to allow tribes to accept wagers from bettors who are not physically on Indian land. A majority of states allow remote betting conducted by state-licensed OTBs through Advanced Deposit Wagering (ADW), where players fund their accounts in advance over the phone or through the Internet. Even though a state might agree to tribal ADWs, that does not mean it had to.

I think courts would find tribes could demand compacts if states legalized Internet lotteries, casinos, sports betting and other Class III gaming. But, again, the bettors would have to be on Indian lands.

The Unlawful Internet Gambling Enforcement Act (UIGEA), 31 U.S.C. §§ 5361 et seq., does allow tribes to go across state lines for inter-tribal Internet gambling, Class II or III, but players are, again, expressly limited to those on Indian lands. 31 U.S.C. §§5362(10)(C).

The reason for the coming explosion of state-legal Internet gambling was the declaration by the Barack Obama administration that the major federal anti-gambling statute, the Wire Act, 18 U.S.C. §1084, applies only to bets on sports events and races. State legislators and governors are desperate to find ways to raise revenue without raising taxes. Gambling is seen as a painless tax, so every state is looking into expanding legal gaming. They can now do so. The only exception is sports betting, which cannot be introduced into a state that does not already have it, due to a different federal statute, the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §§3701–3704. And, New Jersey, which would like to also have true sports betting, has filed a court challenge to the PASPA.

Federal anti-gambling statutes can be seen as being merely enforcement laws, not legalizing or prohibiting any form of gambling. So, with only two exceptions, all federal anti-gambling statutes apply only to gambling that violates some other federal or state law. Only the federal anti-lottery statutes and the Wire Act can apply to gambling that is legal under state law. But, long before Powerball, states found ways of getting around the federal prohibitions on interstate lotteries, by having no money, only information, cross state lines. And state lotteries are now expressly allowed to have multi-state lotteries, 18 U.S.C. §1301.

So, the only remaining barrier that blocks states from legalizing games like Internet poker—which is not a lottery—has been the DoJ's expansive view of the Wire Act. For example, when the American Virgin Islands and Nevada passed legislation licensing online casinos, the DoJ stopped state regulators from issuing licenses by saying they would arrest operators under the Wire Act. Now that the Department charged with enforcing the law has limited that statute to cross-border sports bets, there is literally no federal law standing in the way of a state authorizing intrastate online games, and even entering into compacts with other states and nations to pool players.

The political fights will be over who gets the licenses. There is so much legal gambling in the U.S. that it is easy for politicians to say, "We've already got casinos, racetracks and a state lottery. What's the big deal about Internet poker?" Of course, there is so much legal gambling in the U.S. that those casino and racetrack owners, and even the state lottery, respond, "Internet poker is fine, as long as we get to run it."

But state lawmakers are not proposing legalization to protect local operators; it is solely to raise money. Even in states as big as California, the existing cardclubs, tribal casinos and racetrack do not have anywhere near enough financial strength to outbid outsiders, such as the largest Nevada casino companies and Internet gambling operators.

Giving the exclusive right to Internet games to the State Lottery might bring in more money in the long run, but the states are desperate for cash, now. Only outside companies, like Caesars Entertainment, can come up with the $100 million or so the state will want up front. But California's long-established and politically powerful cardclubs and tribal casinos will not quietly accept an outsider setting up a competing operation that brings legal gambling into every home in the state.

Still, there is so much money at stake that political deals will be made. In states like Nevada and New Jersey, where the local operators are the big money, the landbased casino companies will get the Internet gambling licenses. In states like California, local operators will get a license or two, but others will also be sold to the highest bidders.

The great irony is that this coming explosion of legal Internet gambling in the U.S. was created in part by a conservative Republican attempting to outlaw online gaming. When the GOP controlled Congress and George W. Bush was President, Bill Frist (R–TN), then majority leader of the U.S. Senate, attached the UIGEA to a must-pass anti-terrorist bill, the SAFE Port Act. But, the UIGEA has many loopholes, accidentally opening the door to many forms of online gaming, including fantasy sports, skill games, and intra-state gambling. The UIGEA has an express exemption for gambling where the bettor and operator are in the same state. It explicitly declares that legal gambling does not violate the UIGEA, even if the wires carrying the gambling information pass into another state.

It was the last that led to the announcement by the DoJ. The DoJ had always taken the position that the Wire Act outlawed all forms of gambling, and that that federal law applied so long as the gambling information crossed, even briefly, into another state.

The DoJ decided the only way out of this conflict with the UIGEA was to reinterpret the Wire Act. If this statute applied only to sports bets, then it wouldn't matter if phone lines happened to carry lottery or poker bets across other states.

The timing was also interesting. Although written months earlier, the DoJ made its announcement on Christmas weekend, when news staffs are at their absolute minimum. This prevented it from getting any immediate great attention. Even anti-gambling activists did not notice it for days. Plus, the tie-in to Christmas may not have been accidental. This was a gift of hundreds of millions of dollars and thousands of jobs to the states from Pres. Obama, at a time when they desperately need help to continue recovering from the Great Recession.

The Memorandum Opinion was written by Virginia A. Seitz, Assistant Attorney General, in the DoJ's Office of Legal Counsel, and represents the official position of the Obama administration. It was written in response to inquiries, some more than two years old, from Illinois and New York. Technically, it answered the question: "Whether proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act." But, it also ended up responding to the letter sent by the Majority Leader of the U.S. Senate, Harry Reid (D–NV), and Jon Kyl (R–AZ), the number two Republican in the Senate. They had written to the DoJ, after the District of Columbia Lottery announced it was going to open Internet gaming in Washington, demanding that the Department clarify its position on Internet gambling.

They now have their answer, though it may not have been what they had wanted. Instead of declaring the D.C. Lottery's Internet plans illegal, federal prosecutors will now only use the Wire Act when the gambling involves sports events or races across state lines. Because interstate horse racing already has its own statute, the only federal prohibition remaining on state-legal gambling is on sports betting, and even that might be changing.

The PASPA grandfathers-in Nevada, Delaware and a half-dozen other states, while prohibiting any other state from legalizing sports betting. This is now being challenged in the courts, because New Jersey voters approved sports betting in November 2011. My guess is that the PASPA will be declared unconstitutional. It is as legally irrational as saying that only some states can have movie theaters with sound. And it is possibly the only federal statute in history that tells the states they cannot change their public policies on gambling.

The immediate beneficiaries will be the eight state lotteries that are already using the Internet. Now, they can use out of state payment processors and will quickly expand into selling individual tickets, not just subscriptions. The big question is whether they will sell instant tickets online. Because, if you put a scratcher on a video screen, it becomes almost indistinguishable from a slot machine. Every state lottery is also looking into whether it can offer other games, including online poker, as the DC Lottery already has authority to do. After all, most of the provincial lotteries in Canada are already operating Internet poker and other online gambling games, or are about to.

State legislatures are looking at how much revenue they can raise by changing their laws to license Internet gambling. Nevada is furthest along, having issued regulations for Internet poker. The Silver State already has online and telephone sports betting. It allows remote wagering on casino games from dedicated computer pads, limited to casino grounds and excluding hotel rooms. But Nevada will probably not

license true Internet casino games, as long as the state's brick and mortar casinos fear the competition.

States will then enter into compacts with other states, and even foreign nations. In fact, there is no reason to wait. Nevada and the District of Columbia can immediately agree that players in Las Vegas, Reno and Washington can play online poker on sites operated by the D.C. Lottery or a Nevada-based casino company. The main barriers will be licensing and tax-revenue sharing. But multi-state and multi-national lotteries show these difficulties can be overcome.

They should also be talking with the governments of England, Alderney and the dozens of other foreign jurisdictions that license Internet gaming. So long as they stay away from sports betting and lotteries, there is no federal barrier to having truly international games.

This surprise Christmas present from the DoJ will spur other states to legalize. Iowa will probably be first. The Iowa Legislature mandated a report, which has already been submitted, concluding that intra-state poker can be operated safely and will raise money. This is the third year the Legislature has considered the issue. Since it meets for only 100 days, it will act quickly, one way or another.

California is desperate for any source of revenue, and it has so much legal gambling that the only question is which operators are going to be the big winners.

In New Jersey, the Democratic-controlled Legislature approved intra-state online gaming, but the bill was vetoed by Gov. Chris Christie (R–NJ). Christie understands his state needs the money, so he will help put the issue on the ballot in November. It should probably be done through a constitutional amendment, to eliminate the present language limiting gaming to Atlantic City. The main author, state senator Ray Lesniak (D–Union), will probably not limit online patrons to New Jersey, as his original bill stated, but instead will accept players from any other state and nation where Internet gambling is legal.

Questions remain. The Wire Act still applies to bets on horse races. In December 2000, Congress amended the Interstate Horseracing Act, 15 U.S.C. § § 3001–3007, to expressly allow the states to decide for themselves whether their residents can make bets on horse races by phone and computer. More than half the states have opted in under the Interstate Horseracing Act to allow residents to bet by phone or computer, including across state lines. But the DoJ's official position is still that the ADW operator and the bettor have to be in the same state. No one else, including the World Trade Organization, agrees with the DoJ. And payment processors have to figure out who is right.

The control of gambling has always been left up to the states. A federal licensing law would not really change things that much: States have to be able to opt in or out. Congress will not impose the same gambling policy on Nevada and Utah.

The problem for federally recognized tribes is that gambling remains a public policy decision left to the states. We are in what I call the Third Wave of Legal Gambling. This is the third time in American history that legal gambling has spread nearly everywhere. Historically, it has always been up to the states to decide their own public policy toward gambling. That is why Utah and Nevada can share a common border, yet have completely different gaming laws. The role of the Federal Government has, until recently, always been limited to helping the states enforce their public policies. Congress only acts when it has to, as with interstate horseracing and Indian gaming, or when the states have asked for federal assistance, as with the Wire Act and other statutes designed to fight organized crime. Even IGRA codifies the Supreme Court's decision in *Cabazon* that federally recognized tribes can only operate those forms of gaming permitted by the state where the tribe is located.

There are so many statements in the IGRA referring to "gaming on Indian lands," that there can be little doubt that Congress intended to set up a system for allowing tribes to have legal gambling on their land, if the games were low-stakes social or traditional, Class I, or permitted by the laws of the state where the tribe is located, Class II and III. A typical statement comes at the beginning of IGRA in the Findings, 25 U.S.C. § 2701(5): "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." IGRA contains no similar statement referring in any way to allowing tribes to conduct any part of their gaming off Indian lands.

Even the statement in IGRA, quoted above, that tribes have the exclusive right to regulate gambling on their lands might not be true. At least one judge has found that state lotteries may sell their tickets on Indians lands, and that the state regulation of gambling, in this case, was not preempted by IGRA or by any other federal law. *Confederated Tribes and Bands of the Yakama Indian Nation v. Lowry*, 968 F.Supp. 531 (E.D.WA. 1996), judgment vacated by *Confederated Tribes & Bands of*

Yakama Indian Nation v. Locke, 176 F.3d 467 (9th Cir. 1999). Although the decision is non-binding, it indicates that tribes might find it difficult to convince courts to keep Internet gaming off their land once a state has made it legal.

The attempts to make Indian gaming available to the general population of a state, without patrons having to come onto Indian lands, have not met with much success. The Coeur d'Alene Tribe's attempt to sell its National Indian Lottery tickets by telephone to patrons in most of the states met with such severe legal challenges that the Lottery folded. Many of the cases were resolved on legal technicalities. But it is clear that a number of judges rejected the Tribe's argument that the Lottery was being conducted on the Tribe's land in Idaho, merely because the drawings took place there. Some judges even objected to tribes ever offering any gambling off-reservation, even if the tribe has express permission from the state. See, e.g., the dissent in *AT&T Corporation v. Coeur d'Alene Tribe*, 295 F.3d 899, 910 (9th Cir. 2002) (Gould, Dissenting); see also *State of Missouri v. Coeur d'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999); *AT&T Corporation v. Coeur d'Alene Tribe*, 45 F.Supp.2d 995 (D.Idaho 1998), reversed, 295 F.3d 899 (9th Cir. 2002).

It is theoretically possible that the DoJ could someday reverse its conclusion that the Wire Act's "prohibitions relate solely to sport-related gambling activities in interstate and foreign commerce." But that is highly unlikely. Not only are such reversals rare, but they tend to be limited to issues a new presidential administration considers important, such as Pres. Obama's reversal of the DoJ's approval of torture under Pres. George W. Bush. Perhaps more importantly, the DoJ's position is the one that is legally correct, and is supported by almost all federal court decisions, including consolidated class actions from throughout the U.S. decided by the Fifth Circuit Court of Appeals. *In Re MasterCard International Inc.*, 313 F.3d 257 (5th Cir. 2002), affirming 132 F.Supp.2d 468 (E.D.LA. 2001). See also, *Jubelirer v. MasterCard International, Inc.*, 68 F.Supp.2d 1049 (W.D.Wis. 1999). The only published opinion declaring that the Wire Act does cover non-sports wagering was *United States v. Lombardo*, 639 F. Supp. 2d 1271 (D. Utah. 2007).

The Wire Act was part of Attorney General Robert F. Kennedy's war on organized crime and was designed to cut the telegraph wires illegal bookies used to get the results of horse races before their bettors. Using a 1961 law designed for telegraph wires against Internet poker has always been like using stone tools to perform brain surgery: It might work, but it would be extremely messy.

It is worth noting that the UIGEA and other federal anti-gambling laws have not been rendered irrelevant by the DoJ's new position on the Wire Act. The Black Friday indictments, where the U.S. Attorney for the Southern District of New York closed down the largest online poker sites then taking money bets from America, never mentioned the Wire Act. In that case, the Federal Government bootstrapped New York state anti-gambling misdemeanors into federal organized crime felony charges. This shows that the DoJ has known for quite a while that the Wire Act does not cover poker. It also illustrates the continuing importance of state anti-gambling laws in a federal context.

I want to make it clear that I am not passing judgment on whether it is a good or bad thing that tribes have no inherent rights under *Cabazon* or IGRA to accept off-reservation patrons for Internet gaming. There are some constitutional issues, dealing with federalism and state and tribal sovereignty. But it is mainly statutory: Congress wrote IGRA to make it clear that tribes could run legal gambling, open to the public, but only on Indian lands.

IGRA was also intended to strengthen tribal governments. So there is nothing preventing a tribe from accepting bets off-reservation, if the tribe can reach an agreement with the state.

Some tribes can protect their gaming operations from the coming explosion of online competition, for example, through compacts that are already in place. But it is up to Congress to protect the rest. Of course, any attempt to expand Indian gaming rights will undoubtedly be met with strong opposition from most of the states.

Congress should not put off looking at these issues. States are acting. Now. In 1962, there were no legal state lotteries in the U.S. It took more than 45 years before almost all the states made lotteries legal. Internet years are like "dog years." Developments now happen so fast, that it won't take four decades before Internet gambling is legal in almost every state. And many tribes may be out of luck.

The CHAIRMAN. Thank you very much, Mr. Rose, for your testimony.

Mr. Skibine, please proceed with your testimony.

STATEMENT OF ALEX T. SKIBINE, PROFESSOR, S.J. QUINNEY COLLEGE OF LAW, UNIVERSITY OF UTAH

Mr. SKIBINE. Thank you, Chairman Akaka, Senator Udall. It is a pleasure to testify today on this important issue on Internet gaming. I thank you for inviting me to this hearing.

Before I became a professor of law, I worked for Morris Udall, your uncle, for about 10 years, at a time that the IGRA was first enacted into law. And it is a good thing to see that the two main movers at that time were Senator Inouye and Senator Udall, at least from the Indians' point of view. It is great to see that we still have a chairman from Hawaii and a Udall involved in Indian affairs.

I am here to testify about why, if Internet gaming is otherwise legalized, the special problems of Indians should be taken into consideration. I think there are two reasons for this. One, for sure for many Indian Tribes that have Tribal-State compacts, Internet gaming would be legal under their compacts. There is no reason to treat Internet gaming as a new form of gaming. If there is poker that is allowed as a form of gaming, Internet poker should follow.

However, for other Tribes, it may not be the case. If so, as a result of the Seminole Tribe, which is a Florida Supreme Court decision, those Tribes would have a very hard time amending their compacts, since under that decision, Tribes can no longer sue the State in Federal court if the State raised their sovereign immunity rights.

Number two, and Professor Rose alluded to that, even for those Tribes for whom it is legal under their existing compact, they may be restricted to wagering originating on Indian land. This limitation in effect makes no sense when it comes to Internet gaming, since Internet gaming is borderless. And the reason for that limitation is that IGRA was enacted with a concept of land-based sovereignty that is just not applicable or translatable when it comes to Internet gaming.

Having said that, then if Internet gaming is going to be addressed by new legislation, I think it is very important that the bargain struck in the original IGRA by Chairman Udall and Chairman Inouye should be respected. As you know, and I'm sure Mr. Porter would tell you, the Tribes objected to IGRA when it was first enacted. Because they viewed this as an invasion of their sovereignty. Eventually, IGRA was able to work for Indian Tribes.

But in the process, Inouye and Udall made some bargain with those people that were opposed to Indian gaming. So I think in my mind, IGRA has three major components, or ideas. First, it respected the victory that the Tribes gained in the Cabazon case, which I am sure the next witness will mention. That means that Tribes have a right to conduct gaming, as long as it is not prohibited in the State where they are located. I think that bargain should still be upheld.

Number two, we made a decision when we drafted the very first Udall bill. And I think Morris Udall was the first one to introduce a bill regulating Indian gaming. Gaming was going to be limited on the reservation to Tribally-owned establishments. So in effect, we viewed Tribes as both the owners and the regulators of gaming. And there is a lot of reason why we did that. I think one of the

reasons why we thought that Tribes do not enjoy tax-based revenues that other governments have. So we thought that they needed something. And as a result, by the way, by the time IGRA was introduced, there were privately-owned casinos on Indian land. But we basically made the option that Tribes are going to be both the owners and the regulators. That bargain should also be followed.

And finally, the third one, when Morris Udall introduced his first bill, some people were opposed to it because they thought that it was going to give an unfair benefit to the Tribe. As a result, they demanded a level playing field between, with the Tribes, that was their war cry, so to speak. Eventually, we decided, yes, we are going to maintain this by having a Tribal-State compact. And that was the essence of the bargain, that the Tribe and the State would get together, would negotiate a compact.

And then we also had this provision that Tribes could sue States that did not negotiate in good faith. The Supreme Court got rid of that section and as a result IGRA today does not represent a fair balance between Tribal interests and State interests.

I see my time has expired. Thank you very much.

[The prepared statement of Mr. Skibine follows:]

PREPARED STATEMENT OF ALEX T. SKIBINE, PROFESSOR, S.J. QUINNEY COLLEGE OF LAW, UNIVERSITY OF UTAH

Chairman Akaka, members of the Committee, it is a pleasure to testify today on the important issue of Internet gaming and I thank you for inviting me to this hearing. It is an important issue because Internet gaming is already by some estimates, a $30 billion industry worldwide and it has been estimated that $6 to $7 billion of that come from gamblers residing within the United States. If it is legalized in this Country, it could very well be the next big thing in gaming and there is no reason why Indian tribes should be left out of this economic development opportunity.

My testimony will focus on "what is at stake for tribes" and not on the Justice Department's opinion concerning the scope of the Wire Act. I tend to agree with that opinion and leave to others the task of casting a critical eye on its reasoning. Instead, I want to focus my testimony on "what is at stake for tribes."

First, I want to emphasize why, if general legislation legalizing and regulating Internet gaming is enacted, the special issues and concerns facing Indian tribes should be addressed.

Secondly, while I do believe that it might not be politically wise to amend IGRA in order to address the special problems facing tribal Internet gaming, I also believe that any legislation addressing such Internet gaming should respect the essential bargain that was struck in IGRA between the interests of the Tribes, the States, and the Federal Government.

Finally, I will make some suggestions about how Internet Gaming should be regulated when it comes to Indian tribes.

1. The Need to Specifically Address the Special Issues Facing Indian Tribes and Internet Gaming

The major reason to specifically address the issues facing Indian Internet gaming is that without some specific legislation, Internet gaming would be controlled by the Indian Gaming Regulatory Act. IGRA divides gaming into three classes. Since Internet gaming is not included in either Class I or II gaming activities, it would automatically be included in Class III. Class III is regulated pursuant to Tribal State Compacts. Of course, a very good argument can be made that under current law, Internet gaming is authorized under some existing compacts. Under that argument, "Internet" gaming would not be considered to be a "new form" of gaming under existing compacts. Under that view, if the compact allowed electronic blackjack for instance to be played in a tribal casino, that game would be automatically authorized as an Internet game. In the event that states or others may not agree with this position, perhaps any legislation legalizing Internet gaming generally should have a provision stating that any Internet game that is otherwise authorized as a non-Internet game in a tribal state compact would be deemed authorized under federal law.

The major problem here is that while Internet gaming, if otherwise legal under federal law and within the state where the reservation is located, may be legal for some tribes under their tribal state compacts, it may not be an authorized form of gaming for many others. This would mean that for many tribes, Internet gaming would not be authorized unless they could persuade the states to amend their compacts. This would be an uphill battle and an unlikely scenario for many tribes because the Supreme Court in *Seminole Tribe v. Florida* struck down a key component of IGRA which allowed tribes to sue states in federal court if the states failed to negotiate a compact in good faith. As a result of this Supreme Court's decision, IGRA no longer strikes the appropriate balance between tribal and state interests that Congress had worked so hard to achieve when the legislation was first enacted. Therefore, unless IGRA is amended to restore such appropriate balance between tribal and state interests, I do not believe that Internet gaming, if found not to be authorized under a compact, should be regulated as a Class III game or subject to a tribal state compact.

Such a *Seminole* fix would be very simple to achieve but probably very complicated politically. The Congress would just have to declare that tribes could sue state officials who failed to negotiate in good faith under the doctrine of *Ex Parte Young*. It would be a simple and elegant solution that would not disturb the constitutional part of the Supreme Court decision.

Even for those tribes where Internet gaming would be already legal, the problem is that IGRA is very land specific. It is based on a physical and geographical concept of sovereignty. This is why IGRA limits itself to gaming on "Indian lands" and contains a very specific definition of what are "Indian lands" for the purposes of IGRA. Thus some may make the argument that even if arguably authorized under a compact, Indian tribes should only be able to offer Internet gaming to people located on Indian land. Such a limitation would be ludicrous and incompatible with the very nature of the Internet. The Internet is not land based. It does not have geographical boundaries. It is to a great extent, borderless. Indian tribes should be able to handle wagering from any customer located in a state that allows Internet gaming.

Many people think that archaic conceptions of land based sovereignty are ill adapted to regulation of the Internet. In any case, for the following reasons, Tribes should be able to extend their economic opportunities as sovereigns beyond the reservation borders.

First, one has to look at the historical context behind the creation and location of Indian reservations. Indian tribes used to own the whole country, and at least initially were able to reserve substantial amount of lands for themselves in the early treaties. Later on, however, after first being removed to out of the way and distant places, many tribes saw their treaty land base reduced as a result of warfare, and unilateral abrogation by the United States. Finally, the tribes lost around 90 million acres through the allotment process, which also resulted in a large influx of non-Indians within the reservations. Indian reservations during the removal and later periods were never created with Indian economic development in mind. Quite the contrary, their location was selected, and their size reduced so that non-Indians could proceed with economic development on land previously owned by the tribes.

Second, it has to be understood that, when it comes to economic development, Indian tribes are not just acting as businesses to make money for their shareholders when venturing beyond their reservations. They are in the process of raising governmental revenues because they do not have a tax base on the reservation. They lack such tax base because the Supreme Court has severely curtailed their power to tax non-members, while at the same time allowing state taxation of non-Indians, and Indian land held in fee, located within reservations. In addition, the tribes cannot tax land held in trust by the United States for individual tribal members.

Third, the concept of territorial sovereignty, both in the United States and abroad, has been significantly eroded or modified, and there are no valid reasons why especially when it comes to economic development opportunities, tribal sovereign interests should be strictly limited to the reservation setting. The general concept of sovereignty has evolved from a concept focusing uniquely on territorial sovereignty to a more malleable concept recognizing the interrelationship between various sovereign actors. With the advent of the European Union, and the development of cyberspace, and the Internet, the very concept of sovereignty has evolved and is being challenged. Under traditional understanding of sovereignty, in order to be sovereign, a state had to have complete and exclusive control of everything within its borders. Under such concept, tribes and states such as Utah, could not be considered sovereign. Today, however, that concept of territorial sovereignty is on the decline, and scholars have recognized that there is more than one conceptual framework for defining sovereignty. In a world where everything is interconnected, largely because of the Internet, scholars have moved away from the traditional concepts of terri-

torial sovereignty, to a more malleable concept, that some scholars have called relational sovereignty. In Appendix B which is attached at the end of this statement, I further describe how the United States courts and the Congress have already recognized the validity of tribal sovereign interests beyond the reservation border.

While I believe that because the Supreme Court invalidated parts of IGRA, IGRA no longer incorporates the balance between tribal-state and federal interest sought by Congress when it initially enacted that law, I do believe that any future legislation should uphold the initial compromise reached in IGRA. I now turn to what were the key provisions of this agreement.

2. The Essence of the Bargain Reached in IGRA

The dual purpose of IGRA was to recognize gaming as a legitimate activity for economic development on Indian reservations while at the same time ensuring that Indian gaming remained clean and legitimate by not coming under the influence of organized crime. However, the crucial aspect of the legislation was the recognition that the tribes, the states, and the Federal Government all had legitimate interests relating to gaming on Indian reservations. While the legislation recognized perhaps for the first time that states did have a role to play in the tribal-federal relation, it also recognized that tribes should be incorporated as sovereign governments into our "dual" system federalism. In other words tribes should be integrated as governments into what was before only a federal-state relationship.

With this in mind, what are the essential aspects of IGRA that achieved those goals:

> First, one cannot talk about IGRA without mentioning the Cabazon Supreme Court decision, the 25th anniversary of which we are celebrating this year. In Cabazon, the Court held that states did not have jurisdiction to regulate gaming on Indian reservations although they could prohibit it altogether if the prohibition was applied throughout the state. IGRA incorporated this part of the decision by mandating that states had to negotiate in good faith on any game that was otherwise authorized under state law.
>
> Second, IGRA recognized that Tribes could be both operators and regulators of Indian gaming. The very first bill introduced to regulate gaming on Indian reservations was introduced by my former boss, Morris Udall. Under that initial bill, gaming on Indian reservations would have been legal if authorized by a tribal law and approved by the Secretary of the Interior. The tribal law had to meet certain key criteria. One such criteria was that Indian casinos had to be tribally owned. The reason for this was two-fold. First we were aware that many tribes lacked the essential tax base normally enjoyed by any other governments. Tribes, therefore, were badly in need of an additional source of governmental revenues. Secondly, we were also aware that many states had been successful in raising revenues through the operation of state owned lotteries. This indicated that governments, such as tribal governments, could be both gaming operators and regulators. That essential feature of the original Udall Bill was maintained in the final version of IGRA.
>
> Third, maintaining a level playing field. The initial Udall Bill was forcefully criticized by many on Capitol Hill on the ground that Indians would gain an unfair advantage under such legislation. The operative words were that Indians had to be operating on a "level playing field" with the non-Indian gaming operators. Although initially those who opposed the original Udall bill were thinking of a level playing field between the tribal casinos and the privately owned non-Indian casinos, we on the Udall staff agreed to another type of level playing field and that was between the states as owners and regulators of gaming and Indian tribes as owners and regulators. In the end, it is this kind of level playing field that IGRA incorporated.

3. How Do You Best Maintain the Historic Compromise Reached in Igra as First Enacted

1. Tribes should continue to be recognized as sovereign governments with the authority to regulate gaming occurring on the reservations.

2. Tribes should be able to conduct Internet gaming with customers located in any jurisdiction that allows Internet gaming even if these customers are not located in the state where the tribe is located.

3. Another part of the agreement reached in IGRA called for no state taxation of tribal gaming revenues. This too should be respected and extended to Internet gaming.

4. To the extent that Internet gaming is not already authorized under existing compacts, Internet gaming should not be treated as Class III but as a new type of gaming activity.

5. There is no reason why Internet gaming, if it is considered a new type of gaming, cannot be regulated jointly by the NIGC and the Indian tribes operating such Internet gaming.

A federal court once referred to IGRA as a prime example of "cooperative federalism." The evolution of congressional legislation in Indian affairs (described in Appendix A) shows a move toward what has been referred to as cooperative federalism—instead of imposing federal laws, regulations, and programs on tribes directly, more recent legislation call on the Federal Government to negotiate compacts with the tribes or make federal funds contingent on tribal compliance with federal directives. The goal here should be both to define the role of the state in the federal-tribal trust relationship and integrate the tribes into what was previously a dual federalism comprised of only the states and the Federal Government. The legislative model selected for tribal Internet gaming regulation should represent the best approach for establishing a system some may call cooperative tri-federalism.

One option worth exploring would be for the NIGC and the tribes to follow the informal rule-making model set out in the Administrative Procedure Act, or more likely, in the Negotiated Rulemaking Act of 1990. Under the informal rule-making model, Congress would enact comprehensive legislation outlining general federal requirements and guidelines which would include protections of legitimate state interests. These federal requirements could be similar to the ones currently contained in IGRA. The Tribes would negotiate with the NIGC to create a gaming compact with the Federal Government. The legislation would provide for state interests to be represented during these negotiations. The negotiated compact would then be published as a proposed rule in the Federal Register. Interested parties, including the state and local interests, would then have another chance to comment on the proposed compact before it is issued as a final rule in the Code of Federal Regulations. This option would side-stepped the hurdles created by the Supreme Court decision in *Seminole Tribe v. Florida* and re-establish the balance between competing tribal, federal, and state interests that the original IGRA had sought to achieve. I also believe that, as shown in Appendix A, it would be consistent with the evolutionary trend in federal Indian legislation.

Attachments

Appendix A: The Evolutionary Trend in Federal Indian Legislation

The purpose of this section is not to do a comprehensive in-depth analysis of all major congressional legislation affecting Indian affairs, but to analyze the evolution of such legislation, to discern the normative assumptions behind the different models, and to determine which model is best suited for the regulation of tribal Internet gaming and achieving what could be called cooperative tri-federalism: a version of federalism involving the Tribes, the Federal Government, and the States.

Congressional legislation after the treaty period which ended in 1871 can be divided into four eras: The Allotment Era, the Indian Reorganization Era, the Self-Determination Era, and the current period, which could be called the Self-Governance Era.

The first model, the treaty model, was in effect for almost 100 years, much longer if one includes the pre-constitutional colonial period. This period of tribal-federal relationship was mostly defined by the various treaties and the federal role as a trustee was mostly limited to providing whatever was mandated under the various treaties. Even though the Indian nations acknowledged their "dependence" on the United States in many of those treaties, the assumption behind the treaties was that Indian nations were to remain separate and distinct sovereign political entities. Indians were not citizens of the United States and no federal laws, at least initially, extended to Indians within Indian country. The first law extending federal criminal jurisdiction over Indians committing crimes against non-Indians in Indian Country was enacted in 1817.

Things changed drastically after 1871, the year Congress enacted legislation prohibiting the making of any further treaties with Indian tribes. During that period, known as the Allotment Era, the Court recognized state criminal jurisdiction over crimes committed by non-Indians against other non-Indians within Indian country, and the Court upheld the power of Congress to enact laws, such as the Major Crimes Act, specifically aimed at assuming political control over Indian tribes.

During the Allotment Era, Congress was most interested in assuming control of tribal land and natural resources. The model legislation then was the leasing stat-

utes. These statutes reserved total control to the Federal Government. Some of the leasing acts did not even require tribal consent, and the Supreme Court upheld the power of Congress to delegate plenary authority to the Secretary of the Interior in the management of tribal natural resources.

The next era came about with the Indian Reorganization Act of 1934 (IRA). The IRA's major goal was to put an end to the allotment policy. The proto-typical statute of this era is the Indian Mineral Leasing Act (IMLA). Although tribes obtained more control over their resources, Professor Judith Royster has asserted that "tribes had more authority over resource development on paper than in practice . . . . [T]he Federal Government retained most of the practical decisionmaking about Indian natural resources development and use."

Except for a brief time when Congress embraced a termination policy, the next era, the Self-Determination Era, began in the 1970s. Besides the Indian Self-Determination and Education Assistance Act, perhaps the most important legislation enacted during this era was the Indian Child Welfare Act of 1978 (ICWA). Congress also enacted statutes to govern the development of natural resources during the Self-Determination Era, like the Indian Mineral Development Act of 1982 (IMDA). The IMDA allowed tribes to negotiate the terms of their mineral development and enter into new types of arrangements.

The final generation of statutes is part of a new era which could be called the Tribal Self-Governance Era. An indicative progression from self-determination to self-governance has been the evolution of the Indian Self-Determination and Education Assistance Act, from an act only allowing tribes to assume the management of federal programs pursuant to a procurement contract type model, to a model based on tribal federal agreements, allowing each tribe to design its own program with its own funding priorities. In the natural resources area, a good example of the evolution from the previous model to the new one is the difference between the Indian Mineral Development Act of 1982 and the Indian Tribal Energy Development and Self-Determination Act of 2005 (ITEDSA). Under the ITEDSA, tribes can enter into Tribal Energy Resource Agreements (TERA's) with the Secretary of the Interior. Once the agreement is approved by the Secretary, tribes can enter into leases or other agreements concerning development of natural resources with third parties without any additional federal approval requirements.

The process provided for in the ITEDSA shares some similarities with the one adopted in the Tribal Self-Governance Act of 1994. Both acts provide for an initial foundational agreement between a tribe and a federal agency, after which federal controls are diminished and the tribe assumes primacy over the program. Peculiar to the ITEDSA, however, is that at the same time as the Federal Government releases its daily management and ultimate control over tribal natural resources, the Congress is also giving more of a voice to affected third parties. Thus, under the ITEDSA, the Secretary of the Interior has to request public comments on the final TERA proposal, and has to take such public comments into consideration when deciding whether to approve a TERA. Professor Royster has stated that "[m]any of the public input provisions of the ITEDSA . . . conflict sharply with tribal self-governance." Other provisions in the Act require tribes to establish environmental review processes providing for public notice and comment, as well as providing consultation with state governments concerning any potential off-reservation impacts. There is also a provision allowing any interested party to petition for Secretarial review of the Tribe's compliance with the TERA.

While the Act does maintain the overall trust relationship between the Federal Government and the tribes, Professor Royster concluded that "[t]ribes can take advantage of new options and increased practical sovereignty, but in exchange the [federal] government has a deeply discounted trust responsibility." For instance, while the Secretary has to "act in accordance with the trust responsibility . . . and in the best interests of the Indian tribes," the Act also provides that "the United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms" of any agreement reached pursuant to an approved TERA.

In some important aspects, both the Self Governance Act and ITEDSA follow the model adopted for the implementation of some of the federal environmental laws, a model which has been described as cooperative federalism. Starting in the mid 1980s Congress did include Indian tribes in legislation such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, and Congress provided that, for some of the sections and under certain conditions, tribes could be treated as states for the purposes of assuming primacy for the regulation of the environment within their reservations.

APPENDIX B: DOMESTIC LAW RECOGNITION OF TRIBAL SOVEREIGN INTERESTS BEYOND THE RESERVATION

1. Treaties and Agreements With and Among Indian Tribes

Treaties entered between the United States and various Indian tribes have been recognized as confirming hunting and fishing rights to tribes beyond their reservations borders. Such treaties have been held to immunize tribal members from some state regulations. In addition, tribes can enforce tribal regulations of treaty rights on their own members beyond the reservation. Such tribal regulations may even, in certain cases, preempt state regulations. Usually, however, because tribal treaty rights outside the reservation are said to be held "in common" with the citizens of the state, states have been given concurrent jurisdiction to regulate treaty hunting and fishing rights for the purpose of conservation. Such state regulations have to be reasonable and necessary, and cannot discriminate against Indians exercising their treaty rights.

Although there may be some limitations derived from the Supreme Court's statement that tribes have been divested of the power to "independently . . . determine their external relations," tribes can and have entered into binding agreements and treaties with other tribes. In addition, tribes can and have entered into compacts with states which have recognized some form of tribal authority over tribal members or exemptions from state power beyond the reservation border. For instance, tribes in Michigan have entered into tax compacts with the state which recognize some tribal exemptions from state taxing authority in "agreement areas." As stated by professor Matthew Fletcher, "[t]he 'agreement area' concept developed over the course of the negotiations in order to smooth over many of the difficulties created by the lack of a clearly designated Indian Country for most Michigan Indian Tribes." Therefore, according to Professor Fletcher "[f]ew of the lines and boundaries affecting the [tax] exemptions contained in the agreement have any relationship whatsoever to reservation boundaries or Indian Country."

2. Legislation Recognizing Tribal (Sovereign?) Interests Beyond the Reservation

I put a question mark after the word sovereign because one of the issues here is whether this section should be written in terms of tribal sovereignty interests or something else: cultural, religious, or socio-political interests. Talking in terms of sovereignty often invites conflicts because sovereignty is connected with an assertion of power, often exclusive power. Framing the discussion about cultural or economic rights, on the other hand, seems less confrontational and more aimed at seeking accommodations. Whether described in term of sovereignty, cultural rights, or just economic rights, the United States Congress has enacted a substantial amount of legislation aimed at protecting such off-reservation tribal interests.

Perhaps the most far reaching legislation recognizing tribal sovereign interests beyond the reservation borders is the Indian Child Welfare Act (ICWA) of 1978. In addition to mandating exclusive tribal court jurisdiction over certain child custody proceedings when the Indian child is domiciled on the reservation, the ICWA allows for concurrent tribal and state jurisdiction in such proceedings for Indian children residing off the reservation. Furthermore, the Act allows for transfer of cases from state to tribal courts in the absence of good cause or objections by either parent. As pointed out by Patrice Kunesh, one section of the ICWA recognized exclusive tribal court jurisdiction over non-reservation Indian children when these children are "wards" of the tribal court. Furthermore, professor Kunesh also demonstrated that even before the passage of ICWA, some courts had recognized exclusive tribal court jurisdiction in such off reservation child custody proceedings. Having stated that the unique tribal interest in its Indian children "coalesces with the essentiality of tribal governance in child welfare matters, to compose an uber-tribal interest that transcends territorially-defined jurisdictional limits," professor Kunesh concluded that "[t]he welfare of Indian children lies at the heart of tribal sovereignty. Thus, there are no real boundaries to protecting these essential tribal relations . . . . "

Just as was done in the ICWA, Congress has also enacted federal legislation mandating that full faith and credit be given by federal and state courts to certain orders of tribal courts. Examples of such legislation are the Child Support Orders Act, the Violence Against Women Act, the Indian Land Consolidation Act, the National Indian Forest Management Act, the American Indian Agricultural Management Act, and arguably the Parental Kidnapping Act. These statutes are important to the issue being discussed here because their ultimate effect is to extend the sovereign actions of Indian tribes beyond the reservation borders. In addition, as professor Robert Clinton has argued, legislation providing for full faith and credit, rather than

comity, more clearly "integrate" Indian tribal courts into Our Federalism on the same par with state and federal courts.

Congress has also enacted amendments to federal environmental statutes such as the Clean Air Act, Clean Water Act, and the Safe Drinking Water Act, providing for treatment of tribes as states (TAS). Such treatment as states allows Indian tribes to extend the reach of their sovereignty beyond the reservation borders. As the Seventh Circuit stated in *Wisconsin v. EPA*, "once a tribe is given TAS status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state . . . to make sure that their activities do not result in contamination of the downstream on-reservation waters." The Seventh Circuit also acknowledged that even though "this was a classic extraterritorial effect," it was not prohibited by the Oliphant-Montana line of cases which implicitly divested tribes of the power to independently control their external relations.

Perhaps the most important statute focusing on tribal cultural interests is the Native American Graves Protection Act of 1990 (NAGPRA). Once described as human rights legislation, NAGPRA not only provides for the repatriation of Native American human remains and cultural items in the possession of Federal agencies and museums to the tribes, but also gives certain protections to Native American graves and burial grounds located on tribal and federal lands. Under NAGPRA, if an Indian burial ground is discovered during excavation activities, the appropriate tribes have to be notified. Once a tribe is notified, however, it only has thirty days to decide how to remove, or otherwise make provisions for the disposal of, human remains and cultural items associated with the burial site. After the thirty day period, activities around the site may resume.

Tribal interests in off-reservation sites were also recognized in the 1979 Archeological Resource Protection Act (ARPA) and the 1966 National Historic Preservation Act (NHPA). ARPA prohibits the removal and excavation of "archeological resources" from federal and Indian land without a permit. Under the Act, the appropriate Indian tribe has to be notified if the issuance of a permit could result in harm or destruction to any site, considered as having some cultural or religious importance to that tribe. Under the 1992 amendments to NHPA, federal agencies have to consult with the appropriate tribes if a federal undertaking is likely to affect a historic property of religious or cultural significance to that tribe. However, while consultation allows tribes to be involved in the process, it does not give them a right to veto any federal undertakings.

3. Judicial Recognition

One clear example where tribal immunity from state power has survived even outside the reservation is in the doctrine of tribal sovereign immunity from suit. Thus in *Kiowa Tribe v. Manufacturing Technologies*, the Supreme Court upheld the sovereign immunity of the tribe even though the tribe was being sued over commercial activities which had occurred off the reservation. The majority specifically refused the dissent's invitation to limit the tribe's sovereign immunity to non-commercial tribal affairs occurring on the reservation.

The peculiar situation of Alaskan tribes provides a fertile ground to debate the extent of tribal sovereignty beyond the reservation borders. As a result of the Supreme Court decision in *Alaska v. Native Village of Venetie*, the Native Tribes in Alaska have been described as "sovereigns without territorial reach." Yet in spite of *Venetie*, the Alaska Supreme Court, in John v. Baker, allowed a tribal court jurisdiction over a child custody dispute between tribal members, even in the absence of any Indian country falling under the jurisdiction of that tribe. After stating that "[t]he federal decisions discussing the relationship between Indian country and tribal sovereignty indicate that the nature of tribal sovereignty stems from two intertwined sources: tribal membership and tribal land," the Alaska Supreme Court held that Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members. Although the decision has been criticized, it is now almost ten years old and has not been modified.

The Alaska Supreme Court relied on precedents such as *Wheeler, Montana, Merrion, Fisher, and Iowa Mutual*, to find that under United States Supreme Court jurisprudence, "The key inquiry . . . is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure tribal self-governance." Finally, relying on *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, the Alaskan Court concluded that "Decisions of the United States Supreme Court support the conclusion that Native American nations may possess the authority to govern themselves even when they do not occupy Indian country."

The CHAIRMAN. Thank you very much, Mr. Skibine.

Mr. Washburn, you state in your testimony, "It is time for the United States to formulate a coherent approach toward Internet gaming." Do you think that coherent approach should include a provision to allow Tribes the same access to enter the market as any other commercial entity?

Mr. WASHBURN. Mr. Chairman, I do believe that. I do believe that Tribes should at least have an equal opportunity to engage in Internet gaming. Keep in mind that currently, Federal gaming, Indian gaming is the only Federal gaming, and all of those revenues go towards Indian Tribes. Every nickel of the only federally-authorized gaming goes towards Indian Tribes.

So Tribes have become dependent on that revenue. So if we risk that revenue to Tribes by creating a different regime, we need to ensure that they are able to keep their revenues. And there are several different ways to get there, I think. They certainly should be allowed to participate, those Tribes that wish to participate in Internet gaming, on an equal and fair basis.

Thank you for the question, Mr. Chairman.

The CHAIRMAN. Mr. Rose, you described the DOJ opinion as an unexpected gift to the States.

Mr. ROSE. Yes.

The CHAIRMAN. That is a quote. Can you elaborate on which States you think would benefit most, and whether this gift would extend to Indian Tribes?

Mr. ROSE. Thank you, Chairman Akaka. The gift was really unexpected, because the Department of Justice had been saying that the Wire Act covered all gambling and it covered even legal intra-State gambling if a wire happened to go into another State and come back, which given the Internet and modern technology is the world. It is a gift because the States can use that to legalize Internet gambling, bring in hundreds of millions of dollars and create thousands of jobs.

Your question which States, I actually have created a Power Point presentation, and I have found very few States that won't be doing it. Utah won't, Alabama might not. Literally there is only a handful of States. I practiced law in Hawaii for three and a half years, Hawaii might not but probably will join. Because every State is projecting a budget deficit, and they can't have budget deficits.

So they are going to start with the State lotteries, mostly traditional games, then go on to faster forms. They are going to be looking at Internet poker, which is viewed as being safer. But in some cases like New Jersey, it will be Internet casinos. And I think every State is very seriously looking at this, with only a couple exceptions.

Will the Tribes benefit? I think the politics of this are, this is a State issue. There is so much legal gambling in this Country that the politicians who are desperate for money say, there is no big harm with legalizing one more form, like legalizing Internet poker. But there is so much legal gambling in this Country that we have established local operators.

Where the money is the same, they will get the licenses. But in places like California, which have on the order of 110 federally-recognized Tribes, I think there are now currently 80 card clubs. They

don't have the big Nevada operators. The State wants to either give it to the State lottery to maximize its money or to sell licenses to people like Caesars-Entertainment. I expect a license will cost $100 million cash up front, which the Tribes and the card clubs don't have.

But politically, the Tribes at least have enough power to say okay, if you are going to give three licenses, then at least one has to go to a Tribe or consortium of Tribes. But the rest of the Tribes are going to get cut out. And certainly the small Tribes that aren't near population centers don't have the political power, they usually don't have a compact that will protect them. And they are going to get cut out.

The CHAIRMAN. Thank you, Mr. Rose.

Mr. Skibine, as I mentioned earlier, Indian gaming is currently the only federally-authorized and regulated gaming in the United States. Indian gaming currently makes up 40 percent of total gaming revenue in the U.S. market. Internet gaming could be seen as a threat to that exclusivity.

Given your experience in writing IGRA, what do you think Federal legislation would need to contain to ensure that Tribal exclusivity is maintained in any expansion of gaming?

Mr. SKIBINE. Thank you. As a matter of fact, I am looking at your chart, I can see that if Internet gaming was there worldwide, it probably would represent the biggest percentage of games. So it would be a threat, definitely. I think right now it is an estimated $7 billion comes from the United States, and it is another $30 billion worldwide.

I think there are four essential points that any decision would have to address. Number one, Tribes should continue to be recognized as sovereign governments with the authority to regulate gaming occurring on their reservation. Number two, Tribes should be able to conduct Internet gaming with customers located in any jurisdiction that allows Internet gaming, even if those customers are not located in the State where the Tribe is located.

Number three, another part of the agreement reached in IGRA called for no State taxation of Tribal gaming revenues. And that principle should be continued. And number four, to the extent that Internet gaming is not already authorized in existing compacts, I do not think that Tribes should have to negotiate or amend their compacts. Because they will not be able to do so, they are going to have a very hard time as a result of the Seminole Tribe decision.

So there is no reason why new Internet gaming cannot be regulated jointly by the Tribe and the NIGC. I have suggested in my testimony a kind of an involved mechanism by which the NIGC could sit down with the Tribe and interested parties like the States and negotiate a type of informal rulemaking that would be in effect a compact. Thank you.

The CHAIRMAN. Let me say that all of your entire statements will be placed in the record.

Mr. Washburn, some see the DOJ opinion as opening the door for intra-State online gaming. In your opinion, would this create opportunities or be detrimental for Tribes?

Mr. WASHBURN. Thank you, Mr. Chairman. I would say both. It is detrimental to Tribes in one respect. Many States have promised

Tribes this exclusivity to engage in gaming. And if the State begins Internet gaming, intra-State Internet gaming, it will destroy that exclusivity, and Tribes won't be responsible to pay most of these States the gaming revenue shares that they have promised. So I don't know if that is a detriment or a benefit in some respects. But Tribes would presumably stop needing to pay those revenue shares.

I think that Tribes have this situation now where they have exclusivity in some Tribal-State compacts and they have exclusivity from the Federal Government. Because they operate the only federally-authorized gaming. If they lose that exclusivity, they must be compensated for that. That is a very important principle. Because they have learned to rely on these gaming revenues.

So I am not sure, I think the world is changing rapidly, and it is hard to see exactly whether the detriments will be greater or the benefits will be greater. But Congress must act to help ensure that Tribes get to remain in the same place with governmental resources. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Rose, you mentioned that since the DOJ opinion, there is no Federal law prohibiting a State from authorizing interstate online games and even entering into compacts with other States and nations. Where do you see Tribes fitting into this equation?

Mr. ROSE. I think the problem for Tribes is they are not fitting in. They are left out unless the State voluntarily brings the Tribe in. In other words, if a State says, we are going to have three licenses and a Tribe gets one of those, just competing against Caesars and big other online operators.

The UIGEA, the Unlawful Internet Gambling Enforcement Act, does say the Tribes can go interstate. But it is also clear the players have to be physically on Indian lands. So the main problem is that the Tribes simply haven't been included in this, that the IGRA is very much land-based. It was designed, in fact, primarily for bingo more than anything else. And the Tribes can do a lot, but only on their land and on other Indian lands, unless the States agree or Congress acts.

The CHAIRMAN. Thank you.

Mr. Skibine, in your testimony, you mentioned the outcomes of the Cabazon decision, including the Indian Gaming Regulatory Act. Do you see the DOJ opinion as a precursor to Federal legislation?

Mr. SKIBINE. I think it will be, because if you are going to have, if there is going to be Internet gaming, it is going to have to be regulated. And right now, I think the United States first adopted a position that Internet gaming was illegal. Now they seem to have changed their mind. I think if it is going to be legal, it will have to be regulated and it will have to be regulated by the Federal Government, because of the nature of the Internet. So yes.

The CHAIRMAN. Well, I want to thank you very much for your responses. It is good to have your responses from these different areas, as well as your opinions on how it will impact the Tribes. And of course, all of this on the record will help us in looking forward to further legislation.

So I want to thank you very much for being part of this hearing.

I would like to invite the third panel to the witness table. Serving on our panel is Mr. Patrick Fleming, litigation support director

of the Poker Players Alliance and Mr. Glenn Feldman, Attorney at Mariscal, Weeks, McIntyre & Friedlander. I want to welcome you to the table here in this hearing.

Mr. Fleming, will you please proceed with your testimony?

STATEMENT OF PATRICK W. FLEMING, LITIGATION SUPPORT DIRECTOR, POKER PLAYERS ALLIANCE

Mr. FLEMING. Thank you very much and good afternoon, Chairman Akaka, members of the staff of this Committee.

I consider it an honor to be asked to testify before you today. And I do hope that you will find my testimony useful.

I come here today as an attorney. I am simply an attorney from Portsmouth, New Hampshire. But more importantly, I come before you today as the litigation support director for the Poker Players Alliance.

For anybody not familiar with us, the Poker Players Alliance is a grassroots organization of American citizens. We have 1.2 million members dedicated to the great American game of poker, to advancing the game, to supporting the game and to protecting our ability to play the game.

Our members come from all walks of life. They play the game for fun, they play the game for the spirit of competition and even a good number of our members play the game professionally. They play the game at home, they play the game on their computers, they play it in bars, they play it in charity-sponsored tournaments and they play it in casinos, including, important for this Committee, Tribal casinos.

As I begin, Your Honor, I would like to reiterate what was said by the Chairman of the Poker Players Alliance, former Senator Alfonse D'Amato, when he testified before this Committee last November. The PPA, with respect to online poker, is committed to seeing a broad, cross-border market for online poker. We expect to see that with strong regulation, with maximum consumer protection and most importantly, for this Committee, a market that fosters as much competition as possible between game operators. And that absolutely includes the very important Tribal gaming operators to be very vital participants.

The Committee asks essentially a legal question, but I think the legal question has already been answered and relatively explained. The short answer with respect to the DOJ opinion letter is that States are now free to do whatever they wish with respect to Internet gambling, except of course for sports betting. This opens up an entire Pandora's box of possibilities, and most of those possibilities have been discussed already.

But what I would like to do with my few remaining minutes is concentrate on the area that I think I bring some unique expertise to, and that area is poker. Poker, Mr. Chairman, is different. That is the single most important message I would like to get across to this Committee and to members of Congress. We talk about Internet gambling, but it is important to realize that there is Internet gambling and then there is Internet poker. The two are not exactly the same. The nature of the games are different. Poker is different

Poker is different in three important aspects. Those differences lead to an important different conclusion. Poker is a social game,

poker is a game played between people, and poker is a game of skill that requires active participation and competition among the players. This leads me to conclude that Internet poker is not a threat to Tribal gaming interests.

One important factor we have noted and is noted in my written testimony is that poker itself only represents 1 percent of Tribal gaming revenue. It brings people to Tribal gaming casinos because of its popularity. But it is not the game that supports their existence or helps benefit their operations. It benefits them by virtue of bringing people there, and providing, in that social connectivity that keeps customers coming back.

So it is clear that at the very least, Internet poker is not a threat to Tribal operations.

But I also believe that Internet poker can actually be a benefit to Tribal operations. Whereas things like State-run lotteries that may choose to, as Professor Rose said, have instant scratch-off tickets online, which would effectively been an online slot machine, one can easily see how that would directly compete with Indian gaming operations. But with respect to Internet poker, there is actually a symbiotic relationship between those who play poker online and those who play poker live.

Years ago, there were hardly any organized poker rooms in Las Vegas or Atlantic City. But then the online poker boom happened, and a new generation of Americans discovered this great traditional American game and learned to play it and learned to enjoy it.

But what they did, unlike what players of the other traditional casino games do, is they then took that online experience and brought it to the casino, to the card rooms, to the Tribal reservations, because they wanted to be in a social environment where they could play that game.

I see I am running out of time, Mr. Chairman, and I am happy to take any questions the Committee has. But that is my bottom line. When we look at this and we look at protecting Tribal interests in the future world of Internet gaming, what I think is very important and certainly most important to the members of my organization is that we realize that Internet poker functions differently from Internet slot machines, Internet roulette and other traditional casino games, and presents not, in my opinion, a threat to the Tribes, but actually an opportunity. They too can use poker to bring people into their land-based casinos and support their operations.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Fleming follows:]

PREPARED STATEMENT OF PATRICK W. FLEMING, LITIGATION SUPPORT DIRECTOR, POKER PLAYERS ALLIANCE

Chairman Akaka and Members of the Committee, I am pleased to have this opportunity to testify before you today. I come here as an attorney and, more specifically, in my role as Litigation Support Director for the Poker Players Alliance (PPA), an organization of 1.2 million Americans who like to play a great American game of poker in both commercial and Tribal casinos, in their homes, in bars, in charitable games and on the Internet. They do so for recreation, for camaraderie, for intellectual challenge and stimulation, and some of them do it for a living.

To introduce myself briefly, I am an attorney from Portsmouth, New Hampshire and have been a member of the bar in New Hampshire since 1985. The primary

focus of my legal practice has been criminal defense and that has always included a good familiarity with gambling law. I have also been a lover of competitive games since childhood, and I consider poker to be the quintessential competitive game of skill. I joined the PPA in 2007 and, through a process of recommendation and effort, helped create the PPA's Litigation Support Network in order to assist poker players with the many legal questions that surround their ability to play their favorite game. In 2008, I was named Director of the Network and since then have devoted significant time and effort, with the help of many other poker-playing lawyers, to fully understanding the nature and details of the Federal gambling laws and the gambling laws of the 50 States. It is my hope today that I can use some of that knowledge and experience to assist this Committee.

Let me begin by reiterating something that PPA's Chairman, former Senator Alfonse D'Amato said in this Committee's previous hearing on Internet gaming: the PPA supports a robust, competitive, regulated interstate market in which Tribal gaming interests are vital players.

Today, as I understand it, the Committee seeks to determine the ways in which the recent change in policy by the U.S. Department of Justice (DOJ) regarding the scope of the Wire Act may affect the future of Tribal gaming. The short answer is that this change in policy is likely to have far-reaching effects, few of which are certain at this time, but the many of which may place Tribal Gaming operators at significant disadvantages with respect to other gaming operators. The bottom line is that if Tribal gaming is going to continue to be a competitive operator in the gaming industry, it will most likely need the assistance of this Congress through the passage of new legislation in order to meet the future challenges.

In order to understand the basis for this conclusion, a brief outline of existing Federal and State law is in order.

There are eight Federal laws which concern gambling and gaming (I use both words because which games when played for money constitute gambling games is not consistent across the law): The Wire Act (18 U.S.C. § 1084), the Interstate Horseracing Act (IHA, 15 U.S.C. § 3002), the Professional and Amateur Sports Protection Act (PASPA, 28 U.S.C. § 3701), the Indian Gaming Regulatory Act (IGRA, 27 U.S.C. § 2701), The Travel Act (18 U.S.C. § 1952), the Illegal Gambling Business Act (18 U.S.C. § 1955), the Unlawful Internet Gambling Enforcement Act (UIGEA, 31 U.S.C. § § 5361–5367), and the Lottery Acts (18 U.S.C. § § 1301–1304).

Without going into too much detail regarding each, PASPA is not germane to the discussion as it is essentially a prohibition against additional States allowing sports betting. The IHA also need not be discussed at length as it merely codifies a mechanism for remote wagering on horse racing and to the best of my knowledge there are no Tribal racing operations. And the Lottery Acts are clearly limited to physical transactions involving lottery tickets.

The Travel Act, the IGBA, and the UIGEA all create Federal criminal offenses for certain gambling activity, live or online. But none of these three laws independently identifies an act as an offense. Instead, each of these statutes require that any prosecution commenced pursuant to the statute also include, as an element of the offense, that the defendant has violated some other substantive gambling law. Under the UIGEA, it may be a Federal or State substantive gambling law; under the Travel Act and the IGBA, it must be a State substantive gambling law.

Thus the only Federal statute which independently creates a substantive Federal gambling offense, and therefore can act as an independent Federal prohibition on conduct, is the Wire Act.

Prior to December 23, 2011, there was a live dispute regarding the reach of the Wire Act's prohibition. Most legal scholars and two Federal courts (*In re* MasterCard Int'l Inc., 313 F.3d 257 (5th Cir. 2002)) interpreted the Wire Act to only be applicable to gambling that involved wagering on the outcomes of sporting events and sporting contests. The DOJ, however, consistently maintained that the Wire Act applied to all wagering activity otherwise conducted in the manner proscribed by the statute. Throughout the first 10 years of this century, the DOJ had asserted its position not only in the courts (*U.S. v. Lombardo*, 639 F. Supp. 2d 1271 (D. Utah 2007); but also, according to numerous press reports, when providing information to various State legislatures. In numerous reported instances, beginning with North Dakota in 2005 [1] the DOJ was said to have informed State legislatures that State laws, which would have allowed non-sports wagering over the Internet, would violate the Wire Act and would therefore be pre-empted by Federal law.

Thus prior to 2011, no State acted to specifically allow and implement gambling or gaming activity over the Internet (other than, of course, wagering on horse racing

[1] *http://www.Internetnews.com/busnews/article.php/3632206/North+Dakota+a+Gambling+Haven.htm*

pursuant to the IHA). Indeed, Nevada and the Virgin Islands had actually passed laws intending to allow Internet wagering, but neither fully implemented those laws in light of the Federal opposition.

In June of 2011, Nevada once again passed a law, Assembly Bill 258, allowing and implementing Internet wagering, though limited only to the game of poker. Yet even then, that Nevada law was subject to an explicit limitation that no actual operation would commence until it was deemed clearly legal under Federal law.

Also in 2011, the Lottery Commissions of two States, New York and Illinois, sought guidance from the DOJ on the issue of using the Internet as a means of selling lottery tickets within State borders. Another inquest was made by Senators Kyl and Reid, seeking a broad clarification of the Wire Act's parameters.

And on December 23, 2011, the DOJ responded to these inquiries. The letters publicly issued on that date not only answered questions, they announced a complete change in position. After reviewing its prior stance and acknowledging its previous insistence to the contrary, the new DOJ position is that the Wire Act, after all, really does only apply to gambling that is in the nature of wagering on sporting events. And although the DOJ opinion is not a court ruling with precedent-setting impact, if a prosecuting authority announces it believes certain conduct is not proscribed by a statute, one ought to at least expect that the same authority will not bring prosecutions based on that conduct.

Thus with that communication, the DOJ removed the sole Federal barrier that it had for years argued was a complete bar to Internet wagering activity in the United States.

As a direct result, for any gambling, gaming or wagering activity conducted on the Internet to be currently illegal, it must be illegal under a valid State law.

Currently only nine States (Illinois, Indiana, Louisiana, Montana, Nevada, Oregon, South Dakota, Washington and Wisconsin) have statutes which expressly address wagering activity on the Internet (other than horse racing). In each of those States except Nevada, conducting as a business any wagering activity over the Internet is either expressly illegal or illegal except for horse race wagering. Nevada's recently passed law expressly allows for the game of poker to be conducted over the Internet by operators licensed in the State of Nevada. That Nevada law also allows its licensed operators to offer Internet poker to people located in other jurisdictions provided the law of the other jurisdiction does not make such activity illegal.

It should also be noted that New Jersey is seriously considering a law similar to Nevada's and that the New Jersey legislation is not limited to poker, but would also allow all the other casino games such as slot machines and blackjack to be offered in an online version.

It is impossible to state for certain what the law is for the 41 States that have no express provision regarding Internet wagering. All the statutes in these other States predate the Internet, often by decades, and sometimes by centuries. A lawyer or court seeking an answer regarding Internet wagering's legality must take the existing statute and try and apply it to this new situation. In some cases this may be easier than in others. For example, it would not be surprising to see a court rule that Maryland's statute (§ 12–102), which simply states that "A person may not: (1) bet, wager, or gamble", applies to all methods of wagering including those conducted over the Internet. On the other hand, it is extremely difficult to infer legislative intent regarding Internet wagering when faced with a statute such as South Carolina's § 16–19–40: "Unlawful games and betting. If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place at (a) any game with cards or dice . . . ."

Another aspect of State law is that States define gambling and wagering in a number of different ways. For example, the game of poker is a "lottery" according to the Kansas Supreme Court (*State ex rel. Stephan v. Finney*, 867 P.2d 1034 (1994)), but its neighbor, the Missouri Supreme Court, has specifically declared the opposite (*Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 62 (Mo. 1994)). Similarly, different State courts may make different determinations even when using the same legal definitions. In most States, a game played for money is "gambling" if the outcome of the game is predominantly determined by chance rather than the skill of the players. The PPA, not surprisingly, considers poker to be a game where skill predominates, but not all agree. Indeed, many games, such as backgammon, scrabble and poker, are games where the elements of chance and skill are significantly intertwined. It is very easy to see a future where scrabble and poker (played for money) are legal in State A, only scrabble in State B, and neither in State C.

The bottom line is that, with a few exceptions, current State law does not lend itself to easy answers when one poses a question regarding the legality of a specific

Internet gaming activity. Usually the best that can be said is that the activity is clearly illegal in some States and maybe or maybe not illegal in others. It will be very interesting to see who, if anyone, will attempt to take advantage of these issues in current State law now that the Wire Act is limited to wagering on sporting events.

But far more important to the question at hand is the obvious fact that States can change their laws. And with the lack of any national Federal guideline other than the Wire Act's now limited prohibition on sports wagering, what that future State legislation may look like is limited only by imagination, and, possibly, the US Constitution's Commerce Clause, specifically the "dormant commerce clause" principle.

Regarding what can be imagined, there are already some real examples: Nevada's passage of online poker legislation and New Jersey's contemplation of passing legislation allowing all casino games to be conducted online. Other proposals have been made and are being considered in State legislatures throughout the country. Among the many proposals, all vary as to what specific games will be allowed, the circumstances under which they will be allowed, and as to what entity or entities will get to operate the online games.

Trying to list all the various possible legal online gaming schemes States may choose from is a herculean task, but thankfully not necessary to address this committee's concerns. There are really only two questions that matter with respect to future State online gambling laws and Tribal gaming interests. Those are, what games will be allowed and will Tribal gaming operations be able to compete in the offering of those games.

With respect to which games will States choose to authorize, the basic distinction is already provided in law and practice. The IGRA already distinguishes between Class 2 games (bingo and card games where the players compete against each other such as poker) and Class 3 games (all other gambling games including traditional casino games like slot machines, blackjack, and roulette). Similarly, the distinction most often discussed among State legislatures is between allowing online poker alone (as in Nevada) or allowing all casino games online (as contemplated by New Jersey).

With respect to allowing operators there is again a dichotomy, this time between open markets and closed markets. Nevada's new law is an open market, allowing anyone to operate an online poker site so long as they are able to obtain a license. But many State lottery operators are suggesting that a closed market be created along the same design as that of the State lotteries: one State operator. And at least one State, California, has considered adopting a monopoly model that would allow only a set number of licensed operators.

With these distinctions in mind, it is then possible to chart the ramifications on Tribal gaming of the various possible new State online gambling laws.

First, it is clear that there will be far less impact on Tribal gaming operators if new State gambling laws are limited to games such as poker (and any other card game meeting IGRA's "Class 2" definition). According to the 2010 Spectrum Study prepared for the National Indian Gaming Association, Tribal poker operations account for only 1 percent of Tribal gaming revenue and thus any change in this market is not likely to have profound effects on Tribal gaming operations.

Additionally, all the preliminary evidence strongly suggests that there is a healthy relationship between online poker and live poker. Poker is, at its core, a social game of person against person. Hence poker players as a general rule enjoy both settings and use one to compliment the other. While there are some poker players who prefer live games and some who prefer online games, the majority play both with equal enthusiasm. Since online poker can be offered at stakes far below the minimum needed to make a profit from live games, most poker players use the online game as means of quick entertainment and/or practice. Then, when looking for a long evening's entertainment or after having accumulated enough winnings and experience to try higher stakes, they go to a live game.

With respect to other casino games, the opposite of the first point is clear and the opposite of the second point is highly likely. Slot machines and table games account for the majority of Tribal gaming revenue, so anything that will affect these games may have significant effect.

And it seems, again from preliminary study, that those who play games "against the house" do not really care that much about the nature of their "house" opponents. While some may still see the casino as a special place to go, most simply want to play the games and may well see the ease of play at home as a good reason not to go elsewhere to play the same game.

One final point should also be made with respect to the distinction between Class 2 social games and Class 3 casino games. It is well known that Class 2 gaming on

the Internet requires a larger body of available players to satisfy customer demands and thus be a profitable operation; the need for active opponents to run the game dictates the need for a large player pool from which an active player pool can be guaranteed to always be present. States with small populations, and so Tribal gaming interests in those same States, will therefore need to arrange for cross-border Class 2 games. There is nothing in current Federal law to currently prevent this from happening, but there is also no framework in which to make it happen. It remains to be seen whether smaller States interested in allowing Class 2 games will be able to come to terms with each other on issues such as regulation, consumer protection and taxation and so allow cross-border games. It is equally speculative as to whether these States will decide to include Tribal interests in such interstate compacts.

Regarding the question of being allowed to participate in the market, at first glance it would appear Tribal gaming must be allowed into the market under the provisions of the IGRA. Those provisions, however, may well be outdated in the Internet age. Section 2710 of the IGRA guarantees the Tribes the right to offer games as they are allowed by the State in which the Tribal lands are located. Unfortunately, the specific wording of that section only allows the Tribes to offer those games "*on* Tribal land." And "Tribal land" is specifically defined in 27 U.S.C. 2703.4 as the confines of the reservation or similarly owned and governed land.

Although the current status of Federal law is still emerging in this area, the cases that have tackled the issue so far would suggest that a Tribal online gaming operation that allowed players to access the site from outside the reservation would be found to be operating, at least partially, other than "on Tribal land." Although a very different context, when offshore sports betting operator Jay Cohen was arrested for violating the Wire Act by accepting sports bets from New York made through the Internet to his business in Aruba, he made the argument in court that the betting took place in Aruba and so there was no jurisdiction for the U.S. to prosecute him. Both the trial court and the 2nd Circuit Court of Appeals disagreed (***U.S.*** *v. Cohen*, 260 F.3d 68, 76 (2nd Cir. 2001)). This would strongly suggest that a Tribal online gaming operation which accepts play from people not on Indian land is not operating "on Indian land" just because that is where the games are run.

There thus seems the real possibility that despite its stated purposes and intentions, the IGRA does not, as currently written, guarantee the Tribes the same online gaming rights as the States now have. In short, the likely result of the DOJ's new position on the Wire Act will be this: each jurisdiction will determine who, if anyone, can take play from individuals located in that jurisdiction. If Tribal gaming enterprises in that jurisdiction wanted to take Internet bets from people on Indian land, they would be entitled to do so per the IGRA. But if those same Tribal gaming enterprises wanted to take Internet bets from people outside their reservations, they would have to seek licenses and/or other direct permission from the States in which those players are located.

Additionally, many States are discussing allowing their State lottery operations to also conduct games on the Internet. A law allowing this was passed right here in Washington, D.C., but was also recently repealed. The majority of these proposals envision the lottery having a monopoly on other Internet games similar to the current monopoly they have with respect to lotteries. This sort of law seems especially dangerous for Tribal gaming operations, especially when one considers the possibility of instant lotteries or the online equivalent of lottery scratch tickets. An Internet version of either of these games, while technically not a "slot machine" game, would nonetheless, be virtually indistinguishable from an online slot and so, as noted before, would compete directly with the main revenue generator for Tribal gaming.

Lastly on this point, some States are considering a closed in-State gaming market with participation being limited to a few specific operators. In some cases, the limited operators may include Tribal gaming operators. At first blush this may seem protective of Tribal interests, but it also may be a false protection. The Commerce Clause of the U.S. Constitution (*Article I, Section 8, Clause 3*) has been interpreted to require that unless Congress specifies otherwise (and it has not in this situation), State law may not unfairly discriminate against out-of-State commerce. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (". . . the Court's Commerce Clause decisions dealt . . . almost entirely with the Commerce Clause as a limit on State legislation that discriminated against interstate commerce."). It is therefore a reasonable proposition that once a State allows a form of Internet gambling to be conducted within its borders by private entities, it cannot then prevent out of State interests from seeking to participate in that same form of commercial activity. Some have suggested that a State's traditional police power over gambling may give States extra rights in this context, but there is as yet no case law to support this

argument. At best, it would appear that while States maintain the right to either allow or prohibit gambling within its borders, once it chooses to allow such activity, it cannot significantly discriminate against out-of-State interests in favor of in-State interests. Illustrative of this point is the case of *Rousso v. Washington* (239 P.3d 1084 (2010)) in which the Washington Supreme Court rejected a Dormant Commerce Clause argument that sought to overturn Washington's ban on Internet gambling. That Court accepted that the Dormant Commerce Clause applied to the situation, but rejected the argument based on the finding that Internet gambling and live gambling (which Washington allows) were different areas of commerce and both in-State and out-of-State interests where equally barred from the Internet market.

Accordingly, while it may seem tempting to establish an intrastate monopoly as a way to protect in-State interests (perhaps including Tribal interests), given the undeniable interstate nature of the Internet, that protection may be just as fleeting as the attempt by New York to grant a steamboat monopoly to Robert Fulton on New York waterways (*Gibbons v. Ogden*, 22 U.S. 1 (1824)).

Finally, there is the question of the practical ability of Tribal gaming interests to compete with the larger and more broadly established corporate gaming interests. I am far from an expert in this field, but it appears to be common sense that at least the smaller, less capitalized Tribal gaming operators would have significant disadvantages when trying to compete nationally, or even in-State, with well-financed commercial casino operations. There are, however, ways to participate in certain online gaming markets that do not require direct competition, but instead foster cooperation that benefits all.

I have remarked above on the fact that players of Class 2 social games are more likely to use Internet play as a means to supplement and support live play than players of Class 3 house-banked games. This aspect of social games supports the prospect of direct interaction between live game operators and Internet game operators. It is a well-known fact that social games are not a major source of casino or Tribal gaming revenue and that higher profits are made from the house-banked games. But social games have the additional effect of bringing people into a casino who otherwise would not visit. And, of course, it is well-known in the gaming industry that getting customers through the door is the key to a successful operation. In this context, it is easy to see a correlation between online social gaming operations and local live operations. A website for online poker linked to a local venue is likely to generate additional live business for the local venue, both through increased interest in the game and through the offering of promotions redeemable at the local venue. With respect to social games such as poker, the efficacy of "affiliates" as marketing portals is well established. Affiliates are simple websites through which a player is connected to the larger website that actually provides the games. Typically affiliates earn a percentage of the money earned from the player who participates through them and, probably more importantly, the affiliate establishes the personal relationship with the player. So at least with respect to social games, the ability of small regional operations to participate and benefit as affiliates to larger operations is clearly established. Indeed, Tribal interests may well have an advantage in setting up these kinds of affiliate relationships as they are typically located in areas otherwise without alternative live venues. A poker player in Arizona may well prefer that his status as a customer is rewarded by promotions available at his local tribal casino rather than the casino in Las Vegas that he may only visit once or twice a year.

In conclusion, the basic answer to the Committee's question is clear: the DOJ's new position that the Wire Act does not apply to gaming other than wagering on sporting events will have large and significant ramifications for Tribal gaming interests. Depending on future developments in State laws, those ramifications will present Tribal gaming operators with significant competition issues that current law leaves them woefully unprepared to meet. The actual effects will depend upon the decisions made by the various States with respect to future laws regarding Internet gambling and on whether the Federal government acts to establish a new national policy with respect to Internet gambling.

For Tribal gaming interests specifically, I believe there are three essential issues that must be addressed: (1) whether the IGRA must be updated to clearly allow Tribal interests the same gaming rights on the Internet as States allow themselves or private companies, (2) whether it would better protect Tribal interests by adoption of new Federal legislation that allows only Class 2 social games like poker to be conducted over the Internet, and (3) whether Tribal interests should also be protected by Federal legislation that ensures unfettered interstate competition, but in a manner that directly allows and supports participation by local interests.

I thank you, and am available for any questions.

The CHAIRMAN. Thank you very much, Mr. Fleming.

Mr. Feldman, will you please proceed with your testimony?

STATEMENT OF GLENN M. FELDMAN, ATTORNEY, MARISCAL, WEEKS, MCINTYRE & FRIEDLANDER, P.A., PHOENIX, ARIZONA

Mr. FELDMAN. Chairman Akaka, I appreciate the opportunity to testify here today on this important issue.

By way of background, I am a lawyer in private practice in Phoenix, Arizona, with the law firm of Mariscal Weeks. For more than 30 years, my practice has been devoted exclusively to Federal Indian law, representing Tribes and Tribal entities around the Country.

Among other things, I have served as outside general counsel to the Cabazon Band of Mission Indians since 1979. And it was my great good fortune to argue and win the case of *California v. Cabazon Band,* the so-called *Cabazon* Case, before the U.S. Supreme Court.

Since that time, I have been actively involved in negotiating Tribal-State compacts for Tribes in a number of States, as well as litigating a variety of other Indian gaming issues.

Now, I am not here as an advocate for or against Federal legislation in the area of Internet gaming. Rather, what I hope to do is to provide you with some thoughts, based on my own personal experience in dealing with Indian gaming for more than 30 years, on how this Committee might want to proceed as it considers this important issue.

Let me say at the outset: I believe that lawful Internet gaming in the United States is inevitable. And so the advice that I give all of my Tribal clients is the same, just saying no is not an effective strategy for dealing with inevitable change. In my view, Tribes need to be at the table, need to be active participants in the developments of legislation and need to be flexible and smart in their thinking in order to be sure that they share in the benefits and avoid the problems that Internet gaming may bring.

Part of my message here today, however, is that there is no need to rush to enact Federal Internet gaming legislation. I do not necessarily share the views of those who suggest that the recent Justice Department opinion is immediately going to open the floodgates to unlicensed and unregulated Internet gaming in the United States. While such gaming may not be prohibited by the Federal Wire Act under the Justice Department's opinion, there are certainly existing proscriptions under the Unlawful Internet Gaming Enforcement Act, the Unlawful Gaming Business Act, RICO and other Federal civil and criminal forfeiture statutes.

As a result, I think Congress would make a serious mistake if it were to rush into enacting Federal legislation without the careful, deliberate process the subject deserves. In this connection, I think there are some useful parallels to be drawn between where Congress finds itself today with Internet gaming and where Congress was in the late 1980s when it was considering Indian gaming legislation after the Cabazon decision. Both situations presented a complex and controversial mix of Federal, Tribal, State and commercial interests. And both Tribal gaming then and Internet gam-

ing now are likely to have important economic and societal consequences.

But despite these facts, Congress did not rush to enact Indian gaming legislation in the 1980s. Twenty months elapsed between the time of the Cabazon decision and the date that the Congress passed the Indian Gaming Regulatory Act of 1988. And what must also be kept in mind, though, is that Congress had actually been considering Indian gaming legislation three years before the Cabazon decision came down.

So at the time IGRA was enacted and signed into law by President Reagan in 1988, Congress had devoted more than four full years to that legislation process.

Now, I am not suggesting that Congress needs to study this issue to death. But at the same time, I don't want to minimize the difficulty or the complexity of the negotiations that resulted in the final version of the Indian Gaming Regulatory Act. As Professor Skibine recalls, all of us who were involved in that process left a lot of blood, sweat and tears on the floors of many meeting rooms over a long period of time. But in the end, that long, deliberative process worked and produced a legislative framework that despite its flaws has proven to be a pretty good compromise that is now pumping more than $25 billion annually into Indian Country.

And I think the situation today involving Internet gaming represents the same kind of situation and the same kind of challenge. We don't need to rush. Certainly, Congress has a role to play in this. But I think rushing to enact fast legislation is not the best solution. Taking the time to enact good legislation ought to really be the goal.

So let me make my final point here. That is, Indian Tribal governments need to be full and active participants in all processes by which Federal Internet gaming legislation is developed. And Tribes are entitled to have the full right to develop, use and benefit from Internet gaming to the extent they wish to do so. Legislation that limits or restricts the ability of Tribal governments to reap the benefits of Indian gaming is simply unacceptable.

Internet gaming today, like Indian gaming 25 years ago, is complicated and controversial. But it is coming. So Tribal governments need to be smart and flexible in their thinking on the issue and Congress needs to recognize that Tribes must have a seat at the table where those decisions are going to be made.

That concludes my testimony. I would be happy to answer any questions.

[The prepared statement of Mr. Feldman follows:]

PREPARED STATEMENT OF GLENN M. FELDMAN, MARISCAL, WEEKS, MCINTYRE & FRIEDLANDER, P.A.

Mr. Chairman and members of the Committee:

I appreciate the opportunity to testify here today on this important issue. By way of background, I am a lawyer in private practice in Phoenix, Arizona. For more than 30 years, my practice has been devoted exclusively to federal Indian law, representing tribes and tribal entities around the country. Among other things, I have served as outside General Counsel to the Cabazon Band of Mission Indians since 1979, and it was my great good fortune to argue—and win—*California v. Cabazon Band* (the so-called "*Cabazon* case") before the U.S. Supreme Court in 1987. Since that time, I have been actively involved in negotiating tribal-state gaming compacts

for tribes in a number of states as well as litigating a variety of other Indian gaming Issues. A more complete biography is attached to this testimony.

Let me begin by saying that I am not here as any sort of self-appointed spokesman for Indian Country. Given the complexity of the Internet gaming issue and the wide divergence of opinion among tribes on the subject (including among my own tribal clients), I'm not sure that anyone can—or should—try to perform that role.

Nor am I here as an advocate for or against federal legislation in the area of Internet gaming. Rather, what I hope to do is provide the Committee with some thoughts on how it, and Congress as a whole, might want to proceed as it considers this difficult issue.

Let me say at the outset that I believe that lawful Internet gaming in the United States is inevitable. I don't see how anyone can look at the technological advances of recent years and not understand that the Internet is going to become an important component of the gaming industry in the future. The only real questions are how and when. And so, the advice that I give all my tribal clients is the same: just saying "no" is not an effective strategy for dealing with inevitable change. In my view, tribes need to be at the table; need to be active participants in the development of the legislation and the systems; and need to be flexible and smart in their thinking in order to be sure that they share in the benefits and avoid the problems that Internet gaming will bring.

Part of my message today, however, is that there is no need to rush to enact federal Internet gaming legislation. I do not share the views of those who suggest that the recent Justice Department opinion is immediately going to open the floodgates of unlicensed and unregulated Internet gaming in the United States. While such gaming may not be prohibited by the federal Wire Act under the Justice Department's recent opinion, interstate Internet gaming is still subject to the proscriptions of UIGEA and may well run afoul of the Unlawful Gambling Business Act, RICO and other civil and criminal forfeiture statutes. As a result, I think Congress would be making a serious mistake if it rushed into enacting federal legislation without the careful, deliberative process the subject deserves.

In this connection, I think there are some useful parallels to be drawn between where Congress finds itself today with respect to Internet gaming and where Congress was in the late 1980's, when it was considering Indian gaming legislation after the *Cabazon* decision.

Both situations presented a complex and controversial mix of federal, tribal, state and commercial interests and both tribal gaming then, and Internet gaming now, are likely to have important economic, political and societal consequences. But despite these facts, Congress did not rush to enact Indian gaming legislation in the 1980s. Twenty months elapsed between the time of the *Cabazon* decision, in February, 1987 and the enactment of the Indian Gaming Regulatory Act in October, 1988. But what must be kept in mind is that Congress had been actively considering Indian gaming legislation as early as 1984, a full three years before *Cabazon*. So by the time IGRA was signed into law by President Reagan in 1988, Congress had devoted more than four full years to that legislative process.

Now, I'm not suggesting that Congress necessarily needs to devote that much time to the Internet gaming issue and I'm not proposing that Congress "study the issue to death." Nor do I want to minimize the difficulty or complexity of the negotiations that resulted in the final version of the Indian Gaming Regulatory Act. As Professor Skibine recalls, all of us left blood, sweat and tears on the floors of those meeting rooms. But in the end, that long, deliberative process worked and produced a legislative framework that, despite its flaws, has proven to be a pretty good compromise that is now pumping more than $25 billion annually into Indian Country.

The situation involving Internet gaming today presents a very similar challenge. It involves many moving parts and potentially competing interests. But precisely for those reasons, the issue deserves thoughtful attention and not a rush to judgment. Authorizing the use of this technology in gaming to maximize its benefits and minimize its potential problems requires no less.

While I'm talking about parallels, let me mention one more. In IGRA, and particularly in the definition of "class II gaming," Congress in 1988 declared that tribes were entitled to incorporate future technologic advancements (or what the statute calls "electronic, computer or other technologic aids") into their gaming activities. As this Committee's Report on S. 555 plainly stated,

> [t]he Committee specifically rejects any inference that tribes should restrict class II games to . . . current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to proved maximum flexibility.

Senate Committee Report, page 9.

I think the parallel here is obvious. If Congress is going to continue to keep that promise it made to tribes about allowing them to incorporate technologic advances into their gaming activities, then that same commitment needs to apply to Internet gaming now.

This leads me to the final premise of my testimony. Indian tribal governments need to be full and active participants in all processes by which federal Internet gaming legislation is developed, and tribes are entitled to have the full right to develop, use and benefit from Internet gaming to the extent they wish to do so. Legislation that limits or restricts the ability of tribal governments to reap the benefits of Internet gaming is simply unacceptable.

Admittedly, not all tribes will choose to make this leap across the digital divide. And for those that do, there will be any number of potential models as to how that involvement might be structured. The IGRA format—involving tribal ownership, operation and regulation of the gaming operation—has proven its worth over the last 25 years and could be one option for some tribes.

But that is certainly not the only model. In California, for example, a group of 29 gaming and non-gaming tribes has joined forces with an equal number of commercial cardrooms to form the California Online Poker Association. That group is promoting state legislation under which California would create, license, regulate and derive state revenues from an intrastate Internet poker system. Again, this may not be the right answer for every tribe, but for those that choose that path, they ought to have that right.

Internet gaming today, like Indian gaming 25 years ago, is complicated and controversial. But it's coming, and so tribal governments need to be smart and flexible in their thinking on the issue, and Congress needs to recognize that tribes must have a seat—in fact, given the wide diversity of opinions on the subject in Indian Country, they are probably entitled to several seats—at the tables where these decisions are going to be made.

That concludes my testimony and I would be happy to respond to any questions the Committee members may have.

The CHAIRMAN. Thank you very much, Mr. Feldman.

Mr. Fleming, you testified in favor of Federal legislation regulating Internet poker. You view poker legislation as more beneficial to Tribes than open-ended Internet gaming. Can you elaborate on why Tribes would far better under poker-only legislation, rather than other contemplated legislation?

Mr. FLEMING. Thank you very much for that question, Mr. Chairman. I would be happy to elaborate on that point.

My personal conclusion is that that is clear. We have heard today and we have seen in the various written testimony that has been submitted to the Committee of the dangers of States and certain private interests being able to unfairly, essentially, compete with Tribal interests. We heard from President Porter about how the Tribal interests specifically bargained for their right to a certain amount of geographic exclusivity. But we all also realize that there is no such thing as geographic exclusivity with respect to the Internet.

So if there is a State lottery commission that decides it is going to start offering games that are the functional equivalent of the games that are offered on Tribal lands, then clearly there is going to be a competition there. There is really no way to create a geographic barrier there. And that could seriously undermine Tribal gaming revenue as it exists today.

With respect to poker, as I said earlier, currently the revenue Tribal gaming gets from poker is 1 percent of their total revenue. But more importantly, as I tried to say in my limited time, poker has a symbiotic relationship with local gaming and the Internet. And there is absolutely a direct available way for Tribal gaming in-

terests to take advantage of online poker in a manner that wouldn't really exist with other forms of gaming. And that is to draw the poker player to the Tribal casino.

A Tribal casino that either operates its own site or is part of a network, or in the industry they often call affiliates, is a Tribal casino that could market itself to that same geographic area where it currently has exclusivity. It could market itself to the people in that area, those people would become part of the Internet poker network through the Tribal casino affiliate. And the Tribal casino would then have that personal relationship with the customer and could also, because affiliates are given a percentage of the revenue, could also afford to adopt promotions that would entice the online poker player to come to the online casino.

And I can tell you, as a poker player, we like to play poker a lot, we don't like to have to drive hours to play poker or fly hours to play poker. There is nothing better than having a game nearby. And we can be drawn into that much more efficiently than you could ever do with any of the other games that are being talked about today.

The CHAIRMAN. Thank you.

Mr. Feldman, in your testimony you state that lawful Internet gaming is likely inevitable. What comparison can you make to this new potential market for Tribes and the climate under which the Cabazon decision was made and IGRA was enacted?

Mr. FELDMAN. Chairman Akaka, in the late 1980s, I think Indian gaming presented an uncertain market with unknown potential. At that time, shortly after the Cabazon decision, as IGRA was adopted, nobody really knew where Indian gaming was going to go. As someone mentioned, at that point there were a handful of small casinos and bingo parlors scattered around the Country. And where it was going to go couldn't be determined. If my memory serves me correctly, I think around 1990, the total revenue for Indian gaming nationally was somewhere in the neighborhood of $200 million.

We look today at the chart up here and we are looking at $26.48 billion. So I am not sure anybody could have predicted that level of growth 20, 25 years ago.

With the Internet gaming market, though, sitting here today, I think we have a better sense of what is going on out there. As has been discussed, the number that people tend to use for lawful Internet gaming in jurisdictions where it is permitted is somewhere around $30 billion with $7 billion or $8 billion of that coming from the United States. So my guess is, if Internet gaming were legalized in the United States, all the legal obstacles removed, we would see a dramatic expansion, and I think the market is probably unlimited in terms of where Internet gaming could go.

That is why I am so adamant that Tribes need to be given full participation. Their entitlement needs to be recognized in any legislation that Congress considers. They need to have full participation.

And the other part of it is they need to be given as much flexibility as they can. One model is not going to fit all Tribes. There are a lot of different ways that Tribes may choose to get involved in Internet gaming.

So in addition to full participation, I think the other component there is flexibility, so the Tribes can decide for themselves what is the best approach for them to get into that industry. Thank you.

The CHAIRMAN. Thank you.

Mr. Fleming, do you read the DOJ opinion to now allow States, through their State lotteries, to engage in any type of Internet gaming except sports betting? If so, what is the potential impact to Tribal gaming as it currently exists?

Mr. FLEMING. Thank you for that question, too, Mr. Chairman. I think I answered a little bit of that question in my previous answer.

Yes, I definitely see, the interesting part as I explained in detail in my written testimony is that while there are other Federal laws that control gambling to a certain extent, all of the other Federal laws besides the Wire Act, and Professor Rose mentioned this, too, all of the other laws besides the Wire Act require as part of the offense, part of the conduct that is prohibited, that that conduct also violate a State law. Thus, if you have an activity that a State does not make illegal or specifically allows, it is now, per this new DOJ opinion, outside of the purview of the Wire Act.

So yes, the States now are essentially totally open to adopting any kind of online gaming they wish to, except for that specifically federally prohibited area of sports betting.

And as I said last time, the impact here on Tribal gaming is because that will go directly to where most of the Tribal gaming revenue comes from, from the traditional casino games like blackjack and roulette. And more importantly, because in many States the Tribes have exclusive markets to slot machines, there would be direct competition.

And unlike poker, there is not the same symbiotic relationship. People who like to play slot machines like to play slot machines. It is not a social game that draws them to a particular place. They go where the games are available. If the games are available on their home computer, then certainly they have much less incentive to visit a Tribal casino to play the same game. They are not interacting with other people, they don't need other people to play the game, they don't need a large number of people to make the game viable.

So I see the potential for significant negative effect. Again, there are numerous ways to answer it. One could hope in some States they would take the effort to be protective for the Tribes like they should be. But there is nothing in the Federal legislation as it currently exists that mandates that they do that.

The CHAIRMAN. Thank you very much.

You did mention, I think you did mention that there were three things with poker. One was it was a social game. What are the other two?

Mr. FLEMING. I am sorry if I wasn't clear. It is my first time testifying.

Mr. Chairman, aside from being a social game, it is not a game that is played against the house. Every other game that takes place in the casino pits the customer against the casino. Whereas with poker, the customer is playing against the other customers. That is a fundamental factual difference. It also makes for an entirely

different structure of a poker market, and an online poker market. It is one of the reasons we at the Poker Players Alliance are so insistent on a broad poker market. Because when you need other customers to play against, you have to have a wide pool of players.

The third major difference is that poker is a game that requires active involvement. A poker player doesn't sit down and just push a button and make his bet and wait for a result. A poker player has to make decisions throughout the game, strategic decisions, many times complex and very difficult decisions that actually engage the player in the game. And this again leads to the cohesive nature of poker, the reason why poker brings people together and why playing it online is not going to stop people from playing it in live venues.

The CHAIRMAN. Thank you very much.

Mr. Feldman, if there is an expansion of federally-authorized gaming into Internet gaming, should Tribal governments be compensated for their loss of exclusivity?

Mr. FELDMAN. Mr. Chairman, I think that there needs to be some accommodation for that loss of exclusivity. Tribes have a lot to lose. Tribes probably have more to lose with the expansion of Internet gaming than any other segment of the gaming industry. And I think we need to be cognizant of that, and I think any legislation that Congress considers, I don't have the solution, I can't give you the formula. But I think it is entirely appropriate for Congress to give some consideration to that potential loss of exclusivity and to protect it in some way so that this $26 billion in revenue, which today is funding, as you said in your opening statement, health programs, education programs, senior citizen programs, Tribes can't afford to lose that revenue stream.

So the legislation, any Federal legislation, needs to incorporate some form of protection to ensure that that revenue stream is not threatened by whatever form of Internet gaming is authorized.

The CHAIRMAN. Thank you very much for your responses to our questions. Thank you for basing it on your experiences and the work you have done already with Tribes. I want to say mahalo, thank you, to all of our witnesses who participated in today's hearing.

The discussion has been very informative and has given us all a lot to think about as this issue continues to really develop. The Committee will continue to work closely with Tribes, our Senate colleagues and other interested parties in any Internet gaming legislation that may be moving forward.

Without question, this, may I call it industry, is really developing and growing. It is well that we look closely at what is happening and the direction it is moving in, and help to guide it with our expertise and of course, guidance whether it is executive or legislative, to help out the cause.

So thank you all, our witnesses, for your responses. And we look forward to continuing to hear from you in this area.

Thank you very much. This hearing is adjourned.

[Whereupon, at 4:02 p.m., the Committee was adjourned.]

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