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## Article

### Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets

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*With an unexpected legal memorandum, the Department of Justice (“DOJ”) Office of Legal Council (“OLC”) reversed the DOJ’s decades-old interpretation of federal gaming laws. The OLC removed the last major federal barrier to state Internet gambling: its broad interpretation of organized crime statutes, in particular the late Robert F. Kennedy’s Wire Act. With the DOJ’s change in position, states are now free to legalize Internet gambling, from poker to lotteries, for their citizens. In view of these changes, we expect states to quickly legalize new forms of gambling on an unprecedented scale: intrastate, interstate, and international. This online gambling explosion may come at the expense of tribal operators who are reliant on slow federal laws that may be unable to keep pace with cash-strapped states’ appetites for legalized gambling.*

**ARTICLE CONTENTS**

I. INTRODUCTION..... 655

II. THE FEDERAL LEGAL LANDSCAPE ..... 657

    A. THE WIRE ACT, 18 U.S.C. § 1084..... 659

    B. PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT,  
    28 U.S.C. §§ 3701–04..... 663

    C. THE INTERSTATE HORSERACING ACT, 15 U.S.C. §§ 3001–07 ..... 665

    D. UNLAWFUL INTERNET GAMING ENFORCEMENT ACT ..... 667

    E. EFFORTS TO LEGALIZE INTERNET GAMBLING ..... 669

III. CONFLICT BETWEEN THE UIGEA AND THE WIRE ACT ..... 669

    A. WHAT DOES THE WIRE ACT COVER?..... 670

    B. THE DEPARTMENT OF JUSTICE MEMO..... 672

IV. THE FUTURE OF INTERNET GAMBLING ..... 674

    A. STATE IMPLEMENTATION OF INTERNET GAMBLING ..... 675

    B. STATE LEGALIZATION OF INTERNET GAMBLING ..... 679

    C. INTERNATIONAL GAMBLING ..... 684

    D. EXPANDING SPORTS BETTING ..... 686

V. ISSUES FOR TRIBES..... 688

    A. WORKING WITH STATES ..... 689

    B. UPDATING FEDERAL INDIAN GAMING LAW ..... 692

VI. CONCLUSION ..... 693



# Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets

I. NELSON ROSE\* & REBECCA BOLIN\*\*

## I. INTRODUCTION

Two days before Christmas in 2011, President Obama gave an unexpected gift to the states.<sup>1</sup> With a thirteen-page legal memorandum (“Memorandum”), the Obama Administration reversed an aggressive, decades-old Department of Justice (“DOJ”) position and opened the door for states to legalize almost every form of Internet gambling without interference from federal laws.<sup>2</sup> Through the DOJ Office of Legal Counsel (“OLC”), the Obama Administration announced that the major federal anti-gambling statute, the Wire Act,<sup>3</sup> now applies only to bets on sports events and races. By issuing a clear interpretation of previously vague and inconsistent federal gambling laws, the Executive Branch maneuvered what Congress could not: it turned oversight of Internet gambling operations over to states.

The impacts of land-based casino gambling are long debated,<sup>4</sup> but Internet gaming is a recently developed industry. Opponents have compared online gambling to crack cocaine,<sup>5</sup> but it has also been described

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<sup>1</sup> This Article is based on Professor Rose’s 2012 testimony before the United States Senate on this matter. *The U.S. Justice Department Opinion on Internet Gaming: What’s at Stake for Tribes: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (2012) (testimony of Professor I. Nelson Rose) [hereinafter Rose Testimony], available at <http://www.indian.senate.gov/hearings/upload/Nelson-Rose-testimony020912.pdf>.

<sup>2</sup> 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, 35 Op. O.L.C. 1 (2011) [hereinafter DOJ Memo], available at <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>.

<sup>3</sup> 18 U.S.C. § 1084 (2006).

<sup>4</sup> See, e.g., EARL L. GRINOLS, GAMBLING IN AMERICA: COSTS AND BENEFITS (2004) (concluding that the social costs of casino gambling considerably outweigh the social benefits); Robert Dorr, *40 Economists Side Against More Gambling Signers: Costs Likely Higher than Benefits*, OMAHA WORLD-HERALD, Sept. 22, 1996, at 1B.

<sup>5</sup> *Internet Gambling Prohibition Act of 2006: Hearing on H.R. 4777 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 18 (2006) (statement of John W. Kindt, Professor, University of Illinois). Professor Kindt, an opponent of all legal gambling, stated: “Gambling industry spokespersons have frequently referred to Internet gambling as the killer application of Internet technology because Internet gambling is crack cocaine to addicting new gamblers and because the feeder market is every living room, work station, and school desk.” *Id.*; see also H.R. 2267, *The Internet Gambling Regulation, Consumer Protection, and*

as inevitable and unstoppable.<sup>6</sup> Americans have made Internet bets in the hundreds of millions of dollars to the benefit of offshore illegal and gray market operations.<sup>7</sup> President Obama's Christmas Memorandum was a gift to states worth billions of dollars in new tax revenue and thousands of new jobs. After this thirteen-page reversal, expect a quick departure to uncharted territory for the United States: legal Internet gambling.

Part II of this Article explains the complicated, interlocked set of federal gaming laws at issue. These laws are critical to federal enforcement of state gambling laws and to federal involvement in states' decisions about what forms of gambling they might want to regulate. The law addressed in the Memorandum, the Wire Act, was the most important weapon the DOJ used to prevent states from authorizing Internet gambling, but it is not the only federal barrier to state-authorized gambling.

Part III discusses the tension among these federal laws, which at times undermine and contradict one another. With no legislative solution in sight, the Memorandum offers a clean solution and interprets the law to eliminate most, though not all, of the problems.

Part IV explores the explosion of Internet gambling, which is soon to be legalized by the states. The debate about Internet gambling has now been pushed to cash-strapped state authorities, allowing them to make their own decisions. This major change in federal law will advance the current wave of legalized gambling, which already encompasses all but two states. Internet gambling has the potential to spread pervasively with state cooperation. State legislators and governors are desperate to find ways to raise revenue without raising taxes. Gambling is seen as a painless tax, so states are seriously and quickly expanding to online gambling. They can

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*Enforcement Act: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 44 (2010) (statement of Michael K. Fagan, former Assistant U.S. Attorney) ("Gambling software developers promise to create games available over the Internet that will match the crack-like addictive dopamine-stimulating modern slot machines—and any parent who's puzzled or despaired over their child's trance-like playing of video games during the past twenty years can readily see why Internet gambling operators are drooling over the chance to legally expand their market-base into the United States."). Opponents previously also called video poker and other games "crack cocaine."

<sup>6</sup> *Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act: Hearing on H.R. 21 and H.R. 1223 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 108th Cong. 18 (2003) (testimony of William J. Hornbuckle, President and CEO, MGM Mirage Online) ("We strongly suggest that prohibition in the United States has a long list of failures associated with it. Any attempt of prohibiting activity on the Internet, gaming or otherwise, will unfortunately suffer a similar fate. We see this activity as ubiquitous and impossible to control from an end-user perspective, with long-term attempts to do so as futile.")

<sup>7</sup> *Internet Gambling Legalization Tax Proposals: Hearing Before the H. Comm. on Ways & Means*, 111th Cong. (2010), available at [http://waysandmeans.house.gov/media/pdf/111/2010may19\\_mcdermott\\_testimony.pdf](http://waysandmeans.house.gov/media/pdf/111/2010may19_mcdermott_testimony.pdf) (statement of Congressman Jim McDermott) ("According to industry analysts, Americans have this year alone deposited about \$12 billion for offshore online gambling activities. People in the U.S. made somewhere near \$100 billion total wagers online, generating an estimated \$5 billion a year in gross revenues to offshore operators. All these transactions are underground. None of these activities is regulated and taxed by the U.S. government.")

now do so with the DOJ's blessing for every form of gambling except sports betting.

Part V examines the issues to a major stakeholder, Indian tribes, in the gambling discussion. Internet gambling may pose a serious threat to tribal gambling operations, which may be hindered by state licensing schemes and existing federal law. For tribes to compete in this new wave of gaming, they must rely on Congress to position tribes so that they may participate as equals with the states. Instead of a congressional bill that considered tribal interests, the Memorandum leaves many tribes in danger of being left behind.

## II. THE FEDERAL LEGAL LANDSCAPE

Federal gaming laws have a long and complicated history. Gambling is generally recognized as a state concern within the states' police powers under the Tenth Amendment of the United States Constitution.<sup>8</sup> In fact, the Nevada Supreme Court has taken the extreme position that the regulation of legal gambling is purely a state legislative issue, with no room for federal constitutional rights.<sup>9</sup> Gambling is generally regulated at the state and local level, and all states and the District of Columbia have issued some form of gambling regulations.<sup>10</sup> These regulations range from complex and generally permissive regulation, as seen in Nevada, to the complete ban on any form of gambling, as seen in Utah.<sup>11</sup>

Given the lack of a clear constitutional role in gambling law, federal statutes and regulations have traditionally respected the divergent approaches of the states by attempting merely to assist states in maintaining their public policies within their geographic boundaries. While a state may exercise its police power only within its own borders, the Commerce Clause enables the federal government to authorize or restrict gambling activity throughout the nation.<sup>12</sup> Since the nineteenth century, federal prosecution of illegal gambling has played a key role in enforcing state gambling laws.

Gambling laws throughout history have vacillated between permissive

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<sup>8</sup> See *Chun v. New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) ("The scope of laws regulating gambling and lotteries is clearly a matter of predominantly state concern."); *Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988), *aff'd*, 896 F.2d 555 (9th Cir. 1990) ("Licensed gaming is a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.")

<sup>9</sup> *State v. Rosenthal*, 559 P.2d 830, 836 (Nev. 1977), *appeal dismissed*, 434 U.S. 803 (1977).

<sup>10</sup> Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J. L. & TECH., no. 3, 2004 at 1, ¶ 5, available at <http://law.richmond.edu/jolt/v10i3/article26.pdf>.

<sup>11</sup> See I. NELSON ROSE, *GAMBLING AND THE LAW* 24 (1986) ("But states can experiment, within limits. In fact, the United States Supreme Court has expressly stated that states *should* experiment. If New Jersey wants to try legalizing casinos as a way of revitalizing a dying resort community, so much the better. If it works than other states can try it; if it fails, it will serve as a lesson to be learned. In no event is it a problem for the federal government.")

<sup>12</sup> See ROSE, *supra* note 11, at 23–24 (discussing state and federal authority to regulate gambling).

and prohibitive. In the United States, gambling law is always in reform, and we have had two prior waves of widespread legal gambling followed by prohibitions.<sup>13</sup> This framework is called the “three waves” model, based on the research of Professor I. Nelson Rose.<sup>14</sup> By the end of the nineteenth century, almost all states prohibited lotteries.<sup>15</sup> However, the state-licensed, privately owned Louisiana Lottery, also known as “The Serpent,” actively sold tickets throughout the country.<sup>16</sup> Because of states’ inability to regulate The Serpent’s use of postal mail, in 1890 Congress responded by prohibiting lottery tickets and advertisements from being sent using the U.S. Postal Service.<sup>17</sup> In 1895, after the notorious lottery moved to Honduras, Congress created a new federal felony for importing or carrying gambling materials from one state to another or across international borders, whether or not U.S. Mail was used.<sup>18</sup> By the turn of the twentieth century, all state lotteries had been banned.<sup>19</sup>

In the 1960s and 1970s, states rediscovered the state lottery. But these newly legal lotteries conflicted with the federal prohibitions enacted seventy years earlier, which acted as a blanket federal ban on lotteries. Federal laws yielded to states’ decisions to allow this form of legal gambling, and expressed exceptions for state lotteries were written into the broad federal anti-lottery laws. This allowed federal authorities to protect citizens from illegal lotteries while preserving a state’s authority to conduct a legal lottery.<sup>20</sup>

These state-run, legal lotteries are the part of what Professor Rose has described as the “Third Wave” of legal gambling, or a broad expansion of permitted gambling after a period of prohibition.<sup>21</sup> The Third Wave also includes the modern explosion of horse and race betting, charity bingo, land-based casinos, Indian gaming, and riverboat casinos, all in recent

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<sup>13</sup> I. NELSON ROSE & MARTIN D. OWENS, JR., *INTERNET GAMING LAW* 74–80 (2d ed. 2009) [hereinafter *INTERNET GAMING LAW*].

<sup>14</sup> *Id.* But see DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET* 13–14 (2005) (theorizing that the American gambling experience is too complex for a national theory of legalization and stating that “[p]erhaps it’s only natural that Americans, as people living in an imperfect world and working with imperfect information, have experimented with legal gaming with no eye for the big picture and no real master plan”).

<sup>15</sup> FRANKLIN E. ZIMRING & BERNARD E. HARCOURT, *CRIMINAL LAW AND THE REGULATION OF VICE* 478 (2009).

<sup>16</sup> SCHWARTZ, *supra* note 14, at 23–25.

<sup>17</sup> Gottfried, *supra* note 10, ¶ 6.

<sup>18</sup> *Id.*

<sup>19</sup> ZIMRING & HARCOURT, *supra* note 15, at 478.

<sup>20</sup> Gottfried, *supra* note 10, ¶ 8 (“Congress avoided a federal-state collision by enacting 18 U.S.C. § 1307, an exception to federal law for state-operated lotteries that allowed the latter to use the mail and certain radio and television broadcasts for lottery promotions. Congress thereby accommodated the pro-lottery policy of certain states while it continued to use its federal powers to limit lottery promotions falling outside of the narrow exception, thus supporting the policy of non-lottery states.”).

<sup>21</sup> *INTERNET GAMING LAW*, *supra* note 13, at 81 (“[The Third Wave] did not really gain momentum until New Hampshire re-instituted a state lottery in 1963.”).

memory.<sup>22</sup> The United States is still in the Third Wave, and Internet gambling is an important part of the many expanding forms of legal gambling.<sup>23</sup>

Today's federal laws governing Internet gambling are a patchwork that reflects disparate treatment for different types of gaming, uncertainty about the laws' application for particular types of technology and gaming, and questionable federal interference into state gambling policies. This Part will address the tangled intersection of several federal statutes impacting Internet gambling: the Wire Act; the Unlawful Internet Gaming Enforcement Act of 2006; the Professional and Amateur Sports Protection Act; and the Interstate Horseracing Act.

#### A. *The Wire Act, 18 U.S.C. § 1084*

The Wire Act, 18 U.S.C. § 1084—also called the Interstate Wire Act and the Wire Wager Act—was the government's first direct regulation on gambling since the 1890s lottery legislation.<sup>24</sup> Enacted in 1961, the Wire Act was part of Attorney General Robert F. Kennedy's war on organized crime.<sup>25</sup> The Wire Act was intended to be an anti-bookie statute designed to help the public policies of almost every state in the 1960s to suppress all gambling<sup>26</sup>:

The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.<sup>27</sup>

At that time, the Wire Act was intended to address “the Wire,” that is, the telegraph wire services used by illegal bookies to obtain horserace results before their bettors.<sup>28</sup> The statute proved effective in combating

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<sup>22</sup> *Id.* at 81–82.

<sup>23</sup> *Id.* at 82 (“Given the American public's voracious appetite for gambling, it was inevitable someone would try to bring gambling to the Internet.” (footnote omitted)).

<sup>24</sup> *Id.* at 116.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> H.R. Rep. No. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2631 (to accompany S. 1656—Interstate Wire Act, 18 U.S.C. § 1084).

<sup>28</sup> SCHWARTZ, *supra* note 14, at 99 (“For Kennedy's purposes, the network of bookmakers using phones and telegraphs to coordinate betting information and layoff wagers represented the ideal crime: By its very nature, the race wire permeated jurisdictional borders and demanded a federal solution. If one took the position that local police were helpless to stop out-of-state bookmakers from wiring betting information into their communities, making a crime of interstate bet transmission was manifestly sensible.”).

illegal sportsbooks as well, because illegal betting was conducted mostly by telephone during this era.<sup>29</sup> The Wire Act was used exclusively to prosecute bets on sports events and races that violated state laws during a nationwide crackdown on organized crime.<sup>30</sup>

Today, the Wire Act is the most important federal statute pertaining to remote wagering. It has been central in efforts involving Internet gambling. The most important parts of the statute read:

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

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.<sup>31</sup>

The exception in Section 1084(b) clarifies that the Wire Act does not prohibit news reporting of sports events or contests.<sup>32</sup> There is also no prohibition on “information assisting in the placing of bets” if the bets are legal within the jurisdiction.<sup>33</sup> This was intended to allow licensed books in Nevada—the only state at the time that had any form of off-track betting—to accept wagers in person in Las Vegas on races taking place in other states.<sup>34</sup> But bets themselves across state lines remain prohibited.<sup>35</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> INTERNET GAMING LAW, *supra* note 13, at 116.

<sup>31</sup> 18 U.S.C. §§ 1084(a)–(b) (2006); INTERNET GAMING LAW, *supra* note 13, at 118 (“This section was clearly designed to make federal jurisdiction over sports wagers as broad and far-reaching as reason would allow.”).

<sup>32</sup> 18 U.S.C. § 1084(b).

<sup>33</sup> *Id.* § 1084(a).

<sup>34</sup> H.R. Rep. No. 87-967 (1961) reprinted in 1961 U.S.C.C.A.N. 2631, 2632–33 (to accompany S. 1656–Interstate Wire Act, 18 U.S.C. § 1084) (“Since Nevada is the only State which has legalized offtrack betting, this exemption will only be applicable to it. For example, in New York State parimutuel betting at a racetrack is authorized by State law. Only in Nevada is it lawful to make and

The Wire Act certainly applies to the Internet, as a “wire communications facilit[y],” as would any other common communication technology, including wireless phones, since “wire[s]” are inevitably involved.<sup>36</sup> Though dated, the exhaustive definitions included in the Wire Act endure today.<sup>37</sup> Use of computers and the Internet for illegal gambling is generally not problematic to criminal law, as they are largely considered tools that are used in the commission of what is understood as a traditional crime.<sup>38</sup> Other parts of the Wire Act, however, lack this clarity.<sup>39</sup>

Other statutes from Robert F. Kennedy’s efforts to fight organized crime banned the transmission of wagering paraphernalia<sup>40</sup> included the Travel Act, which prohibited the use of interstate commerce or mail to further “unlawful activity,”<sup>41</sup> and the Gambling Devices Act of 1962, which prohibited trafficking in gambling devices.<sup>42</sup>

During the Nixon Administration, the Organized Crime Control Act of 1970, which included Racketeer Influenced and Corrupt Organizations (“RICO”), named illegal felony gambling as an underlying offense.<sup>43</sup> Gambling became one of the enumerated crimes that could justify a federal wiretap,<sup>44</sup> among other newly enumerated federal crimes, including

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accept bets on the race held in the State of New York where parimutuel betting at a racetrack is authorized by law. Therefore, the exemption will permit the transmission of information assisting in the placing of bets and wagers from New York to Nevada.”).

<sup>35</sup> *Id.* at 2633.

<sup>36</sup> INTERNET GAMING LAW, *supra* note 13, at 118–19.

<sup>37</sup> 18 U.S.C. § 1081 (2006) (“The term ‘wire communication facility’ means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.”).

<sup>38</sup> See Orin S. Kerr, *Cybercrime’s Scope: Interpreting “Access” and “Authorization” in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1602–03 (2003) (“Traditional crimes committed using computers are easy to understand. Examples include Internet fraud schemes, Internet gambling, online distribution of child pornography, and cyberstalking. These crimes involve the online commission or facilitation of traditional criminal offenses. . . . For the most part, traditional crimes committed using computers raise few new issues for criminal law. The basic crimes remain the same regardless of whether wrongdoers use computers or some other means to commit them.”).

<sup>39</sup> See discussion *infra* Part III.A.

<sup>40</sup> 18 U.S.C. § 1953(a) (2006) (“Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.”).

<sup>41</sup> *Id.* § 1952(b) (2006) (“As used in this section (i) ‘unlawful activity’ means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States.”).

<sup>42</sup> Gambling Devices Act of 1962, Pub. L. No. 87-840, 76 Stat. 1075, 1075 (1962) (intending to strengthen the Johnson Act).

<sup>43</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922–23 (1970).

<sup>44</sup> 18 U.S.C. § 2516 (2006).

running an illegal gambling business sufficient to interfere with interstate commerce<sup>45</sup> and obstructing state laws for an illegal gambling business.<sup>46</sup>

The critical distinction between these federal anti-gambling statutes and the Wire Act is that the latter are merely enforcement laws that do not legalize or prohibit any form of gambling. Unlike the Wire Act, these statutes all require violations of underlying state gambling law. With only two exceptions, 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 permissible under state law.<sup>47</sup>

The Wire Act has been used to prosecute online gambling operations. In an early Internet gambling case, federal prosecutors used Conspiracy to Violate the Wire Act for a 1998 indictment of an Antigua-based licensed sports betting service.<sup>48</sup> In that case, the Second Circuit affirmed the use of the Wire Act in this context.<sup>49</sup> However, questions persist for further application in other contexts.<sup>50</sup> 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.<sup>51</sup>

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<sup>45</sup> *Id.* §§ 1955(a)–(b)(1) (2006) (“(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both. (b) As used in this section—(1) ‘illegal gambling business’ means a gambling business which—(i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.”).

<sup>46</sup> *Id.* § 1511(a) (2006) (“(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—(1) one or more of such persons does any act to effect the object of such a conspiracy; (2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and (3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.”).

<sup>47</sup> *Rose Testimony*, *supra* note 1, at 2–3. Long before Powerball, states found ways of getting around the federal prohibitions on interstate lotteries by having no money, only information, cross state lines. State lotteries are now expressly allowed to have multi-state lotteries by federal statute. 18 U.S.C. § 1301 (2006).

<sup>48</sup> *See* *United States v. Cohen*, 260 F.3d 68, 71 (2d Cir. 2001) (“[Defendant] was arrested . . . under an eight-count indictment charging him with conspiracy and substantive offenses in violation of 18 U.S.C. § 1084.”).

<sup>49</sup> *Id.* at 76–77 (“We need not guess whether the provisions of § 1084 apply to Cohen’s conduct because it is clear that they do. First, account-wagering is wagering nonetheless; a customer requests a particular bet with WSE by telephone or internet and WSE accepts that bet. WSE’s requirement that its customers maintain fully-funded accounts does not obscure that fact. Second, Cohen established two forms of wire facilities, internet and telephone, which he marketed to the public for the express purpose of transmitting bets and betting information. Cohen subsequently received such transmissions from customers, and, in turn, sent such transmissions back to those customers in various forms, including in the form of acceptances and confirmations. No matter what spin he puts on ‘transmission,’ his conduct violated the statute. Third, it is clear to lawyer and layman alike that an act must be permitted by law in order for it to be legal.”).

<sup>50</sup> *See* discussion *infra* Part III.A.

<sup>51</sup> *Rose Testimony*, *supra* note 1, at 7.

B. *Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–04*

The proliferation of state lotteries led to competition among the states. Lawmakers considered, and often legalized, other forms of gambling, including off-track betting, pari-mutuel wagering on jai alai and dog racing, and casinos.<sup>52</sup> But when the State Lotteries of Delaware and Oregon began taking bets on National Football League games, Congress decided to act again. For the first time in a century, the federal government intervened to restrict states from implementing or expanding gambling that was legal under state law.<sup>53</sup>

In 1991, Democratic Arizona Senator Dennis DeConcini introduced the bill that would become the Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. §§ 3701–04, in response to the concerns from sports organizations.<sup>54</sup> The Senate Judiciary Committee found that the bill “serve[d] an important public purpose, to stop the spread of State-sponsored sports gambling.”<sup>55</sup> Former professional basketball player and Senator Bill Bradley loudly supported the proposal. He wrote an entire law review article about the policy concerns behind the bill, which was designed to prohibit states from allowing sports betting, leading to it being called the “Bradley Bill.”<sup>56</sup>

Under PASPA a “government entity,” or any state, territory, or tribe, may not “sponsor, operate, advertise, promote, license, or authorize by law or compact” any wagering scheme based on the outcome of professional or amateur sports.<sup>57</sup> A person may not participate in the wagering scheme, pursuant to the law of the government entity.<sup>58</sup> A handful of states already had legal sports betting, and PASPA exempted those preexisting wagering

<sup>52</sup> INTERNET GAMING LAW, *supra* note 13, at 40–42.

<sup>53</sup> See generally Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5 (1992) (explaining policy motivations for PASPA).

<sup>54</sup> Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–04 (2006); 137 CONG. REC. S2256-04 (1991).

<sup>55</sup> S. REP. NO. 102–248, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3554.

<sup>56</sup> Bradley, *supra* note 53, at 5 (“State-sanctioned sports betting puts the imprimatur of the state on this activity. It conveys the message that sports are more about money than personal achievement and sportsmanship. In these days of scandal and disillusionment, it is important that our youngsters not receive this message. Athletes are not roulette chips, but sports gambling treats them as such. If the dangers of state sponsored sports betting are not confronted, the character of sports and youngsters’ view of them could be seriously threatened.”).

<sup>57</sup> 28 U.S.C. § 3702 (2006) (“It shall be unlawful for—(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.”).

<sup>58</sup> *Id.*

schemes to the extent that those schemes had sports betting that pre-dated PASPA's enactment.<sup>59</sup> Although New Jersey was given one year after passage to choose to implement sports betting, Senator Bradley was instrumental in preventing the New Jersey Legislature from passing the necessary enabling law.<sup>60</sup>

Delaware was one of the states that had been grandfathered-in.<sup>61</sup> Its lottery game—a form of parlay betting on NFL games—had failed.<sup>62</sup> Years later, the Delaware Lottery opened video lottery terminals (“VLTs”), which were virtually indistinguishable from slot machines, at the State's three race tracks, thereby creating “racinos.”<sup>63</sup> In 2009, Delaware passed legislation to reopen sports betting through sportsbooks at the racinos.<sup>64</sup> This was primarily intended to bring more patrons to the racinos and to increase play of the VLTs. In an advisory opinion, the Delaware Supreme Court had ruled that the proposal for betting on multiple game outcomes did not violate the Delaware Constitution.<sup>65</sup> But, the professional sports leagues filed suit against the State in federal court to prevent any sports betting from being reintroduced, or at least to limit it to the parlay betting of the early 1990s.<sup>66</sup>

Delaware argued that its plan did not violate PASPA because it fell under a statutory exception, but the Third Circuit ruled that although the

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<sup>59</sup> See 28 U.S.C. § 3704(a)(1) (2006) (providing exceptions to PASPA). PASPA does not apply to “a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990.” *Id.*

<sup>60</sup> See *id.* § 3704(a)(3)(A) (2006) (stipulating that the unlawful sports gambling provision of § 3702 shall not apply to “betting, gambling, or wagering scheme[s] . . . conducted exclusively in casinos located in a municipality, but only to the extent that—(A) such scheme . . . was authorized, not later than one year after the effective date of this chapter”).

<sup>61</sup> Rose Testimony, *supra* note 1, at 4.

<sup>62</sup> See *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1376, 1391 (D. Del. 1977) (providing the National Football League limited injunctive relief against the Delaware lottery scheme based on football games); see also I. Nelson Rose, *Betting on New Jersey's Sports Betting*, GAMBLING & THE LAW BLOG (Nov. 7, 2011), <http://www.gamblingandthelaw.com/blog/316-betting-on-new-jerseys-sports-betting.html> (“When the National Football League and other sports organizations were lobbying for PASPA, the lawmakers, at first, looked to Congress's power to protect trademarks. This even worked in a lawsuit against the Delaware Lottery, where the NFL convinced the court that the use of team names might look like they were endorsing Delaware's games.”).

<sup>63</sup> I. Nelson Rose, *The Growing Third Wave of Legal Gambling*, GAMBLING & THE LAW (2011), <http://www.gamblingandthelaw.com/columns/296-the-growing-third-wave-of-legal-gambling.html>; Delaware Lottery Games, *And They're Off! Video Lottery at Delaware Racetracks*, <http://www.delottery.com/games/video/> (last visited November 7, 2012).

<sup>64</sup> *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293, 295 (3d Cir. 2009) (“Governor Markell described three types of proposed sports gambling: (1) point-spread bets on individual games; (2) over/under bets on individual games; and (3) multi-game parlay bets. On May 14—while the request for an advisory opinion from the Delaware Supreme Court was pending—Governor Markell signed the Act into law.” (footnote omitted) (citation omitted)).

<sup>65</sup> *Id.*

<sup>66</sup> *Office of the Comm'r of Baseball v. Markell*, No. 09–538, 2009 LEXIS 69816, at \*2 (D. Del.), *vacated*, 579 F.3d 293 (3d Cir. 2009).

state was grandfathered-in, the only form of sports betting allowed under PASPA was the game that Delaware had been conducting at the time the federal statute was enacted, namely parlay bets.<sup>67</sup> Delaware, content as the only state on the East Coast to have legal sports betting, had only challenged the interpretation of PASPA limiting it to parlay betting; the state did not challenge the constitutionality of the statute itself.<sup>68</sup>

Currently, PASPA is the law of the land and it prevents states or tribes from implementing any new sports betting schemes. PASPA grandfathers-in various sports betting operations in a half-dozen states, while preventing every other state from legalizing sports betting.<sup>69</sup> New Jersey has already started the front-page news process to challenge PASPA and expand sports betting.<sup>70</sup> The looming fragility of PASPA is discussed in Part IV of this Article. If PASPA is struck down, every state will be able to follow New Jersey's lead and legalize at least some forms of intrastate sports betting.

### C. *The Interstate Horseracing Act, 15 U.S.C. §§ 3001–07*

In December 2000, Congress amended the Interstate Horseracing Act (“IHA”), 15 U.S.C. §§ 3001–07, expressly to allow the states to decide for themselves whether their residents can make bets on horseraces by phone and computer.<sup>71</sup> Betting is only legal if both the bettor and the off-track betting operator are located in states that have statutes authorizing of the off-track betting.<sup>72</sup> This form of remote wagering on races is usually called advanced deposit wagering (“ADW”) because the bettors first have to fund the account so that there is money available for future bets.<sup>73</sup> Because most states limit betting on races to racetracks and licensed off-track betting facilities, state legislatures have amended pari-mutuel wagering statutes to create the legal fiction that the ADW bets take place at the track

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<sup>67</sup> *Markel*, 579 F.3d at 301–02.

<sup>68</sup> *Id.* at 302–03.

<sup>69</sup> See Rose Testimony, *supra* note 1, at 4 (“The PASPA grandfathers-in Nevada, Delaware, and a half-dozen other states, while prohibiting any other state from legalizing sports betting.”).

<sup>70</sup> Suzette Parmley, *After Election Victory, Sports-Betting Backers Push Ahead*, PHILA. INQUIRER, Nov. 14, 2011, at A1.

<sup>71</sup> Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001–07 (2006). The IHA provides:

The Congress finds that—(1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests; and (3) in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.

*Id.* § 3001(a) (2006).

<sup>72</sup> INTERNET GAMING LAW, *supra* note 13, at 142.

<sup>73</sup> *Id.* at 300.

where the deposit is supposedly being held.<sup>74</sup> More than half the states have opted in under the IHA to allow residents to bet by phone or computer, including across state lines.<sup>75</sup>

In 2003, Antigua requested a World Trade Organization (“WTO”) arbitration panel to enforce the treaty rights created by the General Agreement on Trade in Services (“GATS”) Specific Commitments Schedule that bound the United States to open access for Antigua’s gambling and betting services, including online gambling.<sup>76</sup> The United States responded that federal laws (the Wire Act, the Travel Act, the Illegal Gambling Business Act, and RICO) and the laws of every state (except Hawaii and Alaska) were a “total prohibition” on foreign gambling markets.<sup>77</sup> After lengthy proceedings, the WTO found that the United States’ horserace laws violated the rights of offshore horserace betting operations.<sup>78</sup>

The WTO found that the legal, interstate betting authorized by the IHA discriminated against overseas operators in violation of GATS.<sup>79</sup> The DOJ invented an argument that the Wire Act actually outlaws *all* cross-border betting of any kind, and that the IHA, a civil statute, had no authority to supersede the Wire Act.<sup>80</sup> The DOJ claimed that the IHA only allows betting on out-of-state horseraces with an operator located in the bettor’s own state.<sup>81</sup> This argument was both factually and legally unsupported.<sup>82</sup>

The United States refused to comply with the WTO, and President George W. Bush unilaterally pulled America’s commitment under GATS to allow foreign gambling, subjecting the United States to hundreds of billions of dollars in claims from overseas operators and governments.<sup>83</sup> Today, the DOJ maintains that the Wire Act covers all interstate horserace betting, and so the betting operation and the bettor must be in the same

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<sup>74</sup> See I. Nelson Rose, *Betting on New Jersey*, GAMBLING & THE LAW (2011), <http://www.gamblingandthelaw.com/columns/313-betting-on-new-jersey.html> (“The state legislatures merely amend their pari-mutuel wagering statutes to allow bettors to set up accounts by depositing money; it’s called Advanced Deposit Wagering (‘ADW’). ADW is legal, even though every state limits bets to licensed tracks and off-track-betting offices, because the legislature simply declares that an ADW bet is deemed to take place inside the track enclosure.”).

<sup>75</sup> INTERNET GAMING LAW, *supra* note 13, at 142.

<sup>76</sup> *Id.* at 257–58.

<sup>77</sup> *Id.* at 258.

<sup>78</sup> *Id.* at 262.

<sup>79</sup> *Id.* at 263.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 263 (“According to the DOJ, the IHA allowed people to bet on out-of-state horse races, but only with an OTB operator who was in their own states. Besides being factually questionable, given the large, established cross-border betting industries involving horse races, dog races, and state lotteries, the argument was legal nonsense. And the WTO politely said so.”).

<sup>83</sup> *Id.* at 270–71.

state.<sup>84</sup> However, the DOJ has never taken any corresponding enforcement action on this extreme position against any state-licensed ADW operator or state racing commission.<sup>85</sup> Meanwhile, remote wagering continues to grow. Today, more than eighty-eight percent of horseracing are bets made off-track.<sup>86</sup> Payment processors are left to figure out who is right.<sup>87</sup>

#### D. *Unlawful Internet Gaming Enforcement Act*

Ironically, the biggest threat to federal efforts to police Internet gambling using the Wire Act was created in part by a rushed effort to outlaw online gaming, the Unlawful Internet Gaming Enforcement Act of 2006 (“UIGEA”).<sup>88</sup> With a Republican-controlled Congress and George W. Bush as President, Republican Tennessee Senator Bill Frist, then majority leader of the Senate, attached UIGEA to a must-pass, unrelated antiterrorist bill, the SAFE Port Act.<sup>89</sup> The circumstances of its passage have been criticized because it was passed late at night on the last day of Congress without a floor debate.<sup>90</sup>

UIGEA does not directly regulate betting. Instead, it prohibits some of the financial transactions related to “unlawful Internet gambling.”<sup>91</sup> The UIGEA requires the Secretary of the Treasury and the Board of Governors

<sup>84</sup> Rose Testimony, *supra* note 1, at 4.

<sup>85</sup> Mark MacCarthy, *What Payment Intermediaries Are Doing About Online Liability and Why It Matters*, 25 BERKELEY TECH. J. 1037, 1067–68 (2010).

<sup>86</sup> *Reasonable Prudence in Regulation Act and Internet Gambling Regulation, Consumer Protection, and Enforcement Act: Hearing on H.R. 2266 and H.R. 2267 Before the H. Comm. on Fin. Servs.*, 111th Cong. 39 (2009) (statement of Michael Brodsky, Executive Chairman, Yobet.com) (“Based on information compiled by the Jockey Club, over 88 percent of pari-mutuel wagers on thoroughbred racing in the United States were placed at locations away from the host track.”).

<sup>87</sup> Rose Testimony, *supra* note 1, at 4.

<sup>88</sup> See generally I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537 (2006) (providing a detailed analysis of the Act).

<sup>89</sup> Rose Testimony, *supra* note 1, at 5.

<sup>90</sup> *Can Internet Gambling be Effectively Regulated to Protect Consumers and the Payments System?: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 12 (2007) (statement of Radley Balko, Senior Editor, Reason Magazine) (“The Unlawful Internet Gambling Act was passed under rather dubious circumstances. It passed the U.S. Senate on the last day of Congress, late at night, with no floor debate, after being attached to an unrelated port security bill.”).

<sup>91</sup> 31 U.S.C. § 5363 (2006) (“No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card); (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.”); 31 U.S.C. § 5362(10)(E) (2006) (“The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.”).

of the Federal Reserve, in consultation with the Attorney General, to establish regulations related to payment systems to prevent the transmission of money from bettors to operators for unlawful gambling.<sup>92</sup> However, there are no restrictions on the transmission of money from operators to bettors. Besides the regulations imposed on payment processors, supposedly in place to identify and block payments for illegal online gaming, the UIGEA creates one new crime: operating a gambling business that knowingly accepts money for unlawful Internet gambling.<sup>93</sup> Strangely, the UIGEA clearly does not make it a crime to knowingly transmit funds for illegal gambling. It is doubtful whether banks or other payment processors could be charged with the new crime of knowingly accepting money for unlawful Internet gambling under a theory of aiding and abetting since the statute clearly states that that being in the business of gambling does not include the activities of a “financial transaction provider” (or an Internet service provider).<sup>94</sup> The UIGEA does not define unlawful gambling; instead, it refers to the overwhelming array of federal and state laws.<sup>95</sup> Further, the UIGEA does not regulate bettors directly; rather, it attempts to make payment methods for illegal gambling less convenient by eliminating the simplest sources of funds to gamble, such as credit cards.

However, the UIGEA is riddled with loopholes that inadvertently open the door to many forms of online gaming, including fantasy sports,<sup>96</sup> skill games,<sup>97</sup> and intrastate gambling.<sup>98</sup> The UIGEA has an express exemption for gambling where the bettor and operator are in the same state.<sup>99</sup> It explicitly declares that legal gambling does not violate the UIGEA, even if the wires carrying the gambling information pass into another state.<sup>100</sup>

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<sup>92</sup> 31 U.S.C. § 5364(a) (2006).

<sup>93</sup> *Id.* § 5363.

<sup>94</sup> *Id.* § 5362(2).

<sup>95</sup> *Id.* § 5362(10)(A).

<sup>96</sup> *Id.* § 5362(1)(E)(ix) (“The term ‘bet or wager’ . . . does not include . . . participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions . . .”).

<sup>97</sup> *Id.* § 5362(1)(A) (defining the term bet or wager as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome”).

<sup>98</sup> *Id.* § 5362(10)(B)(i) (“The term ‘unlawful Internet gambling’ does not include placing, receiving, or otherwise transmitting a bet or wager where—(i) the bet or wager is initiated and received or otherwise made exclusively within a single State . . .”).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* § 5362(10)(B)(ii) (“The term ‘unlawful Internet gambling’ does not include . . . a bet or wager where . . . the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include—(I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and (II) appropriate data

### E. *Efforts to Legalize Internet Gambling*

For many years, Congress has frequently held hearings weighing the many interests concerned about these bills. On October 25, 2011, the Subcommittee on Commerce, Manufacturing, and Trade of the House Energy and Commerce Committee held a hearing on Internet wagering, specifically considering a bill to allow online gambling titled “Internet Gaming: Is There a Safe Bet?”<sup>101</sup> As in many similar hearings, the Subcommittee heard from academic experts, pro-gambling and anti-gambling interests, and Indian tribes.<sup>102</sup>

Since the enactment of the UIGEA, there have been repeated efforts in Congress to legalize and tax online interstate gambling, excluding sports betting. Most recently, these efforts include bills by Representative Frank (H.R. 2267),<sup>103</sup> Representative McDermott (H.R. 2230),<sup>104</sup> and Representative Barton (H.R. 2366).<sup>105</sup> Efforts to repeal the UIGEA have met resistance, with many believing the UIGEA is important to allow enforcement of anti-gambling laws.<sup>106</sup> These bills have consistently failed, but they may become more urgent and important following the DOJ Memorandum.

### III. CONFLICT BETWEEN THE UIGEA AND THE WIRE ACT

The UIGEA’s broad exceptions threatened to swallow the rule of the Wire Act. Nevertheless, the DOJ continued to pronounce that the Wire

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security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State’s law or regulations . . . .”); *id.* § 5362(10)(B)(iii) (“The term ‘unlawful Internet gambling’ . . . does not include a bet or wager where . . . the bet or wager does not violate any provision of—(I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.); (II) chapter 178 of title 28 (commonly known as the ‘Professional and Amateur Sports Protection Act’); (III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or (IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).”)

<sup>101</sup> *Internet Gaming: Is There a Safe Bet?: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the H. Energy and Commerce Comm.*, 112th Cong. (2011), available at <http://archives.republicans.energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID-9027>.

<sup>102</sup> *See id.* The witnesses included: Parry Aftab of FairPlay USA; Ernest Stevens of the National Indian Gaming Association; Keith Whyte of the National Council on Problem Gambling; the Honorable Alphonse D’Amato of the Poker Players Alliance; Kurt Eggert, a professor of law; and Dan Romer of the Annenberg Public Policy Center. *Id.*

<sup>103</sup> H.R. 2267, 111th Cong. (2009); *cf.* S. 3018, 111th Cong. (2010); S. 1597, 111th Cong. (2009).

<sup>104</sup> H.R. 2230, 112th Cong. (2011) (superseding H.R. 2268 as the companion tax bill for H.R. 2267).

<sup>105</sup> H.R. 2366, 112th Cong. (2011).

<sup>106</sup> *See The Internet Gambling Regulation: Hearing on H.R. 2267 Before the H. Comm. on Fin. Servs.*, 111th Cong. 5 (2009) (statement of Rep. Bachus, Member, H. Comm. on Fin. Servs.) (“[S]upporters of the legalization of Internet gambling argue that prohibition has sent Internet gambling underground and left the vulnerable unprotected, but that was the case before [the UIGEA]. The vulnerable were unprotected because companies that tap the American market violated our laws and our protections. No amount of regulation can begin to protect against this particularly predatory and abusive intrusion into American homes . . . . No approach to blocking Internet gambling will ever be perfect, but [the UIGEA] is our best hope.”)

Act prohibited all interstate wagers. The DOJ Memorandum is a dramatic reversal of the existing DOJ position, and resolves the conflict by opening the door for state legalization of Internet gambling.

A. *What Does the Wire Act Cover?*

The DOJ has always maintained that the Wire Act applies to all forms of Internet gambling if information passed, even briefly, into another state.<sup>107</sup> After the United States Virgin Islands passed laws related to licensing online gambling, the DOJ warned that the Wire Act prohibited any interstate gambling transaction, even where there was local government approval.<sup>108</sup> A similar warning letter from the DOJ stopped Nevada regulators from issuing licenses for non-sports betting Internet wagers, even though the State Legislature had expressly allowed such licensing.<sup>109</sup> The DOJ advised the National Association of Broadcasters that the Wire Act covered advertising for online gaming operations, presumably as “information” related to gambling.<sup>110</sup> In front of the WTO, the DOJ claimed the Wire Act prohibited the same interstate transactions authorized by the IHA.<sup>111</sup>

However, the DOJ’s actions have not matched its words. After its broad pronouncement before the WTO, the DOJ’s brave assertions about interstate horserace betting went unenforced. Its broad threats backed down local governments with democratically passed policy choices, and its broad conclusions left financial service entities confused. Except for the DOJ itself, no one seemed to agree with its aggressive position on the Wire Act.

The broad interpretation of the Wire Act, defining it to apply to all wagers as opposed to only sports wagering, has been unsuccessful for years. In 2001, thirty-three similar cases were consolidated into *In re*

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<sup>107</sup> See Matt Richtel, *Wall St. Bets on Gambling on the Web*, N.Y. TIMES, Dec. 25, 2005, § 1, at 1. (“[A] spokeswoman for the Justice Department[] said that the agency considered online gambling illegal . . .”).

<sup>108</sup> Virgin Islands Internet Gaming and Internet Gambling Act, VI. CODE ANN. tit. 32, §§ 601–46 (2012); Letter from U.S. Attorney David M. Nissman to Judge Eileen R. Petersen, Chair of U.S. Virgin Islands Casino Control Commission (Jan. 2, 2001), available at <http://online.liebertpub.com/doi/pdfplus/10.1089/glr.2009.13304>.

<sup>109</sup> Assemb. B. 578, 2001 Leg., 71st Reg. Sess. (Nev. 2001); see Letter From Michael Chertoff, Assistant Att’y Gen., to Dennis Neilander, Chair of Nevada Gaming Control Board (Aug. 23, 2002), available at [www.hsgac.senate.gov/download/chertoff-letter](http://www.hsgac.senate.gov/download/chertoff-letter).

<sup>110</sup> See Charles Doyle, *Internet Gambling: An Abridged Overview of Federal Criminal Law*, in REGULATING INTERNET GAMBLING 1, 3 (Todd E. Simmons ed., 2009) (“[T]he Department of Justice has advised the National Association of Broadcasters that its members risked prosecution for aiding and abetting when they provided advertising for the online gaming operations. In addition to such accomplice liability, a conspirator who contrives with another for the commission of a federal crime is likewise liable for the underlying crime and for any additional, foreseeable offense committed by a confederate in furtherance of the common scheme.”).

<sup>111</sup> *Supra* text accompanying notes 80–83.

*MasterCard International, Inc.*<sup>112</sup> in the Eastern District of Louisiana.<sup>113</sup> The plaintiffs alleged that credit card providers violated RICO, with an underlying violation of the Wire Act, by allowing bettors to use credit cards on casino-style gambling websites.<sup>114</sup> The plaintiffs in this civil case argued that the Wire Act contained two different prohibitions based on this language of 18 U.S.C. § 1084(a): “knowingly uses a wire communication facility for the transmission . . . of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . or for information assisting in the placing of bets or wagers.”<sup>115</sup> They argued that the Wire Act made it not only a crime to transmit bets on sports events, but also a crime to send information that would assist in the placing of bets relating to any kind of gambling.<sup>116</sup> Using a simple analysis of the Wire Act’s text and some legislative history, the Court found that the “sporting event or contest” language applied to all “bets or wagers” considered in the Wire Act.<sup>117</sup> Thus, only wagers or information assisting in wagers on sports events were prohibited. The Fifth Circuit affirmed the decision.<sup>118</sup> Other courts have also limited the scope of the Wire Act to sports wagers.<sup>119</sup> Only one published opinion has found that the Wire Act covers non-sports wagering.<sup>120</sup>

The DOJ has known for quite some time that the Wire Act does not cover poker. The “Black Friday” indictments of April 15, 2011, which allowed the U.S. Attorney for the Southern District of New York to close down the largest online poker sites taking money bets from Americans,<sup>121</sup> never mentioned the Wire Act.<sup>122</sup> In those cases, the federal government bootstrapped New York state anti-gambling misdemeanors into federal organized crime felony charges.

The DOJ’s broad interpretation of the Wire Act also conflicts with the

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<sup>112</sup> 132 F. Supp. 2d 468 (E.D. La. 2001), *aff’d*, 313 F.3d 257 (5th Cir. 2002).

<sup>113</sup> *Id.* at 471.

<sup>114</sup> *Id.* at 473–75.

<sup>115</sup> *Id.* at 480 (quoting 18 U.S.C. § 1084(a) (2000)).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 480–81.

<sup>118</sup> *In re MasterCard Int’l Inc.*, 313 F.3d 257, 260 (5th Cir. 2002).

<sup>119</sup> *See, e.g., United States v. Marder*, 474 F.2d 1192, 1193–94 (5th Cir. 1973) (stating that the first element of the statute is satisfied when government proves wagering information “relative to sporting events”).

<sup>120</sup> *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1279–82 (D. Utah 2007).

<sup>121</sup> Michael Hiltzik, *Let’s Call Feds’ Bluff on Internet Poker*, L.A. TIMES, May 1, 2011, at B1 (“On April 15, federal prosecutors threw the book at three major online poker websites and their principals, unsealing a 52-page indictment charging 11 defendants with bank fraud, money laundering and operating illegal gambling businesses. The websites—Full Tilt Poker, PokerStars and Absolute Poker—are all based overseas. The indictment declares that to get around federal laws that prohibit U.S. banks from helping to move money for illegal games, the defendants cooked up schemes to make billions of dollars flowing through the banking system between the websites and American players look as if the money was for other purposes.”).

<sup>122</sup> Rose Testimony, *supra* note 1, at 7.

UIGEA's numerous exceptions for "unlawful" gambling. Like most federal gambling laws, such as the Travel Act, the UIGEA relies on an underlying violation of a state law. It specifically states that wire transfers that are legal under the state laws are not covered, even if they go through other states. Without underlying state gambling restrictions, or the UIGEA's statutorily enumerated federal statutes, such as PASPA, there can be no unlawful Internet gambling under the UIGEA's definitions.<sup>123</sup> The Wire Act prohibits the interstate transmission regardless of the underlying state law.<sup>124</sup> The UIGEA also carves out other loopholes problematic to the Wire Act, including games of skill, fantasy sports, and intrastate betting.<sup>125</sup>

The DOJ decided that the only way out of this conflict with the UIGEA was to reinterpret the Wire Act. If Kennedy's Wire Act applied only to sports bets, then it would not matter if phone lines happened to carry state-sanctioned lottery or poker bets across other states.

#### B. *The Department of Justice Memo*

Two days before Christmas 2011, the Obama Administration released a thirteen-page memorandum about the scope of the Wire Act.<sup>126</sup> In the first sentence, this memorandum reversed years of DOJ posturing:

Interstate transmissions of wire communications that do not relate to a "sporting event or contest" fall outside the reach of the Wire Act.<sup>127</sup>

The timing was interesting, to say the least. Although written months earlier, the DOJ made its announcement on the Friday before Christmas Sunday, when news outlets are minimally staffed for what is considered the slowest news day of the year. As a result, the Memorandum went largely unnoticed, even among anti-gambling activists.<sup>128</sup> The tie-in to Christmas may not have been accidental. The pronouncement equated to a gift of hundreds of millions of dollars and thousands of jobs to the states at a time when they desperately needed help in a difficult economy.

The Memorandum was written by Virginia A. Seitz, head of the OLC,

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<sup>123</sup> See *supra* note 91 and accompanying text (noting the UIGEA's reliance on federal state gambling restrictions to arrive at its definition of unlawful gambling).

<sup>124</sup> *Supra* Part II.A.

<sup>125</sup> *Supra* notes 96–98 and accompanying text.

<sup>126</sup> *Opinions by Date and Title*, U.S. DEP'T OF JUSTICE, O.L.C., <http://www.justice.gov/olc/memoranda-opinions.html> (last visited Aug. 26, 2012).

<sup>127</sup> DOJ Memo, *supra* note 2, at 1.

<sup>128</sup> See, e.g., Editorial, *Obama's New Tax on the Poor: Internet Gambling by States*, CHRISTIAN SCI. MONITOR, Dec. 27, 2011 ("The timing of the memo's release is telling about its politics. It was dated last September but was quietly made public just before the long Christmas weekend, perhaps to prevent political waves. And it came a day after Nevada officials approved in-state online gaming.").

the elite office in the DOJ that interprets laws and the Constitution for the executive branch.<sup>129</sup> The previous head of the OLC, Jack Goldsmith, resigned in July 2004. After a lengthy period with no confirmed head of the OLC—including two years of the Obama Administration—Assistant Attorney General Seitz was confirmed in June 2011.<sup>130</sup> Issued by the OLC, the Memorandum represents the official position of the Obama Administration.<sup>131</sup>

The Memorandum was written in response to inquiries, some more than two years old, from Illinois and New York.<sup>132</sup> 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.”<sup>133</sup> It also responded to the letter sent by the Democratic Majority Leader of the U.S. Senate, Harry Reid, and the second-ranking Republican in the Senate, Jon Kyl. 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.<sup>134</sup>

Two days before Christmas, Senators Reid and Kyl also received letters consistent with the Memorandum that the Wire Act did not cover intrastate lotteries.<sup>135</sup> The Senators now have their answer, though it may not have been what they had expected. Instead of declaring the D.C. Lottery’s Internet plans illegal, the DOJ authorized any interstate Internet lottery, additional state Internet lottery, and a slew of other Internet games. Federal prosecutors will now only use the Wire Act when the gambling involves sports events, including races.<sup>136</sup> Because intrastate racing already has its own statute, the IHA, the only federal prohibition remaining on intrastate gambling is on sports betting: PASPA. As is discussed below,

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<sup>129</sup> Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It”*, 96 MINN. L. REV. 194, 243 (2011).

<sup>130</sup> *Id.* at 247 n.221.

<sup>131</sup> *See id.* at 243 (“[The OLC] is often called upon to advise the President about the scope of his constitutional authority, including at times the requirements of international law. By statute, the Attorney General gives opinions on matters of law to the President, and this opinion-writing function has been largely delegated to OLC. OLC’s best practices memorandum explains that its ‘central function’ is to further the President’s constitutional duties to preserve, protect, and defend the Constitution and to take care that the laws be faithfully executed.” (internal citations omitted)).

<sup>132</sup> DOJ Memo, *supra* note 2, at 1.

<sup>133</sup> *Id.*

<sup>134</sup> Letter from Sen. Harry Reid, Majority Leader, & Sen. Jon Kyl to Eric Holder, Att’y Gen. (July 14, 2011), *available at* <http://www.gamblingandthelaw.com/images/stories/pdfbin/reid-kyl-letter-to-holder.pdf>.

<sup>135</sup> Letter from Ronald Weich, Assistant Att’y Gen., Dep’t of Justice, to Sen. Harry Reid, Majority Leader (Dec. 23, 2011), *available at* [http://www.publicgaminginternational.com/images/Online\\_Gambling\\_Letter\\_to\\_Senator\\_Reid.pdf](http://www.publicgaminginternational.com/images/Online_Gambling_Letter_to_Senator_Reid.pdf).

<sup>136</sup> *See* DOJ Memo, *supra* note 2, at 1 (concluding that “interstate transmissions of wire communications that do not relate to a ‘sporting event or contest’ fall outside of the reach of the Wire Act” (citation omitted)).

there are also very few federal restrictions on state-legal interstate or even international betting.<sup>137</sup>

The Memorandum analyzes the conflict between the Wire Act and UIGEA. Intermediate lottery transactions routed out of the state appeared to be legal under UIGEA's exception-riddled definition of unlawful gambling, but illegal under the DOJ's prior interpretation of the Wire Act.<sup>138</sup> Like the court in *In re Mastercard*, the OLC considered the text of the statute and its legislative history.<sup>139</sup> The OLC also concluded that the limited reading was consistent with the text and the legislative history.<sup>140</sup> Thus, the OLC reversed the long-held aggressive position of the DOJ Criminal Division, declaring that the Wire Act applied only to a "sporting event or contest."<sup>141</sup>

It is theoretically possible that the DOJ could reverse the Memorandum's conclusion that the "[Wire] Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce."<sup>142</sup> Reversal, however, is unlikely. Such reversals are rare and typically limited to issues that a new presidential administration considers important, such as President Obama's reversal of the unpopular torture memos under President George W. Bush.<sup>143</sup> Perhaps more importantly, the new Memorandum's position is the one that is legally correct and supported by almost all courts that have addressed the issue.<sup>144</sup>

#### IV. THE FUTURE OF INTERNET GAMBLING

As a result of the DOJ Memorandum, we should expect interstate and international gambling to increase rapidly. Without the Wire Act in the way, states can now allow, regulate, and tax a broad array of interstate games, excluding sports betting. With changes in state law, international

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<sup>137</sup> *Infra* Part IV.

<sup>138</sup> DOJ Memo, *supra* note 2, at 3 ("The Criminal Division is thus concerned that the Wire Act may criminalize conduct that UIGEA suggests is lawful. On the one hand, the Criminal Division believes that the New York and Illinois lottery plans violate the Wire Act because they will involve Internet transmissions that cross state lines or the transmission of lottery data to out-of-state transaction processors.").

<sup>139</sup> *See id.* at 3–11 (examining the relevant text and legislative history of the Wire Act).

<sup>140</sup> *Id.* at 8 ("The legislative history of subsection 1084(a) supports our reading of the text. . . . There is no indication that Congress intended the prohibition on money or credit transmissions to sweep substantially more broadly than the underlying prohibitions on betting, wagering, and information communications, let alone any discussion of any rationale behind such a counterintuitive scheme. More broadly, the Wire Act's legislative history reveals that Congress's overriding goal in the Act was to stop the use of wire communications for sports gambling in particular." (citations omitted)).

<sup>141</sup> *Id.* at 13.

<sup>142</sup> *Id.* at 12.

<sup>143</sup> Michael Isikoff, *The End of Torture: Obama Banishes Bush's Interrogation Tactics*, THE DAILY BEAST (Jan. 21, 2009), <http://www.thedailybeast.com/newsweek/2009/01/21/the-end-of-torture.html>.

<sup>144</sup> Rose Testimony, *supra* note 1, at 7.

gaming operations will certainly be interested in attracting U.S. bettors. Without the prohibition of the Wire Act, federal authorities have no statute to address international vendors for gambling services that are legal under state laws.

The only barrier that blocked states from legalizing non-sports intrastate Internet gaming had been the DOJ's expansive view of the Wire Act. For example, when Nevada passed legislation licensing online casinos, the DOJ stopped state regulators from issuing licenses by saying they would arrest operators under the Wire Act.<sup>145</sup> Now that the department charged with enforcing the law has officially limited that statute to cross-border sports bets, there is no federal law standing in the way of a state authorizing intrastate online games, or even entering into compacts with other states and nations to pool players.

#### A. *State Implementation of Internet Gambling*

The DOJ Memorandum will propel forward the current phase in United States gambling law, what Professor Rose has called the "Third Wave."<sup>146</sup> In the Third Wave, gambling will continue to expand; it has already brought lotteries and horserace betting to a majority of states and led to a proliferation of casinos.<sup>147</sup> There is so much legal gambling in the United States that it is easy for state politicians to say that with casinos, racetracks and a state lottery already, Internet poker should not make such a big difference. Of course, there is so much legal gambling that casino and racetrack owners, and even the state lottery, may respond by arguing that Internet poker is fine, as long as they get to run it. Consequently, the political battle will be over licensing.

State lawmakers are not proposing legalization to protect local operators; these proposals are solely to raise money. 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. Even in states as big as California, the existing card clubs, tribal casinos, and racetracks do not have anywhere near enough financial strength to outbid outsiders, such as the largest Nevada casino companies and Internet gambling operators.<sup>148</sup> Major industry players will be instantly drawn to the prospect of above-board, legal Internet gaming.<sup>149</sup>

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<sup>145</sup> Rose Testimony, *supra* note 1, at 3.

<sup>146</sup> See INTERNET GAMING LAW, *supra* note 13, at 80–82 (discussing the history and current state of the Third Wave of gambling in the United States).

<sup>147</sup> *Id.*

<sup>148</sup> Rose Testimony, *supra* note 1, at 3.

<sup>149</sup> See Radley Balko, *Bring Back Internet Gambling*, REASON.COM (June 11, 2007, 12:36 PM), <http://reason.com/archives/2007/06/11/bring-back-internet-gambling> ("Were Congress to give its blessing to legalized online gambling, I'd suggest you'd soon see brand names like Harrah's, MGM, and Trump immediately enter the market. Reputable offshore brands like FullTilt poker and

Giving exclusive rights to Internet games to the State Lottery might bring in more money in the long run, but states are desperate for cash now. Only outside companies, like Caesars Entertainment, can come up with the millions of dollars that the state will demand up front.<sup>150</sup> But California's long-established and politically powerful card clubs and tribal casinos will not quietly accept an outsider setting up a competing operation that brings legal gambling into every home in the state.<sup>151</sup>

There is so much money at stake that political deals will be made within the state licensing. In states like Nevada and New Jersey, where the local, established operators are powerful, the land-based casino companies will likely get the Internet gambling licenses. In states like California, local operators may get a license or two, but the rest will be sold to the highest bidders.

The immediate beneficiaries will be the eight state lotteries that are already using the Internet.<sup>152</sup> Now that the DOJ Memorandum answered their question, not only can they use out-of-state payment processors, they can sell on the Internet. These lotteries can and will quickly expand into selling individual tickets, not just subscriptions.<sup>153</sup> Every state lottery is also looking into whether it can offer other games, including online poker, as the D.C. Lottery already had authority to do.<sup>154</sup> States selling lottery tickets online can look to Canada as precedent because most of the provincial lotteries in Canada already or are beginning to operate lottery, Internet poker, and other online gambling games.<sup>155</sup> Of course, a scratch-off lottery ticket on a video screen becomes practically indistinguishable from a slot machine.

The first state out of the gate with Internet lottery sales was Illinois,

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PartyPoker would almost certainly incorporate in the U.S. and subject themselves to U.S. market regulation and government oversight. These companies want to win the trust of their customers. And they want to operate in a business environment that respects the freedom of contract and adheres to the rule of law.”)

<sup>150</sup> Rose Testimony, *supra* note 1, at 3; *see also* S.B. 1463, 2011–2012 Regular Sess. (Cal. 2012) (requiring gambling licensees to pay a \$30 million fee up front for deposit in the General Fund).

<sup>151</sup> *See* Howard Stutz, *Net Poker's Prospects Probably Lie Beyond '12*, LAS VEGAS REV. J., Mar. 4, 2012, at 1E (“Too many competing interests will keep the bill from advancing. Influential Indian tribes control the gaming debate in Sacramento. California card room operators and the state's racetrack industry want a slice of the pie. Even if the tribes, card rooms and tracks could get on the same page, Facebook, Zynga and other Silicon Valley social media giants are going to seek a piece of the action.”).

<sup>152</sup> Rose Testimony, *supra* note 1, at 3.

<sup>153</sup> Delaware is already planning to offer lottery tickets to residents online. Doug Denison, *A Casino on Your Computer?*, THE NEWS J., Feb. 5, 2012 (“Delaware's online offerings would likely start with making tickets for the Powerball, Megamillions and daily Play 3 and Play 4 drawings available to in-state buyers, [Delaware Secretary of Finance] Cook said.”).

<sup>154</sup> In 2011, the D.C. Council authorized the D.C. Lottery to offer poker, blackjack, and other games online, but reversed its position in 2012 for political reasons. Theo Emery, *Disputes in Washington End Gambling Program*, N.Y. TIMES, Feb. 16, 2012, at A19.

<sup>155</sup> INTERNET GAMING LAW, *supra* note 13, at 162.

which went live selling individual lottery tickets just in time for a record \$540 million interstate Mega Million jackpot drawn on March 30, 2012.<sup>156</sup> The Illinois online system requires personal information, including a social security number, and it can accept drafts from bank accounts or credit cards.<sup>157</sup> For now, users can only buy ten dollars in each purchase and must be pre-approved.<sup>158</sup> Yet, it took only three minutes to sell the first ticket when the site went live on Sunday morning; in less than five days, Illinois sold \$425,000 of lottery tickets online.<sup>159</sup>

States may even permit new types of games beyond lotteries or traditional casino gaming. Silicon Valley's Zynga, the creator of the popular Facebook game Farmville, is already planning to weave gambling into social games.<sup>160</sup> Zynga plans to partner with an established casino by the end of the year to create social games that include gambling, and is rumored to be in negotiations with casino powerhouse Wynn Resorts.<sup>161</sup> Established operators are already preparing with experiments in free gaming, like IGT's free "American Idol" slot-machine-based Facebook experiment.<sup>162</sup> IGT, a gaming machine operator, also bought Double Down Casino, a free casino-style vendor on Facebook, to prepare for new modes on online gaming.<sup>163</sup>

Internet gambling has potential far beyond decks of cards, roulette wheels, and traditional casino gaming. Zynga has already started lobbying in Washington and in California to enter the gambling market.<sup>164</sup> Facebook has paired with an existing U.K. casino to offer real-money games on iPhones, and plans to offer more games in the U.K.<sup>165</sup> The potential in combining new social gaming with gambling has been described by Zynga's CEO as "mind-blowing."<sup>166</sup>

State online gambling operations can enter into compacts with other

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<sup>156</sup> Jim Jaworski, *Jackpot Tickets Just a Click Away: Illinois Lottery Goes Online as Mega Millions Soars to \$540M*, CHI. TRIB., Mar. 30, 2012, at C3.

<sup>157</sup> *Id.*

<sup>158</sup> Shannon McFarland, *Mega Millions Jackpot a Record \$540 Million, Illinois Online Ticket Sales Soar*, HUFFINGTON POST (Mar. 29, 2012, 7:25 PM), [http://www.huffingtonpost.com/2012/03/30/mega-millions-jackpot\\_n\\_1391018.html](http://www.huffingtonpost.com/2012/03/30/mega-millions-jackpot_n_1391018.html).

<sup>159</sup> *Id.*

<sup>160</sup> John Letzing, *Zynga Puts Real Money into Gambling Lobby*, WALL ST. J., Aug. 16, 2012, at B4; *Fact Sheet*, ZYNGA, <http://company.zynga.com/news/fact-sheet> (last visited Sept. 27, 2012).

<sup>161</sup> *Id.*; Josh Kosman & Garrett Sloane, *Casino-Ville Bet: Odds May Not Favor Zynga Online Gambling*, N.Y. POST, Apr. 4, 2012, at 25.

<sup>162</sup> Howard Stutz, *Slot Makers Preparing for Net Gaming*, LAS VEGAS REV. J., Apr. 22, 2012, at 1E.

<sup>163</sup> *Id.*

<sup>164</sup> Letzing, *supra* note 160.

<sup>165</sup> Nick Clayton, *Big Fish Brings Real-Cash Casino to iOS, but Only in the U.K.*, WALL ST. J., Aug. 17, 2012.

<sup>166</sup> Trefis, *Zynga CEO Confirms Interest in Online Gambling*, MSN MONEY (Mar. 6, 2012, 2:17 PM), <http://money.msn.com/top-stocks/post.aspx?post=d99ef99b-dae2-4c5e-a43d-d6288cd4edcf>.

states, and even foreign nations.<sup>167</sup> The main barriers will be licensing and tax-revenue sharing. But multistate and multinational lotteries have overcome these difficulties and set a Powerball precedent for interstate cooperation in large-scale gambling.<sup>168</sup> So long as they stay away from sports betting, there is almost no federal barrier to having truly international gambling games.<sup>169</sup>

The U.S. Constitution does have a provision that requires states to get congressional approval before entering into “[a]greement[s] or [c]ompact[s]” with other states or nations.<sup>170</sup> The courts have limited this “Interstate Compact Clause” to agreements that are “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”<sup>171</sup> The Ninth Circuit has gone even further, ruling that congressional consent is not required for joint state activity that does not affect the federal government’s authority.<sup>172</sup> It certainly was not an obstacle to states when they created the now commonplace multi-state lotteries.

It is possible for Nevada to expand its pool of Internet poker players without having an express agreement with any other government. England allows gaming jurisdictions to apply for inclusion on its “White List.”<sup>173</sup> Licensing regimes in Antigua and Alderney have already been approved to accept bets from residents of the U.K.<sup>174</sup> State governments in the U.S. could follow England’s example. They can simply change their laws to allow their residents to bet at sites licensed by other states or nations that meet their standards. And they can unilaterally do the opposite: allow their licensed sites to accept online poker players from other states and nations where such betting is legal, such as the United Kingdom. Getting on the U.K.’s White List would merely allow Nevada’s licensed operators to also

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<sup>167</sup> See U.S. CONST. art. I, § 10, cl. 3 (noting that with congressional approval a state may enter into agreements with other states or with foreign nations).

<sup>168</sup> See 18 U.S.C. § 1301 (2006) (stating that “business of procuring for a person in 1 State . . . [an] interest in a lottery . . . conducted by another State” is subject to criminal penalty “unless that business is permitted under an agreement between the States in question or appropriate authorities of those States”).

<sup>169</sup> See DOJ Memo, *supra* note 2, at 12 (“[T]he [Wire] Act’s prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.”).

<sup>170</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>171</sup> *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

<sup>172</sup> *Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1363 (9th Cir. 1986).

<sup>173</sup> See *Guide to Gambling Advertising Codes*, U.K. GAMBLING COMM’N (Sept. 2010), <http://www.gamblingcommission.gov.uk/PDF/Guide%20to%20gambling%20advertising%20codes%20-%20September%202010.pdf> (“The ‘[W]hite [L]ist’ is a list of jurisdictions which are allowed to advertise gambling within the UK.”).

<sup>174</sup> *Do I Need a License—Remote (Including Online Gambling)?*, GAMBLING COMM’N, [http://www.gamblingcommission.gov.uk/gambling\\_sectors/remote/getting\\_a\\_licence-what\\_you\\_need\\_to\\_i\\_need\\_a\\_licence.aspx](http://www.gamblingcommission.gov.uk/gambling_sectors/remote/getting_a_licence-what_you_need_to_i_need_a_licence.aspx) (last visited Sept. 1, 2012).

advertise in England.<sup>175</sup> Of course, it would be better first to have detailed agreements in place, to handle questions of licensing and taxation reciprocity.

In the future, federal oversight and regulation of Internet gaming is possible. Certainly, many advocacy and industry groups are still in favor of a national regulatory scheme.<sup>176</sup> This would not fundamentally change the states' regulatory schemes: states have to be able to opt in or out. Gambling laws have always been decided by the states, and Congress would never impose the same gambling policy on Nevada as it would on Utah.<sup>177</sup> Perhaps the largest issue that remains unresolved is the potential federal taxation of interstate Internet gambling.

### B. State Legalization of Internet Gambling

This surprise change in law from the DOJ will spur states to pass new legislation expanding gambling operations. 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.<sup>178</sup> These regulations were revised in February 2012, and are now complete.<sup>179</sup> Over twenty casino operators, gaming equipment makers, and service providers have applied for intrastate Internet licenses, and expect to be vetted starting this summer.<sup>180</sup> Nevada's eleven-member Gaming

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<sup>175</sup> See DOJ Memo, *supra* note 2, at 2 (stating that “unlawful Internet gambling” under the UIGEA refers to the online placement, receipt, or transmission of a bet “in a jurisdiction where applicable federal or state law makes such a bet illegal”); see also U.K. GAMBLING COMM’N, *supra* note 161 (explaining that the White List consists of jurisdictions “allowed to advertise gambling” in the United Kingdom).

<sup>176</sup> See, e.g., Frank J. Fahrenkopf, Jr., *Federal Online Gambling Legislation Needed Now More than Ever*, AM. GAMING ASS’N (Feb. 1, 2012), <http://www.americangaming.org/newsroom/op-eds/federal-online-gambling-legislation-needed-now-more-than-ever> (articulating the American Gaming Association’s position that Congress should enact federal legislation to “prevent a patchwork quilt of rules and regulations governing domestic online gambling”).

<sup>177</sup> See Brian Pempus, *Utah Gov. Pens Letter Against Fed. Web Poker Bill*, CARD PLAYER (Apr. 12, 2012), <http://www.cardplayer.com/poker-news/13134-utah-governor-pens-letter-against-federal-online-poker-bill> (“Gaming issues traditionally have been regulated by state governments. It is a matter of both constitutional and social preference that matters relating to gaming be regulated by states for the benefits of their residents. The recent U.S. Department of Justice ruling clarifies and reaffirms that this is a matter of state authority.” (quoting Letter from Gary R. Herbert, Governor of Utah, to Rep. John Boehner, U.S. House Speaker, and Sen. Harry Reid, Majority Leader)).

<sup>178</sup> Nevada approved the regulations the day before the Obama Administration released the memorandum. Alexandra Berzon, *Nevada Set for Online Poker*, WALL ST. J., Dec. 22, 2011, at A3 (“Nevada’s new regulations could allow the state’s casino companies to operate gambling websites limited to players within Nevada’s borders . . . [Such] websites . . . could be up and running before the end of next year if the gaming commission votes to allow them.” (quoting Mark Lipparelli, Chairman of Nevada Gaming Control Board)).

<sup>179</sup> State of Nev. Gaming Control Bd., *Minimum Internal Control Standards, Interactive Gaming*, Mar. 20, 2012, <http://gaming.nv.gov/modules/showdocument.aspx?documentid=4553>.

<sup>180</sup> Howard Stutz, *South Point in Line for Poker*, LAS VEGAS REV. J., Aug. 9, 2012, at 1D.

Policy Committee, which has not met since 1984, has planned several meetings for 2012 to address the state's interest in online gaming.<sup>181</sup> Nevada has issued Internet gaming licenses, and online poker has been temporarily approved for as early as fall 2012.<sup>182</sup> However, Nevada is unlikely to license true Internet casinos as long as the state's brick and mortar casinos fear the competition.

The U.S. Virgin Islands has legislation in place to allow Internet casinos.<sup>183</sup> Now that the DOJ and the Wire Act are no longer barriers, it seems the territory's regulators could start issuing licenses. However, the U.S. Virgin Islands has a small population and successful local gaming operators are trying to expand land-based casinos in new areas of the islands where competition from giant outside companies is likely unwelcome.<sup>184</sup> Therefore, there has been little movement, even after the Christmas announcement.

But another small jurisdiction, Delaware, has jumped at the opportunity to expand gambling onto the Internet. The state already relies on tax revenue from legal gambling for seven percent of the state budget, representing its fourth largest income source.<sup>185</sup> Although it is the third state or territory to pass enabling legislation, behind Nevada and the U.S. Virgin Islands, Delaware will be the first to have functioning full casinos online.<sup>186</sup> In June 2012, Delaware legalized Internet video lottery and games like poker, blackjack, and roulette.<sup>187</sup> This expansion of gambling was intended to place Delaware at the forefront, to compete with expanded land-based gambling in Maryland, New Jersey and Pennsylvania.<sup>188</sup> Of course, the regulations are immense and the licensing fees are staggering for operators of Internet games.<sup>189</sup> Delaware has not worked out the

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<sup>181</sup> See *Pushing Nevada Toward Online Gaming*, CBS LAS VEGAS (Mar. 28, 2012, 2:41 PM), <http://lasvegas.cbslocal.com/2012/03/28/pushing-nevada-toward-online-gaming/> (noting Governor Sandoval's calling together of the Gaming Policy Committee to evaluate online gaming economic development opportunities); see also Richard N. Velotta, *Internet Gambling Prompts Rare Meeting of Gaming Policy Committee*, VEGASINC. (Mar. 28, 2012, 4:38 PM), [www.vegasinc.com/news/2012/mar/28/internet-gambling-prompts-rare-meeting-gaming-poli/](http://www.vegasinc.com/news/2012/mar/28/internet-gambling-prompts-rare-meeting-gaming-poli/) (noting Gaming Policy Committee's objective in recommending public policy positions and suggesting bill drafts in advance of 2013 legislative session).

<sup>182</sup> Stutz, *supra* note 151.

<sup>183</sup> See Virgin Islands Internet Gaming and Internet Gambling Act, VI. CODE ANN. tit. 32, §§ 601–46 (2012) (providing for the licensure and regulation of approved Internet gaming and gambling services).

<sup>184</sup> See Daniel Shea, *Senate Committee Holds Casino Bills*, VIRGIN IS. DAILY NEWS, Mar. 3, 2012 (noting concerns about impact of St. Thomas' casino development on St. Croix's tourism industry).

<sup>185</sup> Michael Cooper, *Casino Boom Has States Looking to the Internet for Gambling Dollars*, N.Y. TIMES, Aug. 3, 2012, at A13.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> DEL. CODE ANN., tit. 29, § 4815(c), amended by H.B. 333, 146th Gen. Assemb. (2012), <http://www.delcode.delaware.gov/sessionlaws/ga146/chp285a.pdf> (“[T]he first \$3,750,000 of proceeds

regulatory oversight for private operators, but hopes to have online lottery operational by early 2013.<sup>190</sup>

In New Jersey, the Democratic-controlled Legislature approved intrastate online gaming in early 2011, by a vote of 32-4 in the State Senate and 63-11 in the Assembly, but the bill was vetoed by Republican Governor Chris Christie.<sup>191</sup> At that time, Governor Christie called the bill a “legal fiction” because bets could take place throughout New Jersey, though the New Jersey Constitution restricts gambling to Atlantic City, except horseracing and lottery tickets.<sup>192</sup> Democratic State Senator Raymond Lesniak has continued to push for increased sports betting and online betting.<sup>193</sup> Future bills may not limit online patrons to New Jersey, as his original bill did, but could accept players from any other state and nation where Internet gambling is legal. Online gambling could also be allowed through constitutional amendment, to eliminate limitation to Atlantic City. Governor Christie, already depicted as governor of Atlantic City, has backed the New Jersey legislature’s desire to increase legal gambling revenue and has vowed to start new sports betting operations, despite the federal prohibition in PASPA.<sup>194</sup> He has made it clear that he will support expanded gambling operations, even when the federal law prohibits state-authorized betting parlors.

The newest New Jersey Internet gambling bill passed its Senate Committee April 3, 2012, and is up for vote shortly.<sup>195</sup> This bill allows casinos to operate gambling operations in Atlantic City, taking bets from throughout the state on games approved by regulatory authorities with a ten percent tax on gross revenues.<sup>196</sup> Lesniak believes this bill is essential to the survival of Atlantic City casinos, but it has been postponed until Fall 2012.<sup>197</sup> However, New Jersey did pass a law, signed by Governor

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in each fiscal year shall be transferred to the State Lottery Fund for the benefit of the State.”)

<sup>190</sup> Editorial, *What’s the Rush?*, BALTIMORE SUN, Aug. 6, 2012, at 12A.

<sup>191</sup> John Brennan, *Online Gaming Left in Limbo After Hearing*, THE RECORD (Bergen County, NJ), Mar. 6, 2012, at A4.

<sup>192</sup> *Id.*

<sup>193</sup> Bob Jordan, *You Can Bet on a Super Weekend*, ASBURY PARK PRESS (NJ), Feb. 3, 2012 (“New Jersey’s gambling industry, our casinos and racetracks, employ thousands, produce billions (of dollars) in revenues, and hundreds of millions for the state treasury. Those industries are in decay and in danger of dying. Without an infusion of new revenues from sports betting and online gaming, they will die.” (quoting Sen. Lesniak)).

<sup>194</sup> See Parmley, *supra* note 70.

<sup>195</sup> S. 1565, 215th Leg. (N.J. 2012), available at [http://www.njleg.state.nj.us/2012/Bills/S2000/1565\\_I1.pdf](http://www.njleg.state.nj.us/2012/Bills/S2000/1565_I1.pdf).

<sup>196</sup> *Id.* § 9.

<sup>197</sup> Matthew Kredell, *Lesniak Expects New Jersey’s Internet Poker Bill to Reach Finish Line*, POKERNEWS (Apr. 13, 2012), <http://www.pokernews.com/news/2012/04/lesniak-new-jerseys-internet-poker-bill-finish-line-12447.htm> (“This time it looks like we are going to reach the finish line. It’s just taking longer than I hoped for. . . . The casinos really need it. They want it. Really, it’s the only way some of them will survive.” (quoting Sen. Lesniak)); Matthew Kredell, *Lesniak Says New Jersey Internet Gambling Bill Not Likely to Be Voted On Until Fall*, POKERNEWS (May 31, 2012),

Christie, allowing gambling on mobile devices within Atlantic City casinos.<sup>198</sup>

In Massachusetts, Norfolk Representative Daniel Winslow proposed Amendment 827 to the State's 2012 budget which would allow licenses for Internet poker.<sup>199</sup> The licenses would cost ten million dollars plus taxes on gross revenue.<sup>200</sup> Representative Winslow stated, "Internet poker is a game of skill that fits our high tech job profile perfectly."<sup>201</sup> The amendment has prompted a commission examining the licenses and has been endorsed by Harvard Law School Professor Charles Nesson.<sup>202</sup>

Iowa was closest to legalizing Internet poker until its legislation was defeated in March 2012. This is the third year the Legislature has considered the issue.<sup>203</sup> In 2011, the Iowa Legislature commissioned a study on legalizing Internet gambling, which concluded that intrastate poker could be operated safely and would raise money. The Iowa bill would have allowed licensees to operate intrastate poker, with between twenty-two and twenty-four percent of gross revenue to the state.<sup>204</sup> The bill passed in the Iowa Senate, by a vote of 29-20, but the House failed to consider it in time, claiming little interest in the bill.<sup>205</sup> The Iowa Legislature meets for only one hundred days, and the bill will likely be reintroduced in 2013.

In California, Senate leader Darrell Steinberg joined with Senator Roderick Wright to introduce S.B. 1463 on the last day for legislation to be proposed this year, February 24, 2012.<sup>206</sup> The bill authorizes intrastate

<http://www.pokernews.com/news/2012/05/lesniak-says-new-jersey-internet-gambling-bill-voted-fall-12761.htm>.

<sup>198</sup> *Mobile Gambling Coming to Atlantic City*, CBS N.Y. (Aug. 8, 2012, 3:50 PM), <http://newyork.cbslocal.com/2012/08/08/mobile-gambling-coming-to-atlantic-city/>.

<sup>199</sup> Amend. 827, H. 4100, 187th Gen. Court (Mass. 2012), available at <http://www.malegislature.gov/Budget/FY2013/House/ChamberActions>.

<sup>200</sup> *Id.* § 32 (modifying § 11A(b)).

<sup>201</sup> *State Rep: Online Poker Fits Bay State Tech Profile*, BOS. HERALD, Apr. 19, 2012.

<sup>202</sup> Charles Nesson, *Massachusetts Should Embrace Online Poker*, BOS. GLOBE, Sept. 16, 2011.

<sup>203</sup> Jason Clayworth, *Iowa Lawmakers Considering Online Gambling*, DESMOINESREGISTER.COM, (Feb. 26, 2010, 12:05 PM), available at <http://blogs.desmoinesregister.com/dmr/index.php/2010/02/26/iowa-lawmakers-considering-online-gambling>; Jennifer Jacobs, *Internet Gambling Bill Takes a Step Forward in the Iowa Senate*, DESMOINESREGISTER.COM, (Mar. 2, 2011, 6:12 PM), available at <http://blogs.desmoinesregister.com/dmr/index.php/2011/03/02/internet-gambling-bill-takes-a-step-forward-in-the-iowa-senate>.

<sup>204</sup> S.S.B. 3164 § 6, modifying § 99F.4E(2)(d)(2), 84th Gen. Assemb. (Iowa 2012), available at [http://coolice.legis.iowa.gov/linc/84/external/SF2275\\_Reprinted.pdf](http://coolice.legis.iowa.gov/linc/84/external/SF2275_Reprinted.pdf) (The wagering tax "imposed on adjusted gross receipts from internet wagering . . . pursuant to [Code] section 99F.11 shall be twenty-two percent or, if a majority of participating licensees . . . are otherwise subject to a [wagering tax] of twenty-four percent . . . under [Code] section 99F.11, twenty-four percent").

<sup>205</sup> James Q. Lynch, *Paulsen Says Online Poker Proposal Is Dead*, THE GAZETTE (DES MOINES), Mar. 16, 2012, at 6A.

<sup>206</sup> S.B. 1463, 2011–2012 Sess. (2012 Cal.), available at [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_1451-1500/sb\\_1463\\_bill\\_20120224\\_introduced.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1463_bill_20120224_introduced.html).

Internet gambling with ten-year licenses regulated by state authorities.<sup>207</sup> The license allows “games commonly referred to as poker” for two years, and then all games approved by state administrators and the state legislature.<sup>208</sup> Only operators who have had a California gaming license for three years are eligible to apply.<sup>209</sup> The bill requires a nonrefundable license fee of \$30,000,000, plus ten percent of gross revenues, plus regulatory fees to be determined by the California Department of Justice.<sup>210</sup> This bill was pulled before it made it to a committee hearing.<sup>211</sup>

Hawaii and Mississippi saw bills fail quickly in 2012. Mississippi’s online gambling statute would have allowed all casino games online, but died quickly in committee.<sup>212</sup> Hawaii’s online gambling bill lowered the gambling age to eighteen and allowed lottery and skill-based games.<sup>213</sup>

<sup>207</sup> *Id.* § 19990.20.

<sup>208</sup> *Id.* §§ 19990.14(b)–(c) (“For the first two years following the initial issue date of any license pursuant to this chapter, only games commonly referred to as poker, the play of which is permitted as a controlled game pursuant to Chapter 5 (commencing with Section 19800), shall be authorized. After that two-year period, the department may phase in other games allowed under the California Constitution and the Penal Code. (c) Within 90 days of the department’s approval of any new game, the Legislature may reject, by resolution adopted by majority vote of either house, any new game approved by the department after the initial two-year period of poker only games.”).

<sup>209</sup> *Id.* § 19990.21(b) (“Entities eligible to apply for a license pursuant to this chapter for the operation of an intrastate Internet gambling Web site include all of the following: (1) A holder of an owner license issued pursuant to subdivision (a) of Section 19851 who has been subject to oversight by, and in good standing with, the commission for the three years immediately preceding its application for licensure. (2) A federally recognized California Indian tribe operating a casino pursuant to a tribal-state gaming compact under the federal Indian Gaming Regulatory Act of 1988, that has been subject to oversight by, and in good standing with, the commission and the department for the three years immediately preceding its application for licensure. (3) A thoroughbred, quarter horse, or harness association licensed by the California Horse Racing Board that has been subject to oversight by, and in good standing with, the board for the three years immediately preceding its application for licensure. (4) An operator of an online advanced deposit wagering site regulated by the California Horse Racing Board that has been subject to oversight by, and in good standing with, the board for the three years immediately preceding its application for licensure.”).

<sup>210</sup> *Id.* § 19990.58 (“(a) Any entity licensed to operate an intrastate Internet gambling Web site shall remit to the Treasurer for deposit in the General Fund a nonrefundable license fee in the amount of thirty million dollars (\$30,000,000). This amount shall be credited against fees imposed pursuant to subdivision (b) on the licensee’s gross gaming revenue proceeds for the first three years of operation. Upon depletion of the license fee, the department shall notify the licensee to commence monthly payments to the state in accordance with subdivision (b). (b) A licensee shall remit to the Treasurer on a monthly basis for deposit in the General Fund, an amount equal to 10 percent of its gross revenues. . . . (c) Each licensee shall pay a regulatory fee, to be deposited in the Internet Gambling Fund as established by Section 19990.86, in an amount to be determined by the department for the actual costs of license oversight, consumer protection, state regulation, problem gambling programs, and other purposes related to this chapter.”).

<sup>211</sup> Mark Anderson, *Online Gambling Bill Folds Before Hearing*, SACRAMENTO BUS. J. (June 13, 2012, 2:14 PM), <http://www.bizjournals.com/sacramento/news/2012/06/13/online-gambling-bill-pulled-before-heri.html>.

<sup>212</sup> H.B. 1373, 2012 Leg., Reg. Sess. (Miss. 2012), available at <http://billstatus.ls.state.ms.us/documents/2012/pdf/HB/1300-1399/HB1373IN.pdf>.

<sup>213</sup> H.B. 2422, 26th Leg. (Haw. 2012). Hawaii has no commercial gambling, not even a state lottery. Matt Canham, *Herbert to Congress: Don’t Legalize Online Gambling*, SALT LAKE TRIB., Apr.

Maryland lawmakers are not even considering a bill, after a brief memo mention garnered media attention in the state.<sup>214</sup>

Meanwhile, Utah passed a bill, which clarifies that online gambling remains illegal in the state of Utah for bettors and providers.<sup>215</sup> The sponsor of the bill claims it is an effort to preserve Utah's no-exceptions anti-gambling position, even in the face of what advocates see as potential Congressional interference through federal laws.<sup>216</sup> The bill requires Utah to opt out of any national gambling efforts and claims to preempt any federal law allowing Internet gambling in Utah.<sup>217</sup> After signing the bill, Utah Governor Gary Herbert sent a letter to Senate Majority Leader Reid and House Speaker John Boehner opposing federal efforts to legalize Internet gambling.<sup>218</sup> The political and legal reality is that there is no possibility that Congress would ever force Utah to accept any form of legal gambling. In the history of the United States, only PASPA has attempted to overrule states on their public policies toward gambling, and even that statute looked to the states and locked in their decisions toward sports betting. Every other bill ever introduced in Congress involving gambling has expressly allowed states to decide for themselves what their gambling policies will be.

### C. *International Gambling*

Although the DOJ Opinion was based on intrastate gambling, its conclusion suggests the lifting of federal restrictions also applies to international transactions.<sup>219</sup> Now there is now nothing stopping states from entering into compacts for online gambling with other states, as well

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12, 2012. The bill would have created a state lottery, but the only one in the nation with sales restricted to the Internet.

<sup>214</sup> John Wagner, *Internet Gaming won't Be in Maryland Gambling Mix*, WASH. POST MD. POL. BLOG (Aug. 7, 2012, 10:09 AM), [http://www.washingtonpost.com/blogs/maryland-politics/post/internet-gaming-wont-be-in-maryland-gambling-mix/2012/08/07/022dbb76-e094-11e1-8fc5-a7def1fc161d\\_blog.html](http://www.washingtonpost.com/blogs/maryland-politics/post/internet-gaming-wont-be-in-maryland-gambling-mix/2012/08/07/022dbb76-e094-11e1-8fc5-a7def1fc161d_blog.html).

<sup>215</sup> Canham, *supra* note 213.

<sup>216</sup> Robert Gehrke, *Bill Affirms Utah's Anti-Gambling Stance*, SALT LAKE TRIB., Mar. 3, 2012 (“[The bill] preserves what Utah has been, which is a state that does not recognize gambling,” said Sen. John Valentine, R-Orem. “Were we to recognize Internet gambling, or were we to allow [the congressional bill] to take effect, the Indian Gaming Regulatory Act could easily be used as a method to give casino gambling for Utah.”) (second alteration in original)).

<sup>217</sup> H.B. 108 2012 Leg., Gen. Sess. (Utah 2012) (to be codified at UTAH CODE §§ 76-10-1102(4) to (5)), *available at* <http://le.utah.gov/~2012/bills/hbillamd/hb0108.htm> (“(4) If any federal law is enacted that authorizes Internet gambling in the states and that federal law provides that individual states may opt out of Internet gambling, this state shall opt out of Internet gambling in the manner provided by federal law and within the time frame provided by that law. (5) Whether or not any federal law is enacted that authorizes Internet gambling in the states, this section acts as this state's prohibition of any gambling, including Internet gambling, in this state.”).

<sup>218</sup> Canham, *supra* note 213.

<sup>219</sup> DOJ Memo, *supra* note 2, at 12 (“In sum, the text of the Wire Act and the relevant legislative materials support our conclusion that the Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.”).

as with foreign nations. Because the Wire Act still applies for international betting, its only restrictions are on sports betting and lotteries; the activities must be legal under the local laws where the bettor and operator are, and there can be no impact on federal sovereignty and thus no violation of the U.S. Constitution's Compact Clause.

States 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. International operators are very interested in the United States market, and are more than willing to cooperate with states to expand their reach.<sup>220</sup>

Internet gambling has been available in other jurisdictions for many years, and foreign providers are already eyeing online operations in Nevada and have applied for Nevada gambling licenses.<sup>221</sup> United States operators are also pairing with more experienced, foreign online operators to prepare for online gambling.<sup>222</sup>

One of the ironies of the DOJ Memorandum is that it does nothing to clarify the problem created by Antigua's successful challenge of American federal law at the WTO. The WTO held that the U.S. was discriminating against Antigua's Internet racebooks because Congress enacted the IHA, but there was no comparable International Horseracing Act. In practice, there is actually quite a bit of betting across national borders, including Americans betting on races in Canada and Hong Kong, and Canadians and Mexicans betting on races in the U.S. But these bets technically do violate the Wire Act, and do not fall under the IHA, which has detailed definitions

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<sup>220</sup> *Internet Gambling Regulation, Consumer Protection, and Enforcement Act: Hearing on H.R. 2267 Before the H. Comm. on Fin. Servs.*, 111th Cong., 2nd Sess. 55 (2010) (statement of Tom Malkasian, Vice Chairman of the Board, Commerce Casino) ("If the Congress were ever to decide to legalize marijuana, certainly no one would suggest that the first federal permits to sell it should go to the Tijuana drug cartel since they have the most money and experience in marketing and distributing the product. Yet illegal foreign gaming interests are suggesting just that for Internet gaming, lobbying hard in DC to ensure that HR 2267 is not modified to exclude them based on their past misdeeds. Let's face it. Overseas Internet gaming operators are currently spending millions on lobbying front groups, such as the Safe and Secure Internet Gaming Initiative, hoping to leave as many regulatory loopholes unplugged as possible.").

<sup>221</sup> Chris Sieroty, *William Hill Has Revenue Increase*, LAS VEGAS REV. J., Feb. 28, 2012, at 1D ("[William Hill, PLC] will be selective in where it takes its brand outside the United Kingdom. . . . [The CEO] said the company was 'keeping an eye on where online could be going.' [The CEO] told gaming analysts in a conference call that William Hill has applied for a full gaming license in Nevada, putting the British bookmaker in a 'very strong position.'").

<sup>222</sup> Howard Stutz, *To Ready Itself for Net Gaming, Bally Acquires Internet Gaming Platform*, LAS VEGAS REV. J., Feb. 24, 2012, at 3D ("Slot machine giant Bally Technologies said Thursday it acquired an Internet gaming platform from a European company that it plans to use to help its casino customers enter the online gaming world. The transaction, however, does not mean Bally wants to launch it [sic] own Internet gaming website. The company, which has an application pending with Nevada gaming regulators under the state's newly enacted Internet poker regulations, plans to use the technology with casino companies seeking both free play and wager-based gaming websites.").

of what constitutes a “state” for interstate horseracing.<sup>223</sup> The DOJ’s declaration that the Wire Act is limited to cross-border betting on sports and races does nothing to solve the problems created by the WTO decision, since that was based on the Wire Act prohibiting Antigua’s racebooks from taking online bets from America. It should also be noted that the WTO stated, in dicta, that even U.S. state laws violate America’s GATS commitment to accept legal gambling from other countries that signed that treaty.<sup>224</sup> President Bush unilaterally abrogated that treaty commitment, but it is not clear whether he had the power to change the treaties of the United States without Senate approval.

#### D. *Expanding Sports Betting*

As gambling continues to expand, PASPA probably will not endure. As more and more types of legal gambling are added, some states will likely want to add sports betting, as a natural extension of the Third Wave of legalized gambling. Even states with grandfathered-in permissions under PASPA may wish to expand their sports betting operations beyond their 1970s and 1980s scope, such as adding Internet sports betting or other new kinds of sports betting. Delaware, for example, is unhappy being limited to parlay bets.<sup>225</sup>

PASPA grandfathers-in sports betting policies in Nevada, Delaware, and almost a dozen other states, while prohibiting states from later legalizing sports betting or expanding the grandfathered operations. PASPA in its modern incarnation now has haphazard exceptions including jai alai from PASPA definitions, likely fantasy sports from UIGEA’s loopholes, and the gray area of some state’s Calcutta pools.<sup>226</sup> Perhaps

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<sup>223</sup> See 15 U.S.C. § 3002(2) (“‘State’ means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.”).

<sup>224</sup> Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW 36–38 (Mar. 30, 2007), available at <http://www.antiguawto.com/wto/72Article215Paneldecision.pdf>; see also Panel Report, *United States—Measures Affecting the Cross-Border Supply of the Gambling and Betting Services*, WT/DS285/R 227–28 (Nov. 10, 2004), available at [http://www.antiguawto.com/wto/37\\_WTO\\_Panel\\_Report\\_%2010Nov04.pdf](http://www.antiguawto.com/wto/37_WTO_Panel_Report_%2010Nov04.pdf) (finding Louisiana, Massachusetts, South Dakota, and Utah statutes in violation of GATS).

<sup>225</sup> See *Nat’l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1376, 1391 (D. Del. 1977) (discussing legislative and government support for expanded betting operations).

<sup>226</sup> Questions about PASPA’s applications persist in other state laws. For Alaska, see ALASKA STAT. § 05.15.180(h) (2010) (discussing Calcutta pools on amateur and professional sports, which may not be grandfathered). For Delaware, see DEL. CODE ANN. tit. 29 § 4805(b)(4) (2003) (discussing state lottery games based on sporting events). For Montana, see MONT. CODE ANN. § 23-7-103(4)(a) (2011) (considering state lottery games based on sporting events); §§ 23-5-501–503, 23-5-512–513 (considering sports tab games and sports pools); §§ 23-5-501, 23-5-221–222 (suggesting that licensed operators may conduct Calcutta pools on sports events, except elementary and high school sports and horse races). For Nevada, see NEV. REV. STAT. ANN. §§ 463.0136, 463.0193, 463.1600 (2007) (discussing use of “associated equipment” for licensed sportsbooks). For New Jersey, see 138 CONG. REC. S17434-01 (daily ed. Oct. 7, 1992) (statement of Sen. Bradley) (suggesting qualified

more troubling is its procedural means for enforcement. Sports betting is not regulated or enforced by federal authorities; instead, professional sports organizations can obtain injunctions against generally immune state governments and agents.<sup>227</sup>

The constitutional arguments against PASPA are beyond the scope of this Article, but there are many, and there is good reason to believe that PASPA will be declared unconstitutional.<sup>228</sup> Even at the bill's passage, Senator Charles Grassley of Iowa and the DOJ argued PASPA was unconstitutional.<sup>229</sup> PASPA is vulnerable to constitutional challenges based on its procedural mechanisms, its unequal treatment of states under the Commerce Clause, and its trampling on an area traditionally governed by states.<sup>230</sup> PASPA is a facially unprecedented law, giving sports organizations the ability to trump state legislators, while claiming high moral ground and little legal precedent. It is likely the only federal law in history that tells states they cannot change their position on gambling, simply freezing the status quo. In the words of Professor Rose, "It is as legally irrational as saying that only some states can have movie theaters with sound."<sup>231</sup>

Serious challenges to PASPA are pending, which resist PASPA's constitutional authority to prohibit states from expanding their sports

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organizations may conduct Calcuttas on amateur sports events). For New Mexico, see 138 CONG. REC. S18,332-01 (daily ed. Oct. 29, 1992) (statement of Sen. DeConcini) (discussing "Keirin" parimutuel wagering on bicycle races). For North Dakota, see N.D. CENT. CODE ANN. §§ 53-06.1-03(1)(a)-06.1-09 (2007) (suggesting nonprofit organizations may run sports pools on professional sports events); § 53-06.1-07.3 (suggesting eligible organizations may conduct Calcuttas). For Oregon, see OR. REV. STAT. § 461.213 (2011) (considering state lottery games based on sports). For Washington, see WASH. REV. CODE § 9.46.0335 (2005) (suggesting that anyone can conduct low-limit sports pools). For Wyoming, see WYO. STAT. ANN. §§ 6-7-101(a)(i)-101(a)(iii)(F) (2011). In addition, Connecticut, Florida, Nevada, Puerto Rico, and Rhode Island allow betting on jai alai (pelota), which is clearly sports betting, even though defined out of the PASPA. See 28 U.S.C. § 3704(a)(4) (2006) (stating that PASPA "shall not apply to . . . parimutuel animal racing or jai-alai games").

<sup>227</sup> 28 U.S.C. § 3703 (2006).

<sup>228</sup> Students have written thorough notes on the many constitutional arguments against PASPA. See generally Anthony G. Galasso, Jr., Note, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 KY. L.J. 163 (2010) (addressing whether PASPA is unconstitutional and whether it should actually be overturned); Jason J. Ranjo, Note, *Game Over?: The Potential Demise of the Professional and Amateur Sports Protections Act*, 42 RUTGERS L.J. 213 (2010) (discussing pending a potential constitutional challenges to PASPA and how the Supreme Court might rule).

<sup>229</sup> Sports Protection Act, Pub. L. No. 102-559, 1992 U.S.C.C.A.N. 3563, 106 Stat. 4227 ("The Department is concerned that, to the extent the bill can be read as anything more than a clarification of current law, it raises federalism issues. It is particularly troubling that S. 474 would permit enforcement of its provisions by sports leagues." (quoting letter from Department of Justice to Chairman Biden)).

<sup>230</sup> See generally Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249 (2005) (arguing that the Commerce Clause includes a uniformity constraint that precludes discrimination between states under PASPA).

<sup>231</sup> Rose Testimony, *supra* note 1, at 4.

betting operations. In November 2011, New Jersey voters approved sports betting in Atlantic City casinos, and New Jersey's constitutional challenge to PASPA is now pending to allow sports betting.<sup>232</sup> As expected, the NCAA, MLB, NFL, NBA, and NHL have all sued the New Jersey government to stop the expanded sports betting, and a defiant Governor Christie has vowed to ignore the federal ban and fight the law.<sup>233</sup>

When PASPA is found unconstitutional, conflict about the Wire Act's scope will arise again. Though New Jersey's Atlantic City land-based sportsbooks may be vindicated, Internet sports wagering, including intrastate betting, may collide with the Wire Act, just as it did in Kennedy's day. The DOJ claims it can continue to use the Wire Act to shut down Internet sports betting, even if states have authorized it. The DOJ will then be faced again with the conflict between the Wire Act's prohibition of state-authorized gambling and the express provision of the UIGEA that allows legal intrastate Internet gambling, even if a wire happens to cross temporarily into another state.

#### V. ISSUES FOR TRIBES

Many tribes, especially those with established land-based gaming operations, are worried that they might not be included in this coming proliferation of state-operated and state-licensed Internet gambling.<sup>234</sup> And they have every reason to worry. For many tribes, gambling revenue is critical to the tribe. In the past, tribes have been conflicted about the issue of Internet gambling, but generally believed that if Internet gambling is permitted, Indian tribes must be on a level playing field to protect the financial interests of tribes.<sup>235</sup> After the DOJ memorandum, those concerns

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<sup>232</sup> *Id.* at 3; see *supra* text accompanying notes 196.

<sup>233</sup> Darren Heitner, *Constitutionality of Sports Betting Prohibition at Issue in NCAA and Professional Leagues' Lawsuit Against New Jersey*, FORBES (Aug. 7, 2012, 5:43 PM), <http://www.forbes.com/sites/darrenheitner/2012/08/07/constitutionality-of-sports-betting-prohibition-at-issue-in-ncaa-and-professional-leagues-lawsuit-against-new-jersey/>; *New Jersey to Allow Betting This Fall*, ESPN NEWS (May 25, 2012, 3:03 PM), [http://espn.go.com/espn/story/\\_id/7970130/new-jersey-defy-federal-law-move-forward-sports-betting](http://espn.go.com/espn/story/_id/7970130/new-jersey-defy-federal-law-move-forward-sports-betting) ("If someone wants to stop us, then let them try to stop us. We want to work with the casinos and horse racing industry to get it implemented. Am I expecting there may be legal action taken against us to try to prevent it? Yes.").

<sup>234</sup> *The U.S. Justice Department's Opinion on the Wire Act and Internet Gaming: What's at Stake for Tribes?: Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 7 (2012) (testimony of Robert Odawi Porter, President of the Seneca Nation of Indians) ("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.").

<sup>235</sup> *Internet Gambling Regulation, Consumer Protection, and Enforcement Act: Hearing on H.R.*

have become real and pressing for tribes, who fear state monopolies might exclude tribal operators.<sup>236</sup>

#### A. Working with States

Requirements for Indian gaming are clear based on the 1987 decision of the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*<sup>237</sup> and the declarations of Congress in the subsequent Indian Gaming Regulatory Act (“IGRA”).<sup>238</sup> First, what is permitted in the state? This is shorthand for requiring tribes to follow the public policy of the state toward specific forms of gambling. Second, tribes regulate gambling—sometimes with and sometimes without the aid of state or federal government—but only if the gambling is conducted on Indian lands. Tribes in Nevada can operate casinos and sportsbooks, whereas tribes in Utah cannot.<sup>239</sup>

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 any other operator competing for a limited number of Internet gambling licenses, which are issued by occasionally unsympathetic state governments.

Confining tribal gaming to Indian lands is particularly true with Class II gaming.<sup>240</sup> If a state legalized Internet bingo or poker, tribes could also conduct those games over the Internet, and would not need a tribal-

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2267 *Before the H. Comm. on Fin. Servs.*, 111th Cong. 49 (2010) (statement of Lynn Malerba, Chairwoman, Mohegan Tribe of Connecticut) [hereinafter Statement of Lynn Malerba] (“I believe there would be universal agreement among all tribes that if Internet gaming were to be permitted, Indian tribes must have the ability to participate on a level playing field with other gaming interests, and the gains that we have made as tribal nations under IGRA must not be endangered.”)

<sup>236</sup> *Reasonable Prudence in Regulation Act and Internet Gambling Regulation, Consumer Protection, and Enforcement Act: Hearing on H.R. 2266 and H.R. 2267 Before the H. Comm. on Fin. Servs.*, 111th Cong., 1st Sess. 50 (2009) (statement of Robert Martin, Chairman Morongo Band of Mission Indians) (“Let me be clear at the outset, gaming is the primary economic driver for our government. The Indian Gaming Regulatory Act of 1988 was enacted to assist tribes in the development of reservation based jobs. The revenues from gaming have enabled us to create jobs, provide education and social services; diversify our economic base; and generate substantial economic activity throughout the region. In addition, those same revenues have enabled us to return millions of dollars to local and regional governments in addition to the millions we pay to the state. Our gaming has allowed us to provide millions more in support to non-gaming tribes.”).

<sup>237</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>238</sup> 25 U.S.C. §§ 2701–21 (2006); 18 U.S.C. §§ 1166–68 (2006).

<sup>239</sup> Rose Testimony, *supra* note 1, at 2.

<sup>240</sup> See *Cabazon Band of Mission Indians*, 480 U.S. at 204–05, 212 (holding that “Pub. L. 280 does not authorize California to enforce Cal. Penal Code Ann. § 365.2 (West Supp. 1987) within the Cabazon and Morongo Reservations” to prohibit Class II gaming).

state compact. Players would, however, have to be physically present on Indian lands to participate.

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.<sup>241</sup> 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 ADW, where players fund their accounts in advance over the phone or through the Internet.<sup>242</sup> Even though a state might agree to tribal ADWs, that does not mean it must.

Courts will find that tribes can demand compacts if states legalize Internet lotteries, casinos, sports betting and other Class III gaming.<sup>243</sup> But again, courts will probably rule that the only right tribes have is for bettors to be physically present on Indian lands. They can take bets from players in the rest of the state, but only if the state agrees. If tribes are only allowed to accept bets from tribal land, they will either be unable to accept wagers from anyone outside a reservation, or they must get approval from the state government and be subject to state laws and taxation.<sup>244</sup> UIGEA 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 physically on Indian lands.<sup>245</sup> On-reservation betting on any form of gambling is a tribe’s right once a state permits that form of gambling anywhere in the state. Off-reservation betting is a privilege states might or might not grant to tribes, but it is not a tribe’s right.

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<sup>241</sup> 25 U.S.C. § 2720 (2006) (“Consistent with the requirements of this chapter, Sections 1301, 1302, 1303, and 1304 of Title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter.”).

<sup>242</sup> Rose Testimony, *supra* note 1, at 2.

<sup>243</sup> *Id.*

<sup>244</sup> Statement of Lynn Malerba, *supra* note 235, at 49–50 (“Without such a change, tribes would face two bad choices—either they would not be able to accept wagers from the vast majority of Americans who do not live on reservations, placing them at an extreme and unfair competitive disadvantage with other gaming entities, or they would have to set up their operations somewhere off of the reservation, subject to state laws and taxation.”).

<sup>245</sup> See 31 U.S.C. § 5362(10)(C) (2006) (“The term ‘unlawful Internet gambling’ does not include placing, receiving, or otherwise transmitting a bet or wager where . . . the bet or wager is initiated and received or otherwise made exclusively . . . between the Indian lands of 2 or more Indian tribes to the extent that intertribal gaming is authorized by the Indian Gaming Regulatory Act . . .”).

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.<sup>246</sup> 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 if 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: "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."<sup>247</sup> IGRA contains no similar statement referring in any way to allowing tribes to conduct any part of their gaming off Indian lands.

Even with the IGRA statement quoted above, the statement 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.<sup>248</sup> Although the decision is nonbinding, 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 been successful. The Coeur d'Alene Tribe's attempt to sell its National Indian Lottery tickets by telephone to patrons in most of the states was met with such severe legal challenges that the Lottery folded.<sup>249</sup> Many of the cases were resolved on legal technicalities.<sup>250</sup> 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.<sup>251</sup> Some judges even objected to tribes ever offering any

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<sup>246</sup> *Cabazon*, 480 U.S. at 211 (holding that California law imposing criminal penalties against Indian tribes for hosting bingo games unconstitutional because California "regulates rather than prohibits gambling in general and bingo in particular").

<sup>247</sup> 25 U.S.C. § 2701(5) (2006).

<sup>248</sup> *Confederated Tribes & Bands of the Yakama Indian Nation v. Lowry*, 968 F. Supp. 531, 537 (E.D. Wash. 1996), *vacated*, *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467 (9th Cir. 1999).

<sup>249</sup> *Rose Testimony*, *supra* note 1, at 7.

<sup>250</sup> *E.g.*, *AT&T Corp. v. Coeur d'Alene Tribe*, 283 F.3d 1156 (2002), *modified and amended by AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002).

<sup>251</sup> *See State of Missouri v. Coeur d'Alene Tribe*, 164 F.3d 1102, 1108 (8th Cir. 1999) (noting that IGRA does not completely preempt all claims that may interfere with tribal governance of gaming); *AT&T v. Coeur d'Alene Tribe*, 45 F. Supp. 2d 995, 1001-03 (D. Idaho 1998) (conducting part of gaming in a state other than Idaho, cannot fit into class III gaming within IGRA).

gambling off-reservation, even if the tribe has express permission from the state.<sup>252</sup>

We are not passing judgment on whether it is good or bad 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.<sup>253</sup> So there is nothing preventing a tribe from accepting bets off-reservation if the tribe can reach an agreement with the state.

### B. *Updating Federal Indian Gaming Law*

Unlike balanced and well-considered federal legislation, the interests of tribes were not even mentioned in the DOJ Memorandum. It will be up to tribes to find a voice and a seat at the table for future state or federal gambling regulation. Some tribes may be able to protect their gaming operations from the coming explosion of online competition; for example, they can seek protection through compacts that are already in place. But only Congress can protect the rest. IGRA's current incarnations leaves tribes ill-prepared to compete with state-wide Internet gambling.

In February 2012, the Senate Committee on Indian Affairs held a hearing, designated "The U.S. Department of Justice Opinion on Internet Gaming: What's at Stake for Tribes."<sup>254</sup> The Seneca Nation President Robert Odawi Porter, testifying for tribes, spoke with urgency. He was concerned that Internet gambling legislation would exclude Indian tribes as "inferior and irrelevant gaming operations who are incapable or meeting or exceeding [regulations]."<sup>255</sup> He compared Internet gaming to a gold rush, and suggested Indian interests relied on Congress's protection from the monopolistic control of state governments and historic exploitation of Native Americans.<sup>256</sup> He feared tribes would be left behind in Internet gambling.

The problem for federally recognized tribes is that gambling, and now Internet gambling, is a public policy decision left to the states at a time when it appears gambling will continue to expand. Historically, states democratically decide their own public policy toward gambling. Utah and

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<sup>252</sup> See, e.g., *Coeur d'Alene Tribe*, 295 F.3d at 910 (Gould, J., dissenting) (concluding that the National Indian Lottery is illegal because it did not occur on Native American lands).

<sup>253</sup> Rose Testimony, *supra* note 1, at 8.

<sup>254</sup> *The U.S. Justice Department's Opinion on the Wire Act and Internet Gaming: What's at Stake for Tribes?: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (2012).

<sup>255</sup> *Id.* at 2 (testimony of Robert Odawi Porter, President of the Seneca Nation of Indians).

<sup>256</sup> *Id.* at 7–8.

Nevada can share a common border, yet have completely different gaming laws, and thus completely different treatment of tribes. 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 the major Indian gaming law was a codification of a Supreme Court opinion.<sup>257</sup> Of course, federal attempts to expand Indian gaming rights will undoubtedly be met with strong opposition from most states.

A bill to legalize and regulate Internet gambling on a federal level has been rumored. Senators Heller and Reid of Nevada, along with Senator Kyl of Arizona, have confirmed that they are working on federal gambling legislation to allow Internet gambling, perhaps by statutorily altering the Wire Act.<sup>258</sup> The bill has not been released to the public but is expected to legalize some types of games, such as poker, while prohibiting others.<sup>259</sup> An aide for Reid stated the unreleased bill would ensure that tribes have access to the online poker market.<sup>260</sup> In February 2012, the Chairman of the Senate Committee on Indian Affairs, Hawaii Senator Daniel Akaka, presented a bill entitled the Tribal Online Gaming Act of 2012, which would designate federal authorities to oversee tribal Internet gaming; the bill, however, has been described as “skeletal.”<sup>261</sup> Meanwhile, Texas Representative Joe Barton proposed a bill to regulate online poker—the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act—which is still pending.<sup>262</sup> Despite their urgent concerns, tribes will find no help from Congress before the 2012 elections. Given how historically difficult it is to get any substantive gambling bill through Congress, the odds of the enactment of any federal law involving Internet gambling are slight. The states do not want or need federal involvement, while social conservatives are opposed to Congress expanding gambling into peoples’ homes from Washington.

## VI. CONCLUSION

President Obama’s Christmas Memorandum did what Congress has been unable to do for decades: leave Internet gambling decisions to the

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<sup>257</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>258</sup> Steve Tetreault, *Heller: Legalizing Online Poker on the Front Burner*, LAS VEGAS REV. J., July 19, 2012, at 1D.

<sup>259</sup> Steve Tetreault, *Tribes Want in on Online Gaming*, LAS VEGAS REV. J., July 27, 2012, at 5B.

<sup>260</sup> *Id.*

<sup>261</sup> Earl Burton, *Senate Hearing Present Draft for Tribal Operation of Online Poker*, POKER NEWS DAILY (July 28, 2012), <http://pokernewsdaily.com/senate-hearing-presents-draft-for-tribal-operation-of-online-poker-22244>.

<sup>262</sup> H.R. 2366, 112th Cong. (2011).

states. As Internet gambling explodes with the blessing of the states, it is likely that federal authorities will need more modern tools than the Wire Act or UIGEA. With so much Internet gambling about to become legal, Congress now needs to consider how federal laws should enter the mix and what kind of federal involvement in this field is appropriate. But that is unlikely to happen, which is bad news for tribes that are far from population centers.

States are acting with more economic urgency than they have historically. In 1962, there were no legal state lotteries in the U.S and it took more than forty-five years before almost all the states made lotteries legal.<sup>263</sup> With the unexpected Christmas gift from the Obama Administration, states are likely to quickly embrace the financial opportunity of legal Internet gambling. This time, it will not take four or five decades before Internet gambling is legal in almost every state. And many tribes may be barred from joining the gold rush.

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<sup>263</sup> INTERNET GAMING LAW, *supra* note 13, at 80–82.