

THE INDIAN GAMING REGULATORY ACT: BACKGROUND & LEGISLATIVE HISTORY

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INTRODUCTION

On October 17, 1988, Congress enacted into law the Indian Gaming Regulatory Act (P. L. 100-497; 102 Stat. 2467; 25 USC 2701 *et seq.*). It has been over two decades since the first legislation was introduced in the U. S. Congress relating to gaming on Indian lands and eighteen years since the Act was signed into law by President Ronald Reagan. In that time, many Indian tribes have used the sovereign right acknowledge by the Supreme Court in the *Cabazon* case and secured in the Indian Gaming Regulatory Act (IGRA) to achieve the stated goals of IGRA, i.e., strong tribal governments, tribal self-sufficiency, and solid economic development and growth..

When the Interior Department presented testimony to the House Interior and Insular Affairs Committee in June 1984, its statement noted that 80 Indian tribes were engaged in some form of gaming, primarily bingo, and the income from those operations was, in total, in the millions of dollars. Today, twenty years later, over 200 Indian tribes have developed some form of gaming enterprises. A July 2006 report of the National Indian Gaming Association noted that Indian gaming activities generated \$22.6 billion in gross revenues in 2005, an 18% increase over 2004. The report also notes that Indian gaming has generated, directly or indirectly, more that 600,000 jobs and \$7.6 billion in Federal revenue and revenue-savings. Twenty-eight States now have Indian gaming within their borders with casinos or gaming establishments operated by 354 tribes, from the Absentee Shawnee to the Yavapai-Prescott Tribe.

Yet, as Indian gaming has mushroomed across the Nation and as more and more Indian and non-Indian individuals and entities have become involved in the phenomenon, fewer and fewer of those individuals and entities are aware of development of IGRA and struggles involved in its enactment into law. For all too many Indian tribes, tribal leaders, and tribal gaming operators and regulators, the bottom line for Indian gaming has become the profit line, not tribal sovereignty upon which the whole structure is based.

BACKGROUND

Tribal Sovereignty & Canons of Construction

The sovereign status of American Indian tribes and the nature of their relationship to the Federal and State governments were addressed by the Supreme Court in 1831 and 1832 in the landmark cases of *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832).

Cherokee Nation.—In 1831, the Cherokee Nation, then located within the boundaries of the State of Georgia, brought an action against that State in the United States Supreme Court. In the action, the Nation ask the Court for an injunction against the State, restraining it from applying certain of its laws against the Nation in violation of the Nation’s treaties with the United States. The Nation asserted that the Court had jurisdiction over the parties because of article III of the U. S. Constitution which conferred original jurisdiction on the Court over cases involving States and which extended the judicial powers under article III to cases involving foreign nations. The Nation asserted that it was a foreign nation within the terms of article III.

Chief Justice John Marshall’s opinion opened with an apologetic statement:

“If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.”

However, before addressing the question of whether or not the laws of the State of Georgia could be extended into the territory of the Nation, Marshall addressed the question of the jurisdiction of the Court over the case. He first found that Georgia was, of course, a State within the meaning of article III. Marshall then turned to the question of the Cherokee Nation’s status within the meaning of article III. An extensive quote from the decision makes clear his finding that the Nation was not a ‘foreign’ nation, but also makes clear the relationship between the United States and Indian tribes:

“In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.

“Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to

which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

“They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

“These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a State or the citizens thereof, and foreign states.

“The peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term foreign state, were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers congress to ‘regulate commerce with foreign nations, and among the several states, and with the Indian tribes.’

“In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union.”

While the Court did not address the issue presented by the Nation, *i.e.*, that the laws of Georgia could not be applicable within the territory of the tribe, because the Court found that it did not have jurisdiction over the case, the decision clearly recognized the sovereign status of Indian tribes.

Worcester.—However, the Court did address the issue of the application of State law within Indian country in the *Worcester* case. The plaintiff in this case, a non-Indian, had been convicted in a Georgia court of "residing within the limits of the Cherokee nation" without obtaining a license from Georgia and "without having taken the oath to support and defend the state of Georgia". The issue raised was whether, under the United States Constitution, the State of Georgia has the authority to impose its laws "within the limits of the Cherokee nation". In finding that, under the Constitution, Congress had plenary power over Indian affairs and that, unless permitted by Congress, State law had no application in Indian country, Chief Justice John Marshall held:

“[The constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of

the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

* * * * *

“The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.”

It was this decision about which President Andrew Jackson, who supported the application of State law to the Nation, said, “John Marshall has his decision. Now let him enforce it”. Although Worcester and the Nation won in the Supreme Court, Worcester continued to languish in the State jail.

In the late 1800's, there was some erosion of the *Worcester* doctrine through Supreme Court decisions holding State law applicable to non-Indian activity within the boundaries of Indian reservations that did not affect Indian tribes or their powers of self-government. Nevertheless, the restriction on application of State laws within the boundaries of Indian reservations has continued, with some modification, to this day.

Nature of Tribal Sovereignty.--The most basic principle of all Indian law is that those powers that are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather “inherent powers of a limited sovereignty which has never been extinguished.” [Felix S. Cohen’s Handbook of Federal Indian Law, 1982 ed., pg. 231, citing *U.S. v. Wheeler*, 435 U.S. 313 (1978)]. Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication “as a necessary result of their status.” [*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)]. This principle guides determinations of the scope of tribal authority. (Handbook, pg. 232). The Indian Gaming Regulatory Act was premised on this fundamental principle.

The government-to-government relationship between tribes and the United States, and the trust obligation of the United States, also constrain congressional action in a procedural manner. Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress’ intent toward the tribes is benevolent and have developed canons of construction that treaties and other federal action should be read, when possible, as protecting Indian rights and in a manner favorable to Indians. These primary

canons of construction in Indian law were first developed in cases involving treaties. (Handbook, pp. 221-222) However, similar rules of construction have been applied to situations that do not involve treaties. Statutes, agreements, and executive orders dealing with Indian affairs have been construed liberally in favor of preserving Indian rights. (Handbook, pp. 223-224).

“The rules for construing federal statutes in Indian affairs have a pervasive influence in Indian law. The canons are variously phrased in different contexts, but generally they provide for a broad construction when the issue is whether Indian rights are reserved or established, *and for a narrow construction when Indian rights are to be abrogated or limited* (emphasis added). These canons play an essential role in implementing the trust relationship between the United States and Indian tribes and are involved in most of the subject matter of Indian law.” (Handbook, pp. 224-225).

State Law in Indian Country in P. L. 280 States

As noted above, the *Worcester* case and subsequent the decisions of the Supreme Court have held that that laws of a State, whether criminal or civil, do not apply to Indian tribes and Indians on Indian reservations or in Indian country, unless an Act of Congress has made such laws applicable. One such Act of Congress is Public Law 83-280 (Act of August 15, 1963, 67 Stat. 588) that conferred criminal and civil jurisdiction in Indian country on certain States and authorized other States to take necessary action to assume such jurisdiction. (*In this paper, a “280” State will also include other States that have been conferred criminal and civil jurisdiction over Indian country within its boundaries by other Federal law.*) Six States, including California, were initially granted jurisdiction under P. L. 83-280. A few others, including Florida, assumed jurisdiction under this Act before the enactment of the Indian Civil Rights Act in 1968 (25 USC 1301), which prohibited further expansion of the application of the Act without the consent of the tribes themselves.

In 1976, the Supreme Court decided the case of *Bryan v. Itasca County* (426 U. S. 373). In the *Bryan* case, the Minnesota county attempted to assess its tax upon certain property of an Indian on the reservation. The county asserted that P. L. 280 conferred civil jurisdiction on the State and its subdivision over Indian country and that, therefore, the civil laws of the State were applicable to Indians in Indian country. The *Bryan* Court, in a key decision, held that Congress, in conferring civil jurisdiction on the State of Minnesota, did not intend to make the regulatory or taxing laws of the State applicable to Indian country. Rather, the Court held that the Act merely conferred civil jurisdiction on the courts of the state to decide civil disputes between private parties, including Indians, arising in Indian country. Since it held that the regulatory and taxing laws of the state did not apply, the Court held that the county tax ordinance was not applicable to the Indian on the reservation. As will be noted later, the *Bryan* case presaged the *civil/regulatory v. criminal/prohibitory* analysis developed in later Indian gaming cases.

State Law in Indian Country in Non-P. L. 280 States

In states that do not have “280” jurisdiction or for tribes that are not subject to such jurisdiction, the laws of a state, both criminal and civil, do not generally apply to tribes and Indians within Indian country. This would not be true if there is other general or specific Federal laws relating to that state or tribe, and it is true that the Federal courts have begun to erode the general rule. Nevertheless, in determining the reach of State civil and criminal law in Indian country, Federal courts would still have to engage in the *Bryan* analysis because of the existence of the so-called Indian Assimilative Crimes Act (IACA).

In non-280 states, crimes that involve an Indian as a perpetrator or victim are not generally subject to state criminal law and the state criminal law enforcement system. The Federal Major Crimes Act (18 USC 1153), as amended, provides that an Indian committing one of several identified crimes would be subject to prosecution in Federal court. If the Federal system declined to prosecute, criminal sanctions would be left to the tribal criminal system. In addition, unless covered by some other specific Federal law, other felonies and misdemeanors not covered in the Major Crimes Act would be under the sole jurisdiction of tribal authorities.

Because of the somewhat limited nature of the general Federal criminal code, acts were often committed on Federal land that were not crimes under the Federal code, but **would** have been crimes under state law had they been committed within state jurisdiction. However, since the states have no general criminal jurisdiction on Federal land, such acts would go unpunished. To deal with this gap in Federal criminal law, Congress, at an early date, enacted the Assimilative Crimes Act (18 USC 13). Subsection (a) of that section provides:

“(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.”

The Assimilative Crimes Act (ACA) assimilates state criminal law into Federal law to fill the gaps in the Federal criminal code. Under ACA, an act committed on Federal land for which there was no Federal criminal provision could now be acted upon by Federal prosecutors using the appropriate state criminal law provision.

Subsequently, it was held that the ACA applied to the gaps in Federal criminal law with respect to acts committed in Indian country, *United States v. Marcyes*, 557 F. 2d 1361 (1977). The foundation of this ruling is the so-called Indian Assimilative Crimes Act (18 USC 1152). This Act (IACA) provides that—

“Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.”

The rationale for the *Marcyes* holding is that the ACA is one of the “general laws of the United States” that is extended to Indian country by section 1152. Therefore, it permits Federal prosecutors to “assimilate” state criminal law into Federal law for the prosecution of a person committing an act in Indian country for which there is no Federal law.

However, ACA only assimilates into Federal law the criminal laws of a state, not its civil laws, *United States v. Maryces, supra, United States v. Farris*, 624 F.2d 890 (1980). Consequently, in determining whether a state law can be assimilated into Federal law, a Federal court must apply the *criminal/prohibitory v. civil/regulatory* test set out in the *Bryan* case. If it is determined that the state law is *civil/regulatory* in nature, it is not assimilated and, therefore, is not applicable in Indian country. This is true even if the state law has attached criminal sanctions for violation of the law.

Pre-IGRA Court Decisions

Beginning in 1977 with the *Marcyes* case, the Federal courts began to explore the law with respect to gaming on Indian reservations. Around this time, a few tribes, and at least one individual Indian, had already begun to engage in certain forms of gaming, primarily bingo. As these activities were not conducted under state licensure and were often in technical violation of other state regulatory laws, state officials began to challenge the legality of these activities in Federal and state courts. The decisions in most of these early cases, such as *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (1981) and *U. S. v. Farris*, 624 F.2d 890 (1980), were favorable to the Indian side. A few, such as *U. S. v. Dakota*, 796 F.2d 186 (1986), came down on the other side of the issue. However, the Federal circuit court of appeals decisions in the *Seminole* and the *Barona* cases were the decisions that sparked the explosion in Indian gaming efforts.

Seminole & Barona.--In 1981 and 1982, two Federal appeals courts handed down decisions that confirmed the right of Indian tribes to engage in, or license and regulate, gambling activities on their reservations free of control by state law. The first decision was the October 5, 1981, decision by the (former) 5th Circuit Court of Appeals in the Florida case of *Seminole Tribe v. Butterworth* (658 F. 2d 310). The second was the December 20, 1982, decision of the 9th Circuit Court of Appeals in the California case of *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy* (694 F.2d 1185).

As noted, the State of Florida in the *Seminole* case and the State of California, in the *Barona* case exercised criminal and civil jurisdiction over Indian country under P. L. 280. In each case, the tribe involved had developed and sought to operate a bingo

gambling enterprise without a state license and under terms not in accordance with applicable state law. In each case, the tribe sued the county sheriff in Federal court to enjoin attempts to enforce state laws against the gambling enterprise.

As each state involved was a “280” state, the appeals courts had to determine whether the gambling laws of the state were applicable to the tribe and to Indian country within the state. In doing so, each court applied the *criminal/prohibitory v. civil/regulatory* test developed in the *Bryan* case. At the time of the initiation of the lawsuits in these two cases, both California and Florida law permitted certain entities, such as churches and social organizations like the Elks and the VFW, to operate bingo-gambling activities. The law imposed certain regulations upon the operation of bingo games, such as number of days in a year it might be offered, hours of the day it could be open, and limits on bets and the value of prizes. In some cases, criminal sanctions were imposed for violation of these regulations.

The two appeals courts applied the *Bryan* test to the laws of the state in terms of state’s public policy with respect to bingo in particular and gambling in general. In addition to charitable bingo, the State of Florida had a state lottery and permitted pari-mutuel gambling on horseracing and jai alai. In like manner, the State of California, along with charitable bingo, had a state lottery and permitted pari-mutuel betting and licensed betting at card parlors. The courts found that the laws and public policy of each state supported gambling. They found that the bingo laws of the state were *civil/regulatory* in nature and that, under the *Bryan* test, they were not applicable to Indian tribes and Indians in Indian country. In both cases, the relevant State appealed the decision to the Supreme Court, but the Court refused to take the appeals.

While the two decisions only applied to the states and tribes within the jurisdiction of those Federal appeals courts, it was apparent that their analysis of the applicable Federal-Indian law was sound. The state of the law, prior to the enactment of IGRA, was clear. Where the laws of a state prohibited gambling for all persons as a matter of criminal law, tribes within that state could not engage in, or license and regulate, gambling. This was because Federal law, under either P. L. 280 or IACA, made the state’s criminal law applicable in Indian country. Conversely, where state law permitted gambling and regulated it under civil laws, tribes within that state could engage in, or license and regulate, gambling free of state control. Again, this was because state *civil/regulatory* law is not applicable under P. L. 280 and is not assimilated under the IACA.

The Reagan Budget Cuts.—A major impetus for the quick spread of legalized gambling across the Nation was the drastic cuts in social programs engineered by President Reagan. Coming into office in January of 1981, the Reagan Administration quickly moved to force the Congress to either abolish many of the safety-net social programs developed in the 60’s and 70’s, such as the Comprehensive Employment Training Act (CETA), or to make deep cuts in the funding supporting these social programs. States and municipal and county governments soon found their own budgets in deep trouble because they had become dependent on these Federal funds to meet the

various needs of their citizens. Afraid to incur the political wrath of increasingly conservative constituents by raising taxes, state governments turned to revenue from state lotteries to fill the huge gaps in funding caused by the Reagan cuts.

Nowhere were the Reagan cuts more hurtful than on Indian reservations and among the Indian tribes. Lacking a realistic tax base and a thriving economy, Indian tribes, reliant upon Federal funding from traditional sources such as BIA and the Indian Health Service and increasingly upon other Federal sources, were devastated by the Reagan cuts.

Some tribes had already sought to develop tribal gambling enterprises before the appeals court decisions in the *Seminole* and *Barona* cases, notably, the Oneida Tribe of Wisconsin [see *Oneida Tribe v. Wisconsin*, 518 F.Supp. 712 (1981)]. However, the economic development possibilities of gaming were not well known in Indian country until after the decisions in those two cases. With the draconian reduction in funding of Federal programs under the Reagan Administration, Indian tribes were desperate for sources of revenue to make up for that loss. As the implications of the two Federal court decisions percolated through Indian country, gaming seemed an ideal source of revenue and there was a mini-explosion of tribal high stakes bingo and pull-tab operations.

With the rapid expansion of tribal bingo and pull-tab operations free of state control and often beyond the scope permitted under state law, there also came a harsh non-Indian backlash that was politically reflected in the U. S. Congress. While some attempts were made by certain tribes and Indian individuals to expand gaming to slot machines and other gaming devices, section 5 of the Act of January 2, 1951 (64 Stat. 1135; 15 USC 1175), the so-called Johnson Act, criminally prohibited slot machines and other gaming devices on Federal land, including Indian reservations.

LEGISLATIVE HISTORY OF IGRA

The rapid growth of gaming activities on Indian reservations and the perceived vacuum in legal authority at either the state or federal level caused political outcries from state and local authorities, representatives of the gaming industry, and from those morally opposed to gambling.

Administration Reaction

The anti-Indian backlash over Indian gaming activities occurred during the Reagan Administration. In addition to forcing the large cuts in funding for Federal programs benefiting tribes, the Reagan Administration's policies on Indian affairs were not generally favorable. As the political pressure from state and local officials and other opponents of Indian gaming increased, both administrative and legislative efforts were made by the Administration to deal with the "problem". It soon became apparent that there was no Federal law that would permit the Federal government to prohibit, restrict, or regulate otherwise legal Indian gaming on the reservation.

In 1983, the Department of Justice drafted a legislative proposal that would have amended the ACA to incorporate all state laws relating to gaming into the Act, thereby subjecting Indian tribes to the laws of a state in the same fashion as any charitable organization or business entity. This would have been a total violation of all principles of the Federal/tribal relationship and, as a practical matter, would simply have extinguished gaming as a tribal economic development tool.

In response to the Justice Department proposal, the Bureau of Indian Affairs coordinated with the Indian tribes in forming a National Indian Gaming Task Force, which was established in March of 1983. Within a short time, the membership on the Task Force was entirely tribal and BIA and the Interior Department Solicitor's Office simply provided technical assistance. (*This Task Force would later be transformed into the National Indian Gaming Association.*)

In 1984, John Fritz, the Deputy Assistant Secretary—Indian Affairs of the Department of the Interior, estimated that some 80 Indian tribes were conducting or would soon conduct bingo activities on their reservations. Of those 80 activities, some 20 to 25 were considered “high stakes” operations with unlimited jackpots and grossed between \$100,000 to over \$1 million in monthly revenues. (Hearing before the House Committee on Interior and Insular Affairs on H.R. 4566, June 19, 1984, p. 62).

The 98th Congress

As noted above, the Supreme Court, upon petitions of *certiorari*, declined to review the decisions in the *Seminole* and *Barona* cases, which were favorable to the tribes' position. Nevertheless, it was generally accepted at the time that the Court would soon be forced to address the issue. Committee staff of the House Interior and Insular Affairs Committee were concerned that, given the new conservative complexion of the Court, such a review would result in a reversal of the lower court decisions.

Implications of the Federal Pre-emption Doctrine.—There is a doctrine of Federal judicial construction known as ‘Federal pre-emption’ that has particular relevance to Federal-Indian law. Simply put, the doctrine holds that, where the Congress has enacted a regulatory scheme in a field where it is constitutionally empowered to do so, it has occupied and pre-empted the field to the exclusion of any state regulatory law. Since, as earlier noted, the Congress has plenary power over Indian affairs under the U. S. Constitution, where it legislates with respect to a particular area of Indian affairs, any application of state law otherwise permissible in the area is pre-empted and, thereby, precluded.

Implications of *Oliphant* and *Rice*—Despite the legal soundness of the lower court decisions in *Seminole* and *Barona*, the concern of the House Committee staff was not unfounded. In 1978, the Court, in the case of *Oliphant v. Suquamish Indian Tribe* (435 U.S. 191), had fashioned a new theory of law to deny tribal criminal jurisdiction over non-Indians committing a crime on the reservation. The Court found that any such jurisdiction the tribe may have had was “withdrawn by implication as a necessary result of their status”.

Even more ominous to the House Committee staff was the Court's decision in the case of *Rice v. Rehner*, 463 U.S. 713. The *Rice* case, handed down on July 1, 1983, again established a new theory of Indian law to hold that a state's liquor regulation laws, under 18 USC 1161, were applicable on an Indian reservation. A head note of the case states—

“There is no tradition of tribal sovereign immunity or inherent self-government in favor of liquor regulation by Indians. Although in Indian matters Congress usually acts ‘upon the assumption that the States have no power to regulate the affairs of Indians on a reservation,’ *Williams v. Lee*, 358 U.S. 217, 220, that assumption is unwarranted in the narrow context of liquor regulation. In addition to the congressional divestment of tribal self-government in this area, the States have also been permitted, and even required, to impose liquor regulations. The tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country is justified by the relevant state interests. Here, respondent's distribution of liquor has a significant impact beyond the limits of the reservation, and the State, independent of the Twenty-first Amendment, has an interest in the liquor traffic within its borders.”

It appeared that the Court's majority arrived at a decision and then fashioned a legal theory to support it. The decision ignored the long-standing rule of construction requiring express congressional abrogation of Indian rights.

The Supreme Court denied the State of California's request for a review of the circuit court decision in the *Barona* case soon after the 98th Congress convened in 1983. At that time, the Author was Counsel on Indian Affairs to the House Interior and Insular Affairs Committee. Given the conservative, anti-Indian complexion of the Reagan Supreme Court, as evidenced by the *Oliphant* and *Rice* cases, and the small, but growing, anti-Indian gaming backlash being felt in the Congress, and given that it was generally accepted among attorneys in the Indian Bar that the Court would, sooner or later, review an Indian gaming case, the Author was very concerned about the outcome. The Committee staff felt that, despite the soundness of the *Seminole* and *Barona* decisions, the Court would fashion a new theory of Indian law as it did in the *Oliphant* and *Rice* cases and overturn the favorable decisions of the lower court. In addition, the staff was very concerned that the rising political backlash against Indian gaming might become so strong that very adverse legislation would be the result. Finally, the staff genuinely shared the concern of some members of the Senate and House that non-Indian gaming management firms were bilking Indian tribes out of much of the financial benefits of the Indian gaming enterprises. The result of these concerns was the drafting and introduction of H. R. 4566 in the 98th Congress.

H. R. 4566—In the late Spring of 1983, the Author with his deputy, Alex Skibine, and the Republican Consultant on Indian Affairs, Michael Jackson, held meetings to draft legislation relating to gaming activities by Indian tribes. The purpose of the legislation was three-fold. First, it would be, at least on the surface, responsive to a small, but growing, backlash against Indian gaming. Second and more important, the draft bill, with minimal intrusion upon tribal sovereignty, would represent, in anticipation of a future review of the field by the Supreme Court, a Federal pre-emption of any possible state jurisdiction over Indian gaming on the reservations. Finally, it would address the only real substantive

concern about on-going Indian gaming, *i.e.* the overreaching of Indian tribes by outside management companies.

On November 18, 1983, Congressman Morris K. Udall, Chairman of the House Committee on Interior and Insular Affairs, introduced the draft legislation as H. R. 4566, a bill “To establish Federal standards and regulations for the conduct of gambling activities within Indian country”. The short title of the bill, the “Indian Gambling Control Act”, was in itself an attempt by the staff to mold opinion on the bill. Some thought was given to using the term “Gaming”, thereby avoiding the more adverse connotations of the term “Gambling”. However, since one goal of the legislation was to convince anti-Indian forces of the serious intent of Congress, the more unfavorable term, “gambling”, was used. The same was true of the term “Control”. While the underlying intent of the legislation was pre-emption, the language was designed to accomplish that goal with the least amount of intrusion into tribal sovereignty as possible. Yet, the bill needed to appear to be responsive to the anti-Indian forces. Thus, the more forceful word, “Control”, was used.

Chairman Udall, in his opening statement for the initial hearing of the Committee on Interior and Insular Affairs on H. R. 4566, explained that--

“The Federal courts, and at least two circuits, have determined that, under certain circumstances, Indian tribes may engage in or may license and regulate gambling activities on the reservations free of State licensure and regulations. H. R. 4566 does not make legal anything which is not already legal under those court decisions. The purpose of the bill is to provide some *minimum Federal standards* (emphasis added) and some protection for tribes who are otherwise engaged in legal gambling activities.”

H. R. 4566, in line with the three goals set out above, was rather simple or, perhaps, simplistic.

Section-by-Section Analysis. — As noted above, **section 1** set out the short title as the “Indian Gambling Control Act.

Section 2 of the bill set out six congressional findings. These are basically the same findings that can be found in section 2 of IGRA. Paragraph (1) of H. R. 4566 and of IGRA [25 USC 2701(1)] noted the use of gaming by tribes as a source of tribal governmental revenue. Paragraph (2) of H. R. 4566 and paragraph (5) of IGRA [25 USC 2701(5)] noted that Federal courts had found that tribes had the exclusive right to regulate gambling where Federal law and state criminal law did not prohibit it. Paragraph (4) of H. R. 4566 and paragraph (3) of IGRA [25 USC 2701(3)] noted that existing Federal laws did not provide clear standards or regulation for gaming on Indian lands. Paragraph (5) of H. R. 4566 and paragraph (4) of IGRA [25 USC 2701(4)] provided that—

“a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government”.

The primary purpose of H. R. 4566, looking toward a certain review of the question by the Supreme Court, was to federally pre-empt any possible state regulation of gambling activities by Indian tribes or individuals in Indian country. However, in recognition of the inherent right of tribes to regulate their own affairs, this was to be done *with minimal Federal intrusion on tribal sovereignty*. Therefore, in terms of understanding congressional intent in

the enactment of IGRA, it is important to consider the nearly identical congressional findings language of H. R. 4566 and IGRA.

Section 3 set out a congressional declaration that certain Federal standards for Indian gaming needed to be established to meet the concerns about the conduct of such activities and to protect the activities as a means of generating tribal revenues.

Section 4 contained definition of the terms “Secretary”, “Indian tribe”, “Indian country”, and “gambling”.

Section 5 provided that gambling in Indian country would be illegal unless conducted pursuant a tribal resolution or ordinance adopted by the tribal government and approved by the Secretary of the Interior. Criminal violations were to be prosecuted in tribal, Federal, or state courts as appropriate.

Section 6 was intended to be the substantive language that would federally preempt any state regulation of Indian gaming. Subsection (a) provided that a tribe could engage in, or license and regulate, gambling within its jurisdiction if it adopted an enabling ordinance subject to approval of the Secretary of the Interior. This substantially tracks the language of section 11(b) (1) of IGRA [25 USC 2710(b) (1)]. Subsection (b) required the Secretary to approve such an ordinance if it provided at a minimum that—

- (1) the tribe itself would conduct any proposed gambling activity, except as provided in subsection (c);
- (2) net revenues from tribal gambling operations would be used solely to fund tribal government operations or programs;
- (3) annual independent audits would be performed by the tribe; and
- (4) no individual tribal member or nontribal individual or entity would have any proprietary interest in tribal gambling operations or a percentage interest in the gross or net revenues from such operations.

In requiring the Secretary to approve the ordinance, the drafters of H. R. 4566 deliberately used the word “shall” rather than “may”. This was intended to make the Secretary’s approval ministerial rather than discretionary, as long as the tribal ordinance minimally met the four Federal standards set out in subsection (b). Again, holding in mind the primary purpose of H. R.4566, it is informative to note that section 11(b)(2) of IGRA, which is very similar to section 6(b) of H. R. 4566, provides that the Chairman of the Commission “shall” approve a tribal gaming ordinance if it meets the six minimum Federal standards.

Subsection (c) permitted tribes to license non-tribal entities to engage in gambling, but only if consistent with state law.

Subsection (d), reflecting the intent of the drafters that the Secretary’s approval of the tribal gaming ordinance be ministerial rather than discretionary, provided that the Secretary would have to approve or disapprove a submitted ordinance within 180 days. If no action was taken within that time, the ordinance would be deemed approved.

Section 7 established certain standards for gaming management contracts entered into by tribes and required secretarial approval if the contracts met those standards. It should be noted that this early language prohibited any management contract in which the management fee was based upon a percentage of the gross or net revenues of the gaming operation. The Committee had been advised that, in some cases, management companies were charging as much as 95% of such revenues as the fee.

Section 8 gave the Secretary certain record inspection and facility access powers to carry out his functions under the legislation.

This was the sum and substance of H. R. 4566. Its purposes were simple:

- (1) to forestall a possible reversal of the Federal court decisions, which had thus far supported the Indian tribes' right to engage in gaming free of state and Federal, regulation;
- (2) to protect the right of Indian tribes to continue to engage in an activity the Federal courts had found to be legal;
- (3) to quell a growing political groundswell to make Indian gaming subject to state law and regulation: and
- (4) to provide protection for the tribes against overreaching management firms.

All of these purposes were to be achieved with minimal Federal intrusion into tribal sovereignty and consistent with the right of tribal self-government.

House Hearings on H. R. 4566--On June 19, 1984, the House Committee on Interior and Insular Affairs held a hearing on H. R. 4566 (*Hearing before the Committee on Interior and Insular Affairs, House of Representatives, 98th Congress, 2nd Session, June 19, 1984, Serial No. 98-46*). Congressman Bill Richardson, Democrat of New Mexico, opened the hearing for Chairman Udall, but did read into the record a statement by Mr. Udall that contained the following language—

“The hearing today is exploratory in nature. It will help the Interior Committee determine if there are problems and concerns associated with gambling on Indian reservations which need our attention. It will also help to determine if there is any consensus on the need for legislation, such as H. R. 4566.” Hearing, Page 15.

John Fritz, Deputy Assistant Secretary—Indian Affairs, testified for the Department of the Interior and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, testified for the Department of Justice. Other witnesses included Mark Powless, Chairman of the National Task Force on Indian Gaming; Susan Shown Harjo, Executive Director of NCAI; and Lamar Newton, President of the National Tribal Chairmen's Association.

The Administration witnesses both agreed that tribal gaming was proving to be an important source of tribal revenue. This reflected some progress from the position Justice had taken a year earlier. Both Fritz and Richard expressed support for some legislation to provide some standards for regulation, but both recommended that action on the legislation be deferred while the agencies continued to work with the Indian tribes. Fritz made clear that the only possible existing sources of Federal law for regulation of Indian gaming was section 81 of title 25 of the United States Code and provisions in some tribal constitutions requiring secretarial approval of tribal ordinances.

Section 81 of title 25, USC, requires the approval of the Secretary for contracts entered into by tribes relative to their land or tribal claims. The section 81 issue arose, prior to the enactment of IGRA, in the context of tribal contracts with outside entities for the management of bingo operations. The Federal courts generally found that section 81 did

apply to bingo management contracts [*Wisconsin Winnebago v. Koberstein*, 762 F. 2d 613 (1985); *Ho-Chunk Management Corp. v. Fritz*, 618 F. Supp. 616 (1985); *U.S., ex rel. Shakopee Mdewakanton Sioux Comm. v. Pan American Management Co.*, 789 F. 2d 632 (1986); *Pueblo of Santa Ana v Hodel*, 663 F. Supp. 1300 (1987; *Barona Group of Mission Indians v. American Management*, 840 F. 2d 1394 (1987)]. However, at least one court held that a tribe did not have a duty to seek BIA approval of its management contract [*A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F. 2d 785 (1986)]. In any case, even if such contracts were subject to section 81 approval, it is doubtful that such approval authority could be interpreted to give the Secretary the power to impose regulatory requirements on the tribe for the operation of the gaming activity.

The other authority cited by Fritz was the requirement of some tribal constitutions that tribal ordinances, or some tribal ordinances, be subject to secretarial review and approval. Some tribal constitutions, particularly the “cookie cutter” constitutions developed by the BIA for adoption by tribes under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984 *et seq.*), did contain provisions requiring secretarial approval of some kinds of tribal ordinances. However, these provisions varied from tribe-to-tribe, and were often very ambiguous. In addition, many tribes did not have constitutions or governing documents that required such secretarial approval. Any Federal regulatory authority over Indian gambling proposals that might be drawn from such constitutional provisions would have been tenuous at best.

In the ‘bad old days’ of Federal paternalism, before the Indian Reorganization Act and Indian self-determination, Federal officials and bureaucrats found the right to unrestricted regulation of affairs on Indian reservations in section 2 and 9 of title 25 of the United States Code. Section 2 provides that—

“The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.”

Section 9 provides that—

“The President may prescribe such regulations as he may think fit for carrying into effect the provisions of any act relating to Indian affairs, and for the settlement of accounts of Indian affairs.”

However, this long-standing practice of regulating the affairs and conduct of Indian tribes under this authority was laid to rest in a 1942 Solicitor’s opinion on section 2 by Felix S. Cohen (M-31351, August 24, 1942). An extensive quote from that opinion might be instructive:

“It (*section 2*) was not to add to the business or the authority of the Federal government in Indian matters, nor to diminish the scope of tribal self-government then exercised by Indian tribes and nations, but merely to locate a particular mass of Government business in a statutory office. The reference to ‘management of Indian affairs’ did not confer a power to manage the affairs of Indians or of Indian tribes or nations any more than a reference to ‘foreign affairs’ in defining the duties of the State Department could be construed to confer upon that Department a power to manage the affairs of foreigners or foreign nations. Just as

our ‘foreign affairs’ are affairs of our Government relating to foreign matters, so our ‘Indian affairs’ are affairs of our Government relating to Indian affairs. This is made clear in Chief Justice Marshall’s disquisition upon the meaning of the phrase “management of Indian affairs’ in the case of Worcester v. Georgia.”

The hearings on H. R. 4566 made clear that, where state law on gambling was *civil/regulatory*, the states had no power to prohibit or control gambling by tribes or by individual Indians acting under tribal authority within Indian country. In addition, except for the suspect authorities of section 81 and some tribal constitutional provisions, the United States had no power under existing law to regulate such civil activity by tribes or Indians on the reservations.

Both Fritz and Richard expressed concern about vesting regulatory authority in either the Department of the Interior or the Department of Justice. Richard stated that Justice was not a regulatory agency. Fritz felt that Interior did not have the capacity to undertake such a mission and that, furthermore, it would be in conflict with the Department’s effort to reduce its past paternalistic role in favor of support for tribal independence and self-determination.

Summary Impressions of 98th Congress—The 98th Congress was the first Congress in which legislation to deal with gaming in Indian country was introduced. As stated by Chairman Udall in his opening statement for the hearing, its purpose was exploratory in nature and designed to begin a dialogue. But it was also intended to forestall challenges—political or legal—against Indian gaming.

The major importance of H. R. 4566 in the 98th Congress, in terms of the legislative history of IGRA, is that the simple language of the bill remained in the core of IGRA as subsequently enacted into law five years later. Therefore, to the extent that H. R. 4566 language found its way into IGRA as enacted, it forms a part of the legislative history of IGRA. While the legislation in the 99th and 100th Congress became more complex and detailed, a primary purpose of the legislation continued to be the protection of the tribal sovereign right to regulate its own affairs.

After the hearings on H. R. 4566, no further action was taken on the legislation. This was primarily because of tribal opposition on the grounds of the infringement on tribal sovereignty represented by the bill. The National Congress of American Indians and the National Tribal Chairmen’s Association presented testimony in opposition to the bill. Mr. Newton Lamar, President of NTCA, stated:

“But as it stands now, with the resolutions that have been submitted by the tribes and the vote that was taken at the last (NTCA) convention—I am speaking of the elected leadership of the tribes—the majority voted unanimously that they would oppose any legislation that attempted to regulate gaming in Indian country.

Because of this tribal opposition, the legislation in the 98th Congress was the last opportunity for enactment of a simple, minimally intrusive, pre-emption bill before the storm of the non-Indian backlash broke in the 99th Congress.

The 99th Congress

In a little over a year after the House Interior Committee hearings on H. R. 4566 in June 1984, the number of tribes operating gambling enterprises grew significantly from the number noted in Mr. Fritz' 1984 testimony. In her testimony before the House Interior Committee on November 14, 1985, Acting Interior Solicitor Marian Horn stated that—

“A recent Bureau of Indian Affairs survey that was conducted this past spring indicates that there are some 108 gambling facilities on Indian land. Of these facilities, approximately 104 had bingo, 93 had pull tabs or punch cards, 5 had card games, 4 had casino gaming, and 15 had other types of gambling activity.”

As earlier suggested, tribes were desperately seeking sources of revenue to replace funding lost in the large Reagan Federal budget cuts. Another impetus for this rapid expansion was the opportunities that outside financial interests began to see in tribal gaming as a lucrative field of investment. One aspect of this marriage of Indian tribes and outside investors was the growing number of proposals for taking land into trust near large metropolitan areas for gaming purposes.

In addition, as earlier noted, Indian tribes were not the only governments severely impacted by the Reagan budget cuts. Many cities and towns, some already suffering from the flight of industry, were also adversely affected by these Federal budget cuts. Some of these municipal governments began to approach Indian tribes with proposals involving acquisition of land in or near the town or city for transfer to the United States to be held in trust for the tribe. Then, a tribal gaming facility would be located on the land, providing revenue for the tribes and jobs and economic growth for the non-Indian community.

The increasing number of tribes developing gaming enterprises, the expansion of tribal gambling activities, the tentative moves into “casino” gambling, and the growing number of off-reservation fee-to-trust proposals increased the anti-Indian gaming backlash. State attorneys general and other state governmental officials, resentful of their inability to control, tax and benefit from Indian gaming, continued their efforts in state and Federal courts to stop it. As these efforts failed, they began to exert pressure on their congressional delegations to act. The commercial and charitable gaming industry, fearful of this new competition, made strange political bedfellows with churches and others opposed to gambling on moral grounds in exerting political pressure against Indian gambling.

The concerns of the committee leadership and staff also increased, and the legislative battle over Indian gaming began in earnest in the 99th Congress.

Legislation in the 99th Congress.—In the House of Representatives, Congressman Udall introduced H. R. 1920 on April 2, 1985. The bill, again entitled the “Indian Gambling Control Act”, was modeled on H. R. 4566, and was referred to the Committee on Interior and Insular Affairs. On April 4th, Senator DeConcini of Arizona introduced S. 902, which was referred to the Senate Committee on Indian Affairs. On May 7th, Congressman Shumway of California introduced H. R. 2404, the “Indian Country Gambling Regulation Act”, which was referred to the Interior Committee. On July 31st, Congressman Bereuter of

Nebraska introduced H. R. 3130, a bill to prohibit the granting of trust status to Indian lands to be used for the conduct of gaming activities, which was referred to the Interior Committee.

S. 902 by Senator DeConcini was also modeled on H. R. 4566 and, in its relevant provisions, was substantially the same. Notably, however, S. 902 first legislatively introduced the concept of an Indian gaming commission. However, rather than a national commission, it provided for a number of regional Indian gaming commissions created by the tribes in the region. These commissions were empowered to assume the responsibilities of the Secretary under the legislation.

The purpose of Mr. Shumway's bill, H. R. 2404, was to prohibit gambling within Indian country unless that activity conformed to state law. As this concept was rejected in IGRA, it is not relevant to the legislative history of IGRA except that its rejection was a clear indication of congressional intent to maintain the right of the tribes to engage in, or license and regulation, gaming activities.

Mr. Bereuter's bill, H. R. 3130, prohibited land outside a reservation from being taken into trust for gaming purposes after July 31, 1985, without state approval. The language of H. R. 3130 is the basis of section 20 of IGRA. Otherwise, the bill is not relevant to the legislative history of IGRA.

H. R. 1920: Section-by-Section Analysis—H. R. 1920, as introduced, was a slightly modified and expanded version of H. R. 4566 from the preceding Congress. The legislation still did not separate Indian gaming into different classes. To the extent that the bill conferred oversight and regulatory authority, such authority was still vested in the Secretary of the Interior. The primary focus and concern of the legislation was still pre-emption and control of management contracts for the protection of Indian tribes.

Section 1 retained the short title of "Indian Gambling Control Act".

Section 2, containing congressional findings, was essentially the same as H. R. 4566. H. R. 4566 language, relating to tribal concerns about organized crime, was dropped in H. R. 1920. The Committee hearing on H. R. 4566 and other communications to the Committee staff indicated that there had been little, if any, effort by organized crime to infiltrate Indian gaming. As a consequence, while there was still a concern about that possibility, it was not an over-riding factor in the legislation.

Section 3 contained the same congressional declaration as in H. R. 4566.

Section 4 contained the same definitions language of H. R. 4566, except that the definition of Indian country was dropped.

Section 5 contained the language of H. R. 4566 with respect to the illegality of gaming within the reservation or on lands subject to the tribe's jurisdiction unless under an approved ordinance. The criminal prosecution language was dropped.

Section 6, with some modifications, was very similar to section 6 of H. R. 4566. Subsection (a) again stated that, except where gaming was specifically prohibited by Federal law or by a state as a matter of criminal law, tribes could engage in or license and regulate

gaming subject to a secretari ally-approved tribal ordinance or resolution. H. R. 1920 dropped the use of the term “Indian country” in favor of a reference to the tribe’s jurisdiction.

Subsection (b) provided, as did H. R. 4566, that the Secretary would approve a tribal gaming ordinance if it met the four minimum requirements. However, instead of requiring the tribe to ‘conduct’ the gaming operation, H. R. 1920 required the tribe to have the ‘sole proprietary interest’ in the operation. The use of net revenues was expanded to include the general welfare of the tribal members and economic development. Finally, the language of H. R. 4566 prohibiting non-tribal entities from having a ‘percentage interest’ in gross or net revenues was dropped in H. R. 1920. The dropping of the language prohibiting a percentage interest is mirrored in the new language in section 7 permitting the use of a percentage of revenue to determine management fees.

Subsection (c) provided for the licensing of non-tribal entities to engage in gaming, but only if consistent with state law. It was unchanged from the H. R. 4566 language.

Subsection (d) again contained the 180-day limit on the Secretary in considering tribal gaming ordinances for approval.

Section 7 contained expanded and modified language from H.R. 4566 relating to the requirement of secretarial approval of management contracts and establishing standards for the approval of such contracts. Unlike the H. R. 4566 language, H. R. 1920 permitted a management fee based upon a percentage of gross or net revenues, but with significant restrictions. The addition of the language permitting a fee based on percentage of revenue was based upon new information coming to the Committee that, in many cases, the outside interests often made necessary capital underwriting of the development of the gaming enterprise.

Section 8 authorized the Secretary to have certain record inspection and facility access to carry out her responsibility.

Section 9, not contained in H. R. 4566, authorized the Secretary to keep information received pursuant to sections 7 and 8 confidential.

Section 10, again new from H. R. 4566, gave any existing gaming operation on Indian land one year to come into compliance.

H. R. 1920: Interior Committee Hearings—The House Interior Committee held three hearings on H.R. 1920, H.R. 2404 and H. R. 3130: two in Washington, D.C. on June 25, 1985, and November 14, 1985, and one in California on September 13, 1985. The hearing record from the first two hearings is over 1,200 pages, (*Hearing before the Committee on Interior and Insular Affairs, House of Representatives, 99th Congress, 1st Session, Serial 99-55, Part I*). The hearing on June 25 was held in Washington, D. C. Chairman Udall opened the hearing and stated:

“This morning the committee will hear testimony on H R. 1920 and H. R. 2404. Both bills, although having different approaches, are attempts to impose certain Federal standards and regulations on gambling operations being conducted on Indian reservations and Indian lands.

As I stated earlier, H. R. 1920, which I cosponsored with Mr. Richardson, Mr. Bates, and Mr. McCain, is not intended to be the final conclusive solution to the issues facing gaming on Indian reservations today. Instead, it probably should be viewed as a first proposal which will probably be modified during the legislative process.” Hearings, Page 1

There were 12 witnesses representing the tribal position and five representing interests opposed to Indian gaming. The Indian witnesses generally supported H. R. 1920 and

strongly opposed H.R. 2404. It is interesting to note that Mark Powless, Chairman of the National Indian Gaming Task Force, the precursor to the National Indian Gaming Association, did support H. R. 1920, albeit, with some recommended modifications. The National Tribal Chairmen's Association, a kindred organization, had opposed the less restrictive H. R. 4566 in the 98th Congress. Powless' statement, at page 173 of the hearings, noted that—

“Pending cases: there is (*sic*) at least two pending cases in the Federal Courts . . . Either of these or others could reach the U.S. Supreme Court. Under the present statutes there is no guarantee that a decision would favor the tribes. For this reason, the task force feels it is imperative that Federal protective legislation should be enacted.”

It is interesting to note that, had this kind of support from the Indian community been present in the 98th Congress with respect to H. R. 4566, a much less restrictive bill might have been enacted before the anti-Indian gaming forces grew so strong.

The non-Indian witnesses, including the Attorney General of California, the Deputy Attorney General of Arizona, a member of the Nevada State Gaming Control Board, and representatives of the American Horse Council and the American Greyhound Track Operators, opposed H. R. 1920 and strongly supported H. R. 2404, which would have made state law generally applicable to Indian gaming.

Understandably, there was strong opposition to Indian gaming coming from the State of California. California's public policy clearly favored gambling, which included stud poker card parlors, charitable bingo operations, and pari-mutuel horseracing. Indian gaming, in addition to being free of State control, was a threatening competition to those forms of gaming. There were five members of the California congressional delegation on the House Interior Committee. At their urging, Chairman Udall agreed that Congressman Richard Lehman, Democrat of California, could chair a field hearing on the legislation in California. The hearing was held in San Diego on September 13, 1985. Several Indian tribes presented testimony, which was generally supportive of H.R. 1920, but strongly in opposition to the state jurisdiction provisions of H. R. 2404. The sheriff of San Diego County and the defendant in the *Barona* case, John Duffy, testified in opposition to H. R. 1920 and in favor of H. R. 2404. In like manner, Glen Salter, Deputy County Counsel of Riverside County, urged the Committee to enact the anti-Indian provisions of H. R. 2404.

It was not until the third hearing in Washington, D. C. on November 14th that the Department of the Interior and the Department of Justice presented testimony, (*Serial 99-55, Part II*). While the record will not reflect this, the fact is that, within the Department of the Interior, the responsibility for developing a departmental position on Indian gaming legislation had been taken away from the Bureau of Indian Affairs and moved under the direct authority of the Secretary. In the Solicitor's Office, the legal responsibility had been taken away from the Division of Indian Affairs and moved to the Division of General Law.

The witness for Interior was Marian Horn, Principal Deputy Solicitor for the Department. The witness for the Justice Department was Victoria Toensing, Deputy Assistant Attorney General, Criminal Division. Ms. Horn was the leadoff witness. The

testimony was startling. Interior and Justice, apparently in consultation only with themselves, had reached an agreement, which they described as a “compromise”, but which could only be described as a sell-out or collapse by Interior. As described by Ms. Horn, the agreement, with respect to the terms relevant to this paper, provided that—

(1) Social and ceremonial gaming would be left to the tribes to regulate.

(2) Bingo would be permitted to continue as a matter of Federal policy, but would be subject to Federal regulation. All other forms of gambling (described as “hard core” gambling), such as pari-mutuel and casino gambling on Indian reservations, would be subject to regulation by the states.

(3) A Federal regulatory commission would be established. The commission should be authorized to issue licenses for, and regulate, bingo operations on Indian land. The law would provide a “traditional” definition of bingo and would make it a Federal crime to operate without a license.

(4) The law would provide criteria for the commission’s regulations based primarily on law enforcement rather than economic concerns. Among other things, the commission would be authorized to establish limits on prizes.

(5) Tribes could continue to enforce their gambling ordinances or regulations, but only if they were not inconsistent with the commission regulations or Federal law.

Ms. Horn concluded by stating that this approach “represents a variety of compromises and accommodations”. She stated that they intended to consult with interested tribal leaders and then promptly submit a draft bill to the Committee. Ms. Toensing agreed with Ms. Horn’s description of the proposal. In a telling remark, however, Ms. Toensing responded to a question from Chairman Udall by stating “[I]f the Department of Justice had its druthers, it would not have any gambling whatsoever [on Indian reservations] and I think everyone knows that. That is no secret.” The Administration proposal was later introduced as S. 2557.

The essential point to be drawn from the Administration’s testimony is that the Committee was presented with the outlines of a legislative proposal to confer specific jurisdiction on a Federal commission to regulate closely Indian bingo and to ban other “hardcore” gambling unless done under State jurisdiction. *For purposes of the legislative history of IGRA, it is important to note that the proposal, as later incorporated into S. 2557, was rejected by the Committee.*

H. R. 1920:Interior Committee Markup.—The Interior Committee held a mark up of H. R. 1920 on December 4 and 11, 1985. After extensive debate and amendments, the Committee ordered the bill reported on December 11, 1985, with an amendment in the nature of a substitute. The Committee report to accompany H. R. 1920 was filed on March 10, 1986 (H. Rept. No. 99-488). The bill, as reported by the Committee, was radically different from the bill as introduced. Yet, at its core, it was very much like H. R. 4566 in the

98th Congress. The following section-by-section analysis of H. R. 1920 as amended and reported by the Interior Committee notes changes from the introduced bill that have significance for the legislative history of the bill.

Section 1 is the short title of “Indian Gaming Regulatory Act”. The reported bill dropped the more restrictive phrase “Gambling Control” as contained in the bill as introduced.

Section 2(a), containing congressional findings, was essentially the same as the bill as introduced.

Paragraph (2) of the bill as introduced provided that tribes could engage in gaming not prohibited by Federal law. The Committee changed the phrase to “not specifically prohibited by Federal law”. This change was intended to make clear that the burden of showing that a tribal gaming activity was in violation of Federal law would be upon the Federal agency involved. For purposes of legislative history, it is noted that the phrase “not specifically prohibited by Federal law” was retained in IGRA in section 11(b) (10) (A).

Paragraph (3) of the reported bill was new. It noted that there were no existing statutes requiring approval of Indian gaming management contracts. This addition reflected the Committee’s understanding that the tribal contract approval authority of the Secretary of the Interior under section 81 of title 25, United States Code, probably did not apply to such contracts.

In paragraph (4), formerly (3) in the introduced bill, the Committee changed the phrase “Indian country” to “Indian lands”. This reflected the addition of a definition of Indian lands in a later part of the reported bill.

Section 2(b) contained the congressional declarations found in section (3) of H. R. 1920 as introduced. It included a declaration that a “National Indian Gaming Commission” was necessary to meeting concerns about Indian gaming.

Section 3 of the reported bill was new. It provided that class II and III gaming, as later defined in the bill, would be illegal on lands taken in trust for a tribe after December 4, 1985 if the land was outside the boundary of a reservation. The prohibition would not apply if the Governor and legislature of the state and the governing body of the municipality and county consented. This new language was the Committee’s reaction to the growing concern in and out of Congress about increasing efforts to have such land taken in trust for a tribe near a large city or town. As noted earlier, in many cases, such proposals were initiated by the municipalities that were looking for revenue sources. The language was taken from Congressman Bereuter’s bill, H R. 3130. For legislative history purposes, it is noted that similar, but much less restrictive, language wound up in section 20 of IGRA

Section 4 of the reported bill was new. It provided that Indian gaming operations under the Act would be subject to the tax withholding and reporting requirements of the Internal Revenue Service in the same manner as similar State-operated gaming.

Section 5 of the reported bill was new. It created a National Indian Gaming Commission. The creation of a National commission in the bill reflected the strong feeling of Chairman Udall about the need for such a commission. The Chairman, whose committee had some jurisdiction over the Atomic Energy Commission, felt that that multi-member commission was not adequate to the task. He wanted the gaming commission to be headed by a single person, which he likened to the “Tsar” figure of the Major League Baseball Commissioner. The Committee staff was concerned that vesting the commission’s power in

one individual might be erosive of tribal sovereignty and encouraged the Chairman to adopt a multi-member commission instead. The Chairman accepted the staff's recommendation. Section 5 of H. R. 1920, is very similar to section 5 of IGRA.

Subsection (a) established the commission as an independent commission with the Department of the Interior. For legislative history purposes, it is noted that the word "independent" is not included in the IGRA language.

Subsection (b) made provision for the makeup of the commission and was similar to subsection 5(b) of IGRA. The H. R. 1920 commission would have had eight members with the Chairman being appointed by the Secretary. Five of the members would have been Indian and appointed from a list submitted by gaming tribes. The Attorney General would have selected one member to be appointed by the Secretary and one member would represent State interests. Other differences between the H. R. 1920 provisions and IGRA are not significant.

Section 6 of the reported bill was new.

Subsection (a) provided that the Chairman would have exclusive authority to approved tribal gaming ordinances and management contracts and select, appoint and supervise commission staff. This is somewhat similar to section 6(a) of IGRA. However, the IGRA language includes powers of temporary closures and the levying and collection of civil fines. On the other hand, the IGRA language makes the Chairman's use of the power subject to appeal to the full commission.

Subsection (b) of the bill conferred power on the Chairman, subject to approval of the Commission, to appoint the General Counsel, promulgate regulatory schemes for class III gaming under section 11(c), and to issue temporary closure orders. As noted above, the closure power is now found in section 6(a) of IGRA. The power to appoint the General Counsel is found in section 8(a) of IGRA. For purposes of legislative history, it is important to note that the language of H. R. 1920, as reported, conferring power on the Chairman to "promulgate regulatory schemes" was to be applied to class III gaming and not to class II. As the 11(c) language did not find its way into IGRA, the H. R. 1920 authority to promulgate regulatory schemes for class III gaming is irrelevant to the legislative history of IGRA, except that it does make clear that, had Congress wanted to confer power on the Commission to promulgate and enforce regulatory schemes for class III gaming, it knew how to do so.

Subsection (c) authorized the Chairman to approve or disapprove tribal gaming ordinances or resolutions and licenses for class III gaming under section 11(c). Again, since the 11(c) language was not included in IGRA, the H.R. 1920 provision is irrelevant.

Subsection (d) provided that the Chairman would have such other powers as delegated by the Commission. The identical language is found in section 6(b) of IGRA.

Section 7 of the reported bill was new.

Subsection (a) provided that the full Commission of eight members would have power, not subject to delegation, to approve the annual budget, adopt regulations for civil fines, adopt the annual assessment rates against tribal operations, to authorize the Chairman to issue subpoenas, and to make permanent a temporary closure order of the Chairman. Almost identical language is found in section 7(a) of IGRA.

Subsection (b) set out the general powers of the Commission. The language is much the same as the IGRA language in section 7(b). Only significant differences from IGRA language will be noted.

Paragraph (1) and (2) of subsection (b), as reported, authorized the Commission to monitor Indian gaming on a continuing basis and to inspect and examine all premises where Indian gaming is conducted. Section 7(b) (1) and (2) of IGRA mirror this language, except that the power is limited to class II gaming. This, of course, could have legislative history significance with respect to the Commission's power over class III gaming. The same comment is true with respect to paragraph (4) relating to the Commission's right to demand access to Indian gaming records.

Section 8 of H. R. 1920, as reported, related to Commission staffing and is almost identical to section 8 of IGRA

Section 9 provided for the Commission to secure information from other Federal agencies and is almost identical to section 9 of IGRA.

Section 10 of the bill, as reported, required the Secretary to appoint members to the Commission and to provide interim staff and support assistance to the Commission. It is similar to section 10 of IGRA, except that the IGRA language authorizes the Secretary to continue to exercise whatever authority over Indian gaming vested in the Secretary until the Commission became operative.

Section 11 of the bill as reported set out the substantive power and right of tribes to engage in gaming. For the first time, the legislation contained a separation of Indian gaming into three classes. As defined in section 19(4) of the bill, class I gaming included tribal ceremonial gaming. Class II included bingo or lotto, and pull-tabs, punchboards and other games similar to bingo. Class III included all other forms of gaming.

Subsection (a) (1) left class I to the exclusive jurisdiction of tribes and is nearly identical to section 11(a) (1) of IGRA

Paragraph (2) of the reported bill provided that Indian tribes could engage in, or license and regulate, both class II and III gaming if a tribal ordinance was approved by the Commission. A tribe could not engage in the gaming if specifically prohibited by Federal law or conducted in a state that prohibited the gaming as a matter of public policy and criminal law. In addition, tribes in Nevada were generally prohibited from gaming activities. Except for the exclusion of class III gaming and the Nevada language, the language of section 11(b) (1) was very similar to the H. R. 1920 language. In addition, it should be noted for purposes of legislative history that paragraph (2) of section 11(a) of IGRA preserved the jurisdiction of tribes over class II subject only to the provisions of IGRA.

In addition, the Committee report noted that the only specific Federal law prohibiting gaming activity on Indian land was section 1175 of title 15, United States Code, prohibiting gaming devices within Indian country. For purposes of legislative history with respect to the current attempts of the Justice Department to apply section 1175 to class II machines, the following statement in the Committee report at page 16 is instructive:

“It is not the Committee's intent that general Federal laws limiting gaming activity be applicable to tribal gaming activity meeting the test of the second criterion of subparagraph (b).”

This should make it clear that the House Committee's intent, with respect to section 1175, was that it not be applicable to any Indian gaming that otherwise was in accord with IGRA, as later enacted.

Subsection (b) of section 11 of the reported bill was very similar to the provisions of section 11(b) of IGRA.

Paragraph (1) provided that a tribe could engage in, or license and regulate class II gaming if a tribal gaming ordinance was submitted to, and approved by, the Chairman. Similar language is found in section 11(b) (1) (B) of IGRA.

Paragraph (2) provided that the Chairman was required to approve an ordinance if it met five minimum standards. These included sole proprietorship and conduct of the gaming by the tribe, use of net revenue for only identified purposes, annual outside independent audits, inclusion of certain contracts in excess of \$25,000 in the audits, and environmental and public health and safety assurances. These five standards are nearly identical to five of the six minimum standards contained in section 11(b)(2) of IGRA. The House report on H. R. 1920 contains language that is relevant to the Commission's environment and public health and safety regulations. With respect to that minimum standard, the language states:

“It is not intended by this provision that tribal gaming activity be subject to general Federal laws relating to the environment unless it would be so subject under existing law.”

This clearly evinces a Committee concern about the imposition, through Federal means such as the Commission, of onerous environmental standards not otherwise applicable.

Paragraph (3) permitted a tribe to license individuals and non-tribal entities to engage in class II gaming if otherwise in accordance with state law. Almost identical language is found in section 11(b)(4)(A) of IGRA.

Paragraph (4) imposed a 160-day time requirement on the Chairman to approve or disapprove a tribal gaming ordinance. Any ordinance not acted upon within that time would be deemed approved. Again, the inclusion of this language was intended by the Committee to cast the burden of proof on the Commission and not the Indian tribes. Section 11(e) of IGRA contains similar language, although the time limit was shortened to 90 days.

Subsection (c) of section 11 of H. R. 1920, as reported, contained an extremely restrictive provision permitting tribes to engage in class III gaming. The Chairman of the Commission was empowered to license the activity if it was determined to be in compliance with subsection (b) provisions and in conformance with regulations adopted by the Commission. The Commission was required to adopt a comprehensive regulatory scheme identical to the regulatory scheme of the State involved. Criminal penalties attached to such state law were to be enforced by the State in P. L. 280 states and by the Federal government in non-280 states under ACA. Paragraph (5) provided that, prior to granting a class III license, the Chairman had to conduct an analysis that, at a minimum, included:

1. a summary of needed capital outlay and long-term financing requirements,
2. the financing method and proof of availability of financing,
3. the impact of granting a license on both the tribal and near-by non-Indian communities, and
4. the ability of the licensee to monitor and insure that the gaming operations were conducted in a fair and safe manner.

While none of the subsection (c) wound up in IGRA, it does have legislative history implications. It shows that, had the Committee intended that the Chairman and Commission have comprehensive regulatory power over class III gaming and over the business decisions of an Indian tribe, it knew how to craft such language. In fact, in the end, the Committee and Congress specifically rejected the concept of such Commission regulation over class III.

Section 12 of the bill, as reported, is similar to section 7 of the bill as introduced. The section authorized the Chairman to approve or disapprove of management contracts entered into by tribes for the operation of class II or class III gaming. In like manner, section 12 of the reported bill is very similar to section 12 of IGRA.

Section 13 of the reported bill was new. It required the submission of any tribal gaming ordinance or resolution adopted before the enactment of the bill to the Chairman for review with respect to its compliance with the provisions of section 11(b). It made similar provision for existing management contract it terms of compliance with section 12. It is similar to section 13 of IGRA.

Section 14 of the reported bill was new. It authorized the Commission to establish a procedure for the levying and collection of civil fines and for temporary or permanent closure of a gaming facility for violation of the Act and Commission regulations. It is similar to section 14 of the Act.

Section 15 was new and authorized the Commission to establish a procedure for the issuance of subpoenas for the attendance of witnesses and the production of evidence for any hearing of the Commission. It is similar to section 16 of the Act.

Section 16 of the reported bill was generally new. First, it required the Commission to preserve information received as confidential. This language was similar to section 9 of the bill as introduced and to section 17(a) of the Act. It also authorized the Commission to refer possible criminal violations to the appropriate law enforcement officials and authorized the U. S. Attorney General to investigate alleged violations of Federal criminal law. In much modified versions, these two provisions are contained in section 17(b) and (c) of the Act.

Section 17 provided that not less than three-quarters of the annual budget of the Commission would be derived from an annual assessment of not more than 2 1/2% of the gross revenues of a gaming activity and authorized the Commission to adopt the rate of assessment. In addition, it authorized the Commission to adopt an annual budget and to seek an annual appropriation from Congress in an amount not to exceed one-third of the amount of the funds derived from assessments. It is similar to the language contained in section 18 of IGRA, although that language was later amended.

Section 18 of the bill as reported authorized the annual appropriation of funds for the Commission. In much modified form, similar language is contained in section 19 of the Act.

Section 19 provided definition of the terms ‘Attorney General’, ‘Commission’, ‘Indian lands’, ‘Indian tribe’, ‘gaming’, ‘net revenues’, and ‘Secretary’. As earlier noted, the reported bill dropped the use of the term “Indian country” and, instead, used the term “Indian lands”. One reason for dropping the use of the term “Indian country” was the definition of Indian country in section 1151 of title 18, United States Code. Section 1151 defines “Indian country” to be all land within the boundaries of a reservation and, outside of a reservation, dependent Indian communities and Indian allotments to which Indian title had not been extinguished. The question of what constituted a dependent Indian community had become a legal bone of contention. The Committee felt that using the term “Indian lands” and defining that term as all land within a reservation and all trust or restricted land outside a reservation over which a tribe exercised jurisdiction would be clearer and less fraught with legal problems.

In addition, as noted above, the reported bill for the first time adopted the separation of Indian gaming into the three classes. The language in the reported bill did not include any provision for the use of technological aids for class II gaming.

Section 20 provided that section 1307 of title 18, United States Code, would be applicable to tribal gaming activities. Section 1307 makes an exception for State lotteries from the ban on certain kinds of interstate advertising of gaming activities.

Section 21 of the reported bill was a savings clause that provided that if any provision of the legislation was held invalid, it was the intent of Congress that the remaining sections or provisions would remain in force.

H. R. 1920: House Consideration.—The House took up consideration of H. R. 1920, as reported from the Committee, on April 21, 1986. The bill was considered in the House under a provision known as ‘Suspension of the Rules’.

Suspension of the Rules.—On certain identified days of the month, the House rules permitted the Speaker to call up certain bills for consideration under suspension of the rules. The Chairman of the committee reporting the bill, who had previously requested that the bill be listed on the suspension calendar, would be recognized by the Speaker for a motion. The motion offered is to suspend all of the rules of the House inconsistent with the consideration of the bill, as reported, and to pass it. Under this procedure, no amendments to the bill as introduced are normally permitted except those reported by the Committee and a two-thirds vote is necessary for passage.

A committee chair would elect to list a bill for consideration under suspension of the rules when he did not want to have any amendments offered to the bill as reported when the House considered the bill and when he felt that he could secure a two-thirds favorable vote if a roll call vote was demanded. However, it sometimes occurred that a Chairman would realize that he could not get a two-thirds vote unless some further modification to the Committee bill was made. To accommodate this circumstance and to still avoid opening a bill to any germane floor amendment, there arose what became known as the “Burton” procedure after Congressman Phil Burton of California. A Chairman would negotiate with those demanding a further modification to the bill as reported by the Committee and, when agreement was reached, the modification(s) would be penciled into the bill pending before the House. While this was not technically legal under the House rules, the motion being made was to “suspend” all of the House rules inconsistent with the consideration and passage of the bill at the Speaker’s desk. Since the bill pending at the Speaker desk now contained the further modifications, that would be the bill that would be considered and passed.

The Class III Moratorium.—Between the time the bill was ordered reported from the Interior Committee with amendments on December 11, 1985, and the time the report was filed on March 10, 1986, it became apparent to Chairman Udall and the Committee staff that the it was unlikely that the bill as reported could get a two-thirds vote under suspension of the rules. This was due solely to the treatment of Class III gaming in the reported bill.

The primary opponent of Indian gaming on the Interior Committee was Congressman Tony Coelho, a Democrat of California. In this opposition, Coelho was primarily representing the interests of the horse racing industry of California. As a member

of the Committee, Coelho filed dissenting views in the Committee report, which were signed by Congresswoman Beverly Byron (D.-MD), and Congressmen Jim Moody (D.-WI), Richard H. Lehman (D.-CA), and Manuel Lujan (R.-NM). They were opposed to the section 11(c) provision of the reported bill that permitted class III gaming subject to regulation by the Commission using the State law regulatory scheme. The dissenting views in the report stated:

“To insure that the states will be able to continue their role in regulating gambling activities, an amendment will be offered on the House floor to place Class III gaming on Indian lands under state jurisdiction. By doing this, we will guarantee that the states have the responsibility for regulating all gambling within their borders, whether it takes place on Indian land, or off Indian land.”

Chairman Udall filed his own supplemental views in the Committee report responding to the dissenting views, which is instructive in its entirety. At the end of his supplemental views, he stated:

“Conferring State jurisdiction over tribal governments and their gaming activities would not insure a ‘level playing field’, but would guarantee that Indian tribes could not gamble at all.

“I urge the members of my Committee and the members of the House to reject the position and amendment proposed by the dissent.”

However, it became clear that the Committee bill could not get the necessary two-thirds vote if it was brought under the suspension of the rules procedure. On the other hand, Chairman Udall and the Committee staff knew that, if the bill were brought to the House floor under the normal procedure, it would be open to devastating germane amendment that would only require a majority vote to be adopted.

While the Chairman could not agree to state jurisdiction over Class III gaming, he authorized the Committee staff to negotiate a compromise with the other side. From March 10, 1986 until late in April, the Committee staff met with staff of the other side to work out a compromise. Out of these negotiations came the unfortunate ‘moratorium’ provision. It was agreed to strip out section 11(c) of the bill entirely. Instead, it was agreed that a new subsection (c) would be added to section 3. In general, this provision made all Class III gaming illegal on Indian lands for a period of four years. It grandfathered in any existing Class III operations if otherwise illegal and as long as they remained within the same nature and scope.

In addition, the compromise provided that a new section 21 would be added to the bill. This new section required the Comptroller General of the United States to conduct a study of Class III gaming on Indian lands within two years of enactment and to submit a report to Congress. As this provision did not find its way into IGRA, it is irrelevant for purposes of the legislative history.

In terms of understanding the scope of the current power of the Commission under IGRA, it is very significant to note how H. R. 1920 dealt with the grandfathered class III operations. Because of the class III moratorium, H. R. 1920 gave the Commission no power

over class III gaming. The Commission was only given authority to approve class II gaming ordinances and class II management contracts. Concerns were expressed that the grandfathered class III operations would not be subject to any ‘outside’ control. To deal with this ‘problem’, the moratorium provision that was negotiated required the Commission, *inter alia*, to apply the class II provision requiring approval of tribal gaming ordinances in section 11(b)(2) to the grandfathered class III operations. However, it was the understanding of the committee leadership and staff that the section 11(b)(2) provision left class II gaming to the regulation of the tribes with only minimal Commission oversight, guidance and regulation. Since it was felt that the grandfathered class III operations should be subject to more detailed and stringent ‘outside’ regulation and since it was the understanding of the committee leadership and staff that section 11(b)(2) did not give the Commission such regulatory authority, it was determined necessary to specifically confer such power on the Commission. As a consequence, section 3(c)(3) provided that, in addition to applying the class II provisions, the commission would—

“(A)dopt and apply to such Class III gaming activities a regulatory scheme which is substantially equivalent to those of the State within whose boundaries such gaming occurs and shall require that such Class III gaming activities be brought into compliance with such regulations within sixty days”

The legislative history significance of this provision is that, had Congress intended for the Commission to adopt and apply a regulatory scheme for class III gaming, it knew how to do so.

H. R. 1920: The Burton Procedure.—The House took up consideration of H. R. 1920 on April 21, 1986. Using the “Burton” procedure, the Union Calendar bill pending before the House was further modified with the compromise reached on the Class III gaming provisions.

With such modification, the bill passed the House under suspension of the rules. A year later, in a May 21, 1987, Congressional Record statement, Chairman Udall commented about that action as follows:

“In order to secure passage of the bill (*H. R. 1920*) under suspension of the rules, I agreed to a further compromise on the legislation. I agreed, reluctantly, to a further amendment which imposed a moratorium on class III gaming, primarily pari-mutuel betting, with a study provision and a submission to Congress.” (Congressional Record, May 21, 1987, p. E 2041)

The bill, as so amended, was sent to the Senate and was referred to the Senate Select Committee on Indian Affairs on April 22nd.

S. 902 & H. R. 1920: Senate Action—S. 902 was introduced in the Senate by Senator DeConcini of Arizona on April 4, 1985, two days after H. R. 1920 was introduced. Like H. R. 1920, S. 902 was modeled after H. R. 4566 in the 98th Congress. The bill was referred to the Indian Affairs Committee. The major difference between S. 902, as introduced, and H. R. 1920, as introduced, was that S. 902 provided for the establishment of regional Indian gaming commissions by the Indian tribes in each of the Bureau of Indian Affairs areas. These commissions could assume the powers of the Secretary to approve

tribal gaming ordinances and management contracts. In addition, on June 16, 1986, Senators Laxalt and Hecht of Nevada introduced the Administration's Indian gaming proposal as S. 2557.

S. 902 & H. R. 1920: Committee Hearings.—On June 26, 1985, the Indian Affairs Committee held a hearing on S. 902 and received testimony from over 40 Indian and non-Indian public witnesses. A year later, on June 17, 1986, the Committee held a hearing on S. 902 and the related bills, H. R. 1920 as passed by the House and S. 2557, the Administration's bill. (*Hearing before the Committee on Indian Affairs, U. S. Senate, 99th Congress, 2nd Session, S. Hrg 99-887*). As was evident in the earlier House hearing on H. R. 1920, the Interior Department had clearly given in to the strong anti-tribal sovereignty position of the Justice Department. In addition to 30 Indian and non-Indian public witnesses, the Administration's witnesses were Victoria Toensing for the Justice Department, and Frank Ryan, Deputy Assistant Secretary of the Interior for Indian Affairs.

The primary focus of the Administration's testimony was to compare the strong regulatory content of their bill, S. 2557, with the 'weak' provisions of H. R. 1920 as passed by the House. Ms. Toensing testimony stated:

"It is my understanding, Mr. Chairman, that S. 902 was introduced mainly for discussion purposes and does not address all the issues it would if it were really a specific legislative proposal. So I will not be comparing that in any depth." Senate Hearings, p. 47.

Several excerpts from Ms. Toensing's oral and written testimony comparing S. 2557 and H. R. 1920, as passed by the House, are instructive. In her oral testimony, Toensing stated:

"The bottom line is this: Only our bill has the controls necessary to regulate an industry involving large sums of cash and with such lucrative peripheral service industries that it is extremely likely to attract organized crime and other criminal elements." Hearings, p. 47.

Ms. Toensing's inference, of course, was that H. R. 1920 did not provide for strong 'outside' regulation. Throughout her written statement, she repeatedly made Justice's argument that H. R. 1920 did not make provision for comprehensive, strong Federal regulation. (At the time her statement was prepared, the Justice-Interior bill had not been introduced and the statement cites S. 2557 as S. XXXX.)

"S. XXXX allows organized Indian tribes recognized by the Department of the Interior to apply for a federal license to run a bingo operation. The conduct of bingo operation would be supervised by a federal commission and subject to federal statutes and regulations." Hearings, p. 146.

Again, Ms. Toensing's interpretation of H. R. 1920 is that it did not vest such power in the commission.

In specifically comparing the commission powers of S. 2557 and H. R. 1920, Ms. Toensing's statement asserts—

"Both H. R. 1920 and S. XXXX establish a commission to exercise some degree of control over tribal gaming. However, the Commission established by S. XXXX has considerably

more power than the one established by H. R. 1920. The greatest contrast in the two commissions can be seen in the fact that the commission established by S. XXXX has the power to license tribal gaming operations and, if it chooses to do so by regulation, to license individual employees of bingo establishments. Such licensing authority is typically exercised by state gambling regulatory bodies; *yet the commission established by H. R. 1920 has no such power* (emphasis added).” Hearings, p. 151-2.

It is no wonder that Toensing made this comparison. H. R. 1920 provided, in section 11(b)(1), that “An Indian tribe may engage in, or license and regulate, Class II gaming activity on the Indian lands of such tribe” under an ordinance approved by the Chairman of the Commission. Ms. Toensing’s bill would have given the Commission the power to license, oversee, audit and regulate bingo operations.

Another extensive quote from her written statements shows Ms. Toensing’s correct comparison of scope of commission regulatory powers in the Administration bill and H. R. 1920, as passed by the House—

“The Commission (*under S. 2557*) will grant a license if it is satisfied that the tribe, and any management contractor with whom the tribe has contracted, are able to comply with all provisions of law and all Commission rules, and the operation is likely to be conducted honestly and for the general economic benefit of the tribe. . . . By contrast, H. R. 1920 . . . requires only that a tribal ordinance authorizing such gaming be submitted to the Chairman of the Commission who must approve the ordinance if it meets the minimum (*emphasis in the original*) standards set out in the bill. We have no quarrel with the standards set out in section 11(b)(2) of the bill We think, however, that H. R. 1920 is seriously defective in not allowing the Commission to exercise real judgment and discretion over other factors that go into operating a high stakes gambling enterprise.” Hearing, p. 152-53

Again, there should be no wonder about her correct interpretation of section 11(b)(2) of H. R. 1920 and of IGRA. Congress intended that the tribes retain their inherent right of self-government to regulate their own class II gaming activities. The intent was that the Commission would have oversight and guidance responsibilities with only a minimal intrusive right to regulate it.

Finally, in speaking of commission structure and organization, Ms. Toensing’s statement makes clear the limited scope of regulatory authority conferred on the Commission in H. R. 1920. It states—

“The structure and organization of the Commissions established by S. XXXX and H. R. 1920 also differ markedly. The differences reflect the intention of S. XXXX to establish a strong Commission that has the power to police high stakes gaming, whereas H. R. 1920’s Commission would be, in many respects, subservient to the tribes that are operating and profiting from that gaming.” Hearing, p. 154.

While it is not accurate to say that H. R. 1920 made the Commission subservient to Indian tribes, it is true that it was the intent of the House Committee leadership and staff that the Commission’s authority to regulate class II gaming was to be very limited.

Other testimony taken by the Senate Committee mirrored the testimony taken in the House hearings. The Indian witnesses, including tribal representatives and Indian

organizations, generally supported S. 902 and H. R. 1920, although there were some concerns expressed about some of the provisions of the legislation. They were united in their opposition to the Administration's proposal later introduced as S. 2557. In like manner, non-Indian witnesses generally opposed S. 902 and H. R. 1902, and strongly supported the state jurisdiction provisions of the Administration's bill.

H.R. 1902: Senate Committee Markup.—The Committee marked up H. R. 1902 on September 15 and 17, 1986. On September 17th, after extensive debate, the Committee ordered H. R. 1920 reported favorably to the Senate, with an amendment in the nature of a substitute. The Senate report (S. Rept. No. 99-493) was filed on September 26, 1986, and the bill was placed on the Senate calendar for action.

While the substitute adopted by the Senate Committee was substantially the same as the bill passed the House, the Committee did make several changes in H. R. 1920. However, comments will be made only on those changes that are relevant to the legislative history of IGRA, whether they were eventually included in IGRA or not.

The Senate-reported bill made several changes to the congressional findings and declaration of policy in sections 2 and 3. Much of this language did finally wind up in IGRA.

The Senate Committee did make some changes relating to the Commission in sections 5 through 10. In particular, the size was reduced from eight members to five. However, most of the changes were not significant from a legislative history standpoint.

While the Senate Committee made several changes in the organization of the legislative language in section 11(a) and (b) providing for the conduct and regulation of class II gaming, the substance remained much like the House-passed bill. However, the Committee did add back to section 11 a new subsection (d) dealing with Class III gaming. In doing so, the Senate committee struck the House provision for a class III moratorium contained in section 3 and the Comptroller General study in section 21 of the House-passed bill. In the Senate, strong pressure was being exerted by anti-Indian gaming forces of the states and non-Indian gaming industry to subject class III gaming to full state regulation. The sense of the Indian tribes at that time was that they would rather that the bill federally prohibit class III Indian gaming than be subject to state jurisdiction and regulation. As a consequence, in section 11(c)(1), the Committee bill prohibited class III gaming.

As in the case of the House moratorium provision, the Senate's class III treatment highlights the limited power conferred on the Commission by section 11(b)(2). While the new section 11(c)(1) prohibited class III gaming, the remainder of the subsection did give any tribe the option to request the Secretary to transfer jurisdiction over class III gaming on the reservation to the state. The Secretary would approve such transfer if the Commission certified that the tribe's class III gaming ordinance conformed to the standards of section 11(b)(2) and that the state had agreed to such transfer. However, in recognition of the limited scope of section 11(b)(2), the Senate provision also required that—

“(A)ny regulation or authority exercised by a state under this subsection, including issuance of a license, shall be exercised in the same manner and to the same extent as it is exercised on non-Indian lands within the state.” Andrew’s Amendment No. 3226, Congressional Record, October 6, 1986, pp. S29028-9

None of the parties on either side of the issue of Indian gaming were happy with the bill as reported from the Senate Committee. Efforts were made between the time the bill was ordered reported from the Committee and the adjournment of the 99th Congress to negotiate a compromise position. However, these compromise efforts failed. Senator Laxalt of Nevada placed a hold on the bill and then left town. The bill died with the adjournment of the 99th Congress.

Summary Impressions of the 99th Congress—Despite the growing pressure from those opposed to Indian gaming, including the Reagan Justice Department, to impose either state or federal regulation on Indian gaming, the leadership of both the House and Senate committees still sought to protect the right of tribal sovereignty and self-government in the regulation of gaming on Indian land. The congressional findings and statement of purpose of both H. R. 1920 and S. 902, as with H. R. 4566 in the 98th Congress, continued to assert the right of tribes to regulate their own affairs and the importance of gaming revenue to strong tribal governments. Admittedly, they also recognized the need for “clear standards or regulations for the conduct of gaming on Indian lands”.

The language of the legislation and the interpretation of that language by those who wanted strong Federal regulation of tribal gaming make clear that Congress did not intend to give the Commission that strong power in H. R. 1920. It is important to continue to make clear that the language discussed in this part and the language noted by the Administration witnesses as being too weak is basically the same language found in IGRA.

Also, in the second session of the 99th Congress, the Supreme Court granted *certiorari* in the case of *California v. Cabazon Band of Mission Indians* on June 10, 1986. This action had a profound effect upon the final consideration of H. R. 1920 in the 99th Congress, committee staff debate and deliberation in the last months of 1986, and legislative development in the first five months of the 100th Congress.

The 100th Congress

A primary motivation for the development and introduction of minimalist legislation in the 98th Congress was the concern that the Supreme Court would eventually decide to review an Indian gaming case and, based upon its *Oliphant* and *Rice* record, would reverse the favorable lower court decisions.

In 1985, the Cabazon Band of Mission Indians sued the County of Riverside in Federal district court to enjoin the county from enforcing its gambling laws against the Tribe. The State of California intervened and the district court granted the Tribe’s motion for summary judgment, holding that the state and county gambling laws were *civil/regulatory* in nature, and that neither had any authority to enforce their gaming laws within the reservation. The case was appealed to the 9th Circuit Court of Appeals. On

February 25, 1986, that court affirmed the lower court decision in favor of the Tribe, *Cabazon Band of Mission Indians v. Riverside County* (783 F. 2d 900). The court amended its decision on April 8th, fourteen days before H. R. 1920 was referred to the Senate Indian Affairs Committee. The State of California appealed the decision to the U. S. Supreme Court.

The House Committee staff concerns of the 98th Congress in 1984 would soon become a reality. The Supreme Court docketed the *Cabazon* case on April 29, 1986, and granted *certiorari* on June 10, 1986. Because the general expectation of parties on both sides of the Indian gaming issue was that the *Rice v. Rehner* Court would find a way to reverse the well-grounded lower court decisions, the legislative impact of the Supreme Court's action was immediate.

In the closing months of the 99th Congress, the legislative bargaining position of the state and gaming industry opponents of Indian gaming, and their congressional advocates, was significantly strengthened. Conversely, the tribes and their congressional proponents found themselves in a much weaker negotiating position. This was reflected in the negotiations that occurred after the June hearings of the Senate Committee and the filing of the Senate report in September. The state and gaming industry representatives were able to force a prohibition on class III gaming unless fully subject to state law. The tribes found themselves in the unenviable position of preferring an outright Federal ban on tribal class III gaming rather than being unilaterally subject to state law.

After the adjournment of the 99th Congress, the staff of the House Interior and Insular Affairs Committee began to assess the results of the 99th Congress on Indian gaming legislation, the dismal predictions for Supreme Court action in the *Cabazon* case, and the legislative prospects for the 100th Congress that would begin in January of 1987. In the fall of 1986, the Supreme Court heard oral arguments in the *Cabazon* case. As noted above, the grant of *certiorari* in the *Cabazon* case had already prejudiced the Indian legislative position. In addition, reports on the tenor of the questioning by Justices of the Court during oral argument were not encouraging for the Indian side, but, at least, it was expected that a decision would not come for several months. Finally, the strongest proponent for the rights of Indian tribes in the gaming legislative fight, House Interior Committee Chairman Morris K. (Mo) Udall, had already been diagnosed as having Parkinson's disease, which even then was affecting his ability to control the legislative action. Constrained by these and other considerations, the House committee staff began the development of legislation for introduction in the 100th Congress. Viewed from a post-*Cabazon* perspective, this legislation could only be seen as an unwarranted invasion of tribal sovereignty. Viewed from a pre-*Cabazon* perspective, it was a desperate attempt to salvage as much as possible from a bleak situation.

Legislation in the 100th Congress—Seven bills were introduced in the 1st Session of the 100th Congress relating to Indian gaming. The House bills were H. R. 964 introduced by Congressman Coelho on February 4, 1987; H. R. 1079 introduced by Congressman Udall on February 10th; H. R. 2507 introduced by Congressman Udall on May 21st; and H. R. 3605 introduced by Congresswoman Vucanovich on November 3rd. All of these bills were

referred to the House Committee on Interior and Insular Affairs, which was chaired by Congressman Udall. The Senate bills were S. 555 introduced by Senator Inouye on February 19th; S. 1303 introduced by Senator McCain on June 2nd; and S. 1841 introduced by Senator Reid on November 4th. All of these bills were referred to Senate Committee on Indian Affairs, which was chaired by Senator Inouye.

H. R. 964 was very much like H. R. 1920, as reported by the Senate Committee in the 99th Congress. It was introduced by Congressman Coehlo of California, who was the major opponent of Indian gaming in the House. Other than being one of the bills scheduled for the Interior Committee hearing on June 25, 1987, no further action was taken on the bill and, except for the fact that its anti-tribal gaming provisions were eventually rejected by the Congress, it is not relevant to the legislative history of IGRA.

H. R. 3605 and S. 1841 were identical bills. The House bill was introduced by Congresswoman Vucanovich and Congressman Bilbray of Nevada. S. 1841 was introduced by Senators Hecht and Reid of Nevada. These bills would have completely banned tribal class III gaming and made class II subject to state law. No action was taken on the bills and they are not relevant to the legislative history.

The other four bills, H.R. 1079 and 2507 in the House and S. 555 and 1303 in the Senate, played some role in the final development of IGRA and their legislative history have some relevance, more or less, to this paper.

H. R. 1079--The formal legislative history of the 100th Congress in the House with respect to action on Indian gaming legislation is sparse. As was noted above, the House committee staff had already begun the development of what, at best, can be called conciliatory legislation. On February 2, 1987, Chairman Udall introduced this legislation as H. R. 1079.

H. R. 1079 must be viewed as an attempt to salvage as much as possible for tribal sovereignty over Indian gaming before the Supreme Court rendered its decision in the *Cabazon* case. Even upon the date of introduction of H. R. 1079, it was the opinion of members of the Indian bar with Supreme Court experience that the Court might not reach a decision for six months or more. It was hoped that the concessions made to the opponents of Indian gaming would permit enactment before the Court's decision and before Chairman Udall lost his political and physical strength. H. R. 1079 was based upon the Senate version of H. R. 1920 that died on the Senate floor in the 99th Congress.

The bill still provided that Indian tribes could engage in, or license and regulate, class II gaming activities on Indian lands if the governing body of the Indian tribe adopted an ordinance or resolution. The Chairman of the Commission was still required to approve the ordinance if it met the minimum standards of section 11(b)(2). However, H. R. 1079 went further. It required that tribal licensing requirements for class II gaming had to be at least as restrictive as state law governing similar gaming within the state. For class III, the bill provided that a tribe could engage in the activity if it adopted an ordinance under the bill, secured approval of the Commission AND obtained a

Commission license. It is important to note, however, that the Committee leadership and staff interpreted the ordinance approval requirement, standing alone, as not conferring power on the Commission to regulate tribal class II or III as would be the case under a state licensing procedure.

Mr. Udall's introductory statement made clear his intent to confer only a limited regulatory power on the Commission, despite the concession made in the bill.

"The bill I am introducing today will establish a National Indian Gaming Commission which will be vested with the responsibility of implementing the terms of the Act and with administering the regulations and standards set up by the Act. . . . (T)he powers vested in the Commission may not be as comprehensive as some might desire. The tribes seem to be doing an adequate governmental job of protecting themselves and the public which participate in those games." (Congressional Record, February 10, 1987, p. E 437)

In this statement, Chairman Udall set forth his intention that the Commission's regulatory powers be of a limited nature and expressed his continuing confidence in the primary responsibility and right of the tribes to govern themselves. He goes on to state:

"This does not mean that my committee does not find a need for some Federal involvement in the regulation of tribal gaming activity. . . . However, I believe that any Federal intrusion into the powers of tribal self-government should be limited to that which is necessary to protect the tribes and the public while honoring this right of self-government.

There can be no mistaking the intent of Congressman Udall, as the original sponsor of the language that would become section 11(b)(2) of IGRA [25 USC 2710(b)(2)], that such language did not confer extensive regulatory power on the Commission.

California v. Cabazon—Even with the concessions it made, H. R. 1079 generated little support from opponents of Indian gaming. If the Supreme Court used its rationale in the *Rice v. Rehner* case as a guide in deciding *Cabazon*, the decision would wipe out the right of tribes to engage in gaming free of state control and regulation. The opponents of Indian gaming were certain the Court would do so, and they remained adamant in their legislative insistence upon full state control or Federal prohibition.

On February 25th, fifteen days after the introduction of H. R. 1079, the Supreme Court dropped another bombshell into the consideration of Indian gaming legislation. Its decision in *California v. Cabazon Band of Mission Indians* (480 U. S. 202) was a full vindication of the right of tribes to engage in gaming activity as set out in the lower court and in the earlier appeals court decisions in *Seminole* and *Barona* cases. With the *Cabazon* decision, the legislative momentum and strength shifted away from the state-gaming industry position to the tribal government position.

The evidence of this shift is reflected in the tone of a May 4, 1987, letter from Chairman Udall to Congressman Claude Pepper of Florida. Pepper, the Chairman of the powerful House Rules Committee, had been a reluctant ally of Congressman Coelho and other House opponents of Indian gaming. In discussing the impact of the Court's decision and in advising of an upcoming Committee hearing, Chairman Udall's letter stated:

“One effect of the Court decision is that some tribes are now opposing enactment of any legislation imposing regulations on tribal gaming. This opposition extends to my own bill, H. R. 1079. While I can appreciate this change in attitude of the tribes, I still feel that some legislation is desirable to provide needed protection for the tribes, themselves, and the public. As a consequence, I have directed my staff to redraft a bill which recognizes the rights secured to the tribes by the Supreme Court decision and, yet, establishes some Federal standards and regulations to protect the tribes and the public interest. *However, I believe that this Federal regulation must be accomplished in a manner which is least intrusive upon the right of tribal self-government* (emphasis added).

Even though Chairman Udall could now deal from some degree of legislative strength because of the *Cabazon* decision, he still tried to reach out to the other side in a compromising manner. In a lengthy statement setting out his philosophy and actions in the Indian gaming legislative battle, Chairman Udall stated:

“But I think that I have shown myself to be a realist in the legislative process. Recognizing the real and fabricated concerns of non-Indian interests and over the strong objections of Indian tribes, I laid on the table a compromise offer which included significant State jurisdiction over class III gaming activities while retaining only basic tribal government rights. No reasonable person could say that this was anything other than an honest attempt at compromise. In fact, it went well beyond a mid-point compromise.

“The horse and dog track interests sneered at the offer and reiterated their demand for total domination of Indian rights. The casino owners expressed a willingness to accept my compromise subject to certain changes which brought it back to State control. Their unwillingness to accept such an honest, good faith offer of compromise only reinforces the conviction that their concern is not organized crime in Indian gaming, but the suppression of Indian competition.

“Mr. Speaker, I reluctantly take my compromise off the table and revert to my support for the language of my bill, H. R. 2507, which will provide effective regulation of Indian gaming within the context of our solemn promises to the Indian tribes. Still, I am willing to consider compromise if the non-Indian gaming industry is willing to respect Indian rights and are willing to leave a small piece of the pie for the Indian people.

“Until then, I must oppose legislation damaging to Indian self-government and Indian rights.” Congressional Record, July 6, 1988, P. H5028.

H. R. 2507--As noted in his May 4, 1987, letter to Congressman Pepper, Chairman Udall directed his staff to develop a post-*Cabazon* bill for introduction. The committee staff did so and, on May 21, 1987, Mr. Udall introduced the bill as H. R. 2507, which was referred to the Committee on Interior and Insular Affairs. Because the Chairman felt that an extensive record had already been made on similar legislation in the 98th and 99th Congress, he did not see the need for more extensive hearings. In his May 4th Pepper letter, he stated—

“Because my Committee has held extensive hearings on this subject in the last Congress, hearings in this Congress will be primarily to update the record.”

A hearing was held on the bill on June 25, 1987.

Provisions of H. R. 2507--With several minor exceptions and a few major exceptions, the language of H. R. 2507, as introduced, is remarkably similar to the language of the Indian Gaming Regulatory Act. Except for the treatment of class III gaming, the language of H.R. 2507 that is relevant to this paper is nearly identical to IGRA language.

The provisions of H. R. 2507 establishing the National Indian Gaming Commission tracks very closely the IGRA language in sections 5 through 10 [25 USC 2704-2709].

In terms of class I and II gaming, section 10 and 11 of H. R. 2507 provided that class I gaming would be within the exclusive jurisdiction of the Indian tribes and not be subject to the Act. They provided that Class II and Class III gaming would be within the jurisdiction of Indian tribes, subject to this Act, where the State permitted the gaming activity and it was not otherwise specifically prohibited on Indian lands by Federal laws. It permitted a tribe to conduct and regulate Class II gaming if it adopted an ordinance that was approved by the Commission Chairman. It required the Chairman to approve any such ordinance if it provided that—

- (1) only the tribe would own the gaming activity;
- (2) net revenues would only be used for specific purposes to benefit the tribe;
- (3) the tribe would submit an annual independent audit of gaming activity;
- (4) contracts exceeding \$25,000 (except for legal or accounting services) would be subject to independent audits;
- (5) Construction and maintenance of the gaming facility would meet applicable environmental, health and safety standards; and
- (6) an adequate system existed for conducting background investigations on management officials and key employees.

It also provided that Indian tribal ordinances regulating Class II gaming activities would be deemed approved by the Chairman 60 days after their submission if the Chairman did not act on them within such period.

As is evident, these provisions of H. R. 2507 closely resemble the language of section 11(a) and (b) of IGRA [25 USC 2710(a) and (b)]. They are also very similar to the previous bills introduced by Chairman Udall in the 98th & 99th Congress. In every case, Chairman Udall made clear his intention that the language would result in only minimal intrusion upon the right of tribes to regulate gaming within their jurisdiction.

H. R. 2507 authorized an Indian tribe to engage in Class III gaming, but made such gaming subject to Commission regulation. The tribe had to adopt an ordinance meeting requirements of a Class II ordinance with approval by the Commission. It also required the tribe to obtain a license from the Commission. It required the Commission to grant a license to any applicant unless it made a specified finding of the applicant's inability to operate the gaming activity in accordance with the standards under the bill and Commission gaming codes. It also required that Chairman to adopt a comprehensive regulatory scheme for Class III gaming activity in any case where he first approved a

Class III ordinance, and that those regulations be patterned on those of the State where the activity was to occur. Finally, H. R. 2507 required that, if any State law or regulation adopted by the Commission for class III gaming contained criminal penalties, they would be enforceable by the State where it has criminal jurisdiction over Indian reservations or the United States, as appropriate.

Again, it is clear from these provisions that, if Congress had intended to vest power in the Commission to impose comprehensive gaming regulations on Indian tribes, it knew how to do so. In fact, section 6(a) of the bill provided that the Chairman had the power, subject to appeal to the Commission, to—

“(5) promulgate regulatory schemes for class III gaming as provided in section 12.”

Nowhere is there found in IGRA any such language empowering the Chairman or Commission to ‘promulgate’, and impose upon tribes, regulatory schemes. It is also clear that, when Chairman Udall and other congressional sponsors of gaming legislation felt the need to vest such power in the Commission, they determined that the language of section 11(b)(2) of IGRA [25 USC 2710(b)(2)] had not done so.

H. R. 2507: House Committee Hearing—The House Interior Committee held a hearing on H.R. 2507 and H. R. 964 on June 25, 1987 (*Hearing before the Committee on Interior and Insular Affairs, U. S. House of Representatives, 100th Congress, 1st Session, Serial No. 100-70*). . In opening the hearing, Chairman Udall stated:

“I had originally intended to have only a short hearing to update the extensive record that our committee made on this issue in the last two Congresses. However, it is clear that much more extensive hearings and consideration by the committee will be necessary in this Congress. . . .Much has changed since the 99th Congress. Indian tribes won a surprising victory before the Supreme Court in the Cabazon case, and many are now opposed to any legislation on this matter. . . . The non-Indian gaming industry, fearful of this new source of competition, has become more insistent on State regulation of Indian gaming.”

While the Chairman noted his intention of holding several hearings, including field hearings, this was the only day of hearings.

The administration witnesses were Ross O. Swimmer, Assistant Secretary of the Interior for Indian Affairs and Victoria Toensing, Deputy Assistant Attorney General. The Interior Department position delivered by Swimmer, although an unfortunate position for the principal trustee for Indian tribes, was not surprising in view of the Administration position in the 99th Congress. He stated:

“We believe that regulation should be at a Federal level for bingo, because there is no appropriate State regulation of bingo. Most of the States permit a form of charitable bingo. They do not have a regulated, they are not equipped to regulate Indian bingo as it is played now, in a high stakes manner.

“Our preference as to the so-called class III or what we call hard-core gaming is one of two options, either not be allowed in Indian country, or that if it is allowed in Indian country, it

should be regulated by the State that has an appropriate regulatory body already in place to do it. . . .

As a result of that, we support H. R. 964 and its companion bill in the Senate”

Toensing, on behalf of the Justice Department, testified in the same vein as Swimmer. For purposes of legislative history, it is important to note that their strong call for Federal regulation of class II (bingo) and State control of class III was ultimately rejected by the Congress.

H. R. 964 & H. R. 2507: Further House Action.—There is a relative lack of legislative history on gaming legislation in the House during the 100th Congress. This is because the June 1987 hearing of the House Interior Committee on H. R. 2507 was the last formal action taken by the Interior Committee. No further hearings were held. There was no committee markup on any of the pending bill and, therefore, no committee report was filed with the House. For the rest of 1987, there was a behind-the-scenes, often bitter, battle over the course of House action on Indian gaming legislation.

The forces arrayed against Indian gaming were politically powerful. They included the Governor, Attorney General, and the entire congressional delegation of the State of Nevada. The National Association of Attorneys General weighed in against Indian gaming and for state regulation. The commercial gaming industry, including the casino industry of Nevada and New Jersey, the greyhound and horse track organizations, and the jai alai operators, exerted heavy political pressure against Indian gaming. Religious organizations and social groups such as the Southern Baptists Convention and the National Council on Compulsive Gambling urged prohibition or severe restriction of Indian gaming by the Congress. In the House, the anti-Indian gaming effort was lead by Congressman Coelho of California, the Democratic Whip. In addition to the two House members from Nevada, he had the support of Congressman Pepper of Florida, Chairman of the powerful Rules Committee.

The Indian tribes, while active in pushing for the most favorable legislation and opposing the anti-Indian bills, had not been able to form a strong, united lobby effort. In fact, there was some division in that effort. Those tribes that had successful high stakes bingo operations seemed willing to accept state regulation or strong Federal restrictions on class III gaming if the class II operations were protected. Other tribal leaders vehemently opposed any legislation restricting the *Cabazon* rights. In fact, this split in the Indian position over class II and class III came into play in a meeting held in Chairman Pepper’s office in the Capitol building. Present were Chairman Pepper, Chairman Udall and the Author, and Congressman Coelho and his staff person. Despite the fact that some ‘bingo tribes’ had made public their willingness to accept State regulation or a Federal prohibition on class III, Chairman Udall, at staff urging, had taken a strong position against any kind of State regulation. Coelho accused Udall’s staff of standing in the way of legislation moving forward despite this tribal position.

During the summer and fall months of 1987, Chairman Udall and his committee staff made several efforts to secure a compromise with the opposing forces in the House that

would be minimally acceptable to most of the tribes. As noted, some of the tribes would have accepted a bill that would have subjected class III to state regulations, but Mr. Udall would not agree to such a provision. The opposing forces, including Congressman Coelho, would not agree to an acceptable compromise. As the year neared its end, Mr. Udall's health began to worsen and his ability to control legislative events, even in his own committee, began to erode. As the end of the 1st session of the 100th Congress approached, Chairman Udall advised his committee staff that, while he probably could secure enough votes to report H. R. 2507 out of the Committee in an acceptable version, he did not think that he could secure a two-thirds vote under suspension of the rules and that he could keep killer amendments off the bill during any regular House floor action.

While Chairman Udall was doubtful of his ability to control legislative events on the floor of the House, his stature in the House and in his own committee, particularly on Indian matters, was such that he could prevent any detrimental bill from coming out of his committee. Therefore, the Chairman made a decision that no further action would be taken in the Committee on H. R. 2507 or any other Indian gaming legislation. In addition, no further attempts would be made to secure a compromise in the House. His advice to the parties on both sides of the issue was to focus their attention on passage of a bill by the Senate. He advised that, if the Senate passed a bill the terms of which were unacceptable to him, it would be referred, in the normal course, to the Interior Committee and he would kill it. If a bill were passed by the Senate that was acceptable to him and to the parties on both sides, he would arrange to have it held at the Speaker's table without committee referral. He would then secure House passage under suspension of the rules that permitted no amendments. Chairman Udall authorized and directed his committee staff to enter into negotiations that might develop in the Senate to work for an acceptable compromise. That process did develop, with S. 555 and S. 1303 as the focus.

S. 555: Senate Committee Consideration—S. 555 was introduced by Senator Inouye, Chairman of the Senate Indian Affairs Committee, on February 19, 1987, six days before the *Cabazon* decision. S. 555 was largely based upon H. R. 1920, as reported from the Committee in the 99th Congress. The provisions and implications of that legislation, as discussed earlier, are relevant to S. 555. On June 2, 1987, Senator John McCain introduced S. 1303. The bill was identical to H. R. 2507 and the discussion of the provisions and implications of H. R. 2507 above are relevant to S. 1303.

S. 555: Committee Hearings.—On June 18, 1987, the Senate Indian Affairs Committee held a hearing on both bills (*Hearings on S. 555 and S. 1303, Select Committee on Indian Affairs, June 18, 1987, 1st Session, 100th Congress, S. Hrg. 100-341*). The testimony before the Committee covered much of the ground that had been covered in the 98th and 99th Congress. Senator Chic Hecht of Nevada, a sponsor of the anti-Indian gaming bill, S. 1841, made a revealing comment at the hearing when he stated—

“(T)wo identical measures, S. 1303 and H. R. 2507, put substantially all regulatory control in the hands of the Indian tribes themselves. . . . S. 1303 and H. R. 2507, in allowing self-regulation, fail to separate the regulated activity and the regulators”, *Hearings*, p. 81.

Again, however, it was the Justice Department statement presented by Ms. Victoria Toensing, Assistant Attorney General, that was most illuminating on the question of the perceived scope of Commission regulatory authority under S. 555 and S. 1303. First, Ms. Toensing rejected S. 1303, the bill most closely resembling the final shape of IGRA, as a viable markup vehicle—

“We respectfully suggest that S. 1303 as presently drafted proposes such an ineffective regulatory structure and we are not optimistic that an acceptable compromise can be developed if S. 1303 is to serve as the drafting vehicle. . . . We believe that S. 555 represents a vehicle for a possible solution.” Hearings, P. 254.

In terms of its treatment of class II gaming, the provisions of S. 555 were much like the provisions of S. 1303 and IGRA. With respect to the Commission’s authority in that respect, Toensing statement asserted—

“(I)t is essential that this Commission have the fundamental authority necessary to regulate gaming effectively . . . S. 555, while setting forth general and some specific standards, relies primarily on self-regulation by the tribes . . .” Hearing, p. 261

Toensing continued to interpret the language of tribal gaming ordinance approval found in H. R. 4566 in the 98th Congress, H. R. 1920 in the 99th Congress, H. R. 2507, S. 555, and S. 1303 in the 100th Congress, and in IGRA itself as the Author did, *i.e.* that it establishes general standards for the Chairman’s approval, but “relies primarily on self-regulation by the tribes”. The fact that Ms. Toensing, on behalf of the Justice Department, found this language unacceptable in that regard is even more telling when it is considered that Congress rejected her position and retained the language.

The other testimony taken by the Committee was in the same vein as testimony before the House Committee and testimony taken in the 99th Congress. Senators and House members from states with significant commercial gaming activity strongly pushed for legislation either banning Indian gaming or subjecting it to state regulation. The same was true of State government officials and representatives of the non-Indian gaming interests. Indian tribal representatives general supported the Udall-McCain bill and strongly opposed State regulation.

As in the House, no further formal action was taken in the Senate Indian Affairs Committee in 1987 after the June hearing. The intransigent opposing forces that had deadlocked the House were also at work in the Senate. S. 1303, which Chairman Inouye had co-sponsored, was acceptable to the Indians and to Chairman Udall. S. 555 and the other pending bills were not. The Justice Department evidenced lukewarm support for S. 555, with further changes, but preferred the language contained in its 99th Congress bill, S. 2557. The states and the gaming industry supported the language of S. 2557, but preferred the state-control bills of the Nevada delegation. In addition, the Senate Committee leadership and staff were aware of Chairman Udall’s final position in the House. Given Udall’s continuing ability to kill legislation referred to his Committee, it would have been an exercise in futility for the Senate to send a bill to the House that was not acceptable to him and, therefore, to the tribes.

S. 555 Negotiations—The Supreme Court’s decision in the *Cabazon* case was the primary motivating force behind the eventual negotiation of Indian gaming legislation that was at least minimally acceptable to all parties. The other two major factors was Chairman Udall’s announced decision to halt further action in his committee on Indian gaming legislation and the political pressure generated in the Congress from the anti-Indian gaming forces.

From the perspective of most of the tribes, the best legislative solution would have been no legislation at all. They had won the battle in the Supreme Court and could only see a reduction in their *Cabazon* rights through legislation. There were, however, two countervailing considerations in this position. First, although casino gaming had not yet become a major part of the Indian gaming scene, a few tribes had developed operations that would be class III under the pending legislation and other tribes saw definite possibilities in casino gaming. However, the Johnson Act (15 USC 1171 *et seq.*) was a Federal criminal prohibition against slot machines and other gaming devices on Indian lands. These most lucrative activities were barred by Federal criminal law. Some of the tribes and their congressional supporters thought that it might be possible to include a waiver of the Johnson Act in any legislative compromise.

Secondly, the tribes were not unaware of, or indifferent to, the size and intensity of the political force in Congress behind the anti-Indian gaming movement. These forces might have been able to force consideration of detrimental legislation in both the House and Senate. Congressional supporters of the Indian position, including Chairman Inouye and Udall, independently felt the need for some kind of legislation and were urging the tribes to work for a compromise.

The anti-Indian gaming forces, inside and outside Congress, remained adamant that all Indian gaming be subject to full state regulation or, at least, strict Federal regulation and control. This was particularly true for class III gaming. The opposing forces had generally concluded that they had lost the class II argument, but some were still insisting on strict Federal regulation of the activity in lieu of tribal regulation. However, while they did not agree with the Court’s rationale in the *Cabazon* case, they understood its implications and were afraid of the scope of the tribes’ authority under the case. Where the tribes’ initial reaction was to oppose any legislation, the more rational segment of the opposing forces and their congressional supporters felt the need for some kind of legislation, even if not fully to their liking.

These factors made possible the negotiation of compromise legislation. However, little occurred in the remaining months of 1st session of the 100th Congress after the conclusion of the House and Senate hearings in June. Active attempts to negotiate an agreement on compromise legislation began in late 1987, but did not begin in earnest until the beginning of the 2nd session of the 100th Congress in January of 1988.

Through the winter and spring of 1987-88, the Senate Indian Affairs Committee became the focus of those negotiations. The majority and minority staff of the Committee, acting under the direction of Chairman Inouye and Vice-Chairman Daniel J. Evans of

Washington, hosted the negotiations, as the goal was passage of a Senate bill. The House Interior Committee majority and minority staff participated in the negotiations, acting under the direction of Chairman Udall and Ranking Republican Don Young. Also involved in the negotiations was the personal staff of other members of the House and Senate having an interest in the legislation. At various times, representatives of the Federal and state governments participated in the negotiations. The Indian tribes and interested non-public parties did not directly participate in the negotiations, but obviously made their views known through the several participating parties.

The negotiations were often tense, volatile, and acrimonious. On more than one occasion, a party would threaten to walk out and the process was near collapse. While the recounting of the course of these negotiations would make interesting telling, they are not relevant to the issue of this paper. The final result of the negotiations is relevant.

The negotiations did result in some minor changes in all parts of the legislation, but the primary focus of the negotiators was on how to deal with class III gaming. While interesting, it is not here relevant to discuss the compromises that went into the final language on class III gaming and resulted in the Tribal-State compact concept. The agreement arising from the negotiations was incorporated into S. 555 as an amendment in the nature of a substitute. The negotiation vehicle, however, was the text of H. R. 2507. Consequently, the legislative history of H. R. 2507 and S. 1303, and their legislative antecedents in the 98th and 99th Congress, are relevant to the non-class III portions of IGRA.

After all parties had reluctantly signed off on the compromise language, it was presented to the Senate Indian Affairs Committee as a substitute for S. 555.

S. 555: Senate Report and Passage—Final agreement was reached on the compromise language in late April 1988. On May 13th, the Senate Indian Affairs Committee took up consideration of S. 555. It adopted an amendment in the nature of a substitute that was the text of the compromise and ordered the bill reported favorably, as amended, to the Senate. On August 3, just prior to the adjournment of the Congress for the Labor Day recess, the Committee filed its report on S. 555 (S. Rept. No. 100-446).

Other than Senate and House floor debate, the Senate report is the only formal legislative history on S. 555 as enacted into law. This does not discount the value of the legislative history in the 98th, 99th, and 100th Congress on other bills with identical or nearly identical language as contained in S. 555, as reported.

S. 555, as reported, was enacted into law as the Indian Gaming Regulatory Act. As this paper will examine relevant portions of IGRA in another part, comments on the specific provisions of the bill will not be made at this point. However, some extracts from the Committee report and Senate and House floor comments will be examined.

The Senate report almost immediately restates the five-year record of congressional intent in the enactment of Indian gaming legislation—

“S. 555 recognizes the primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For class III casino, pari-mutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues.” Senate report, p. 3.

This report language sets out with clarity the congressional intent that the tribes would retain their inherent right to regulate class II gaming. The Commission role was to be primarily one of oversight to ensure that the tribes implemented the minimum Federal standards set out in its gaming ordinance under section 11(b)(2). The Commission was given certain other powers *vis-à-vis* class II gaming such as management contract review and approval, establishment of fees and assessment of fines, granting of certificates of self-regulation, etc. Again, on page 7 of the report, it states—

“Class II continues to be within tribal jurisdiction but will be subject to oversight regulations by the National Indian Gaming Commission”

There is no question that the Commission has a regulatory role with respect to class II gaming. However, as is made obvious by this report language, the role is **not** one of the development and imposition of detailed regulations of Indian gaming in lieu of tribal government decisions on necessary regulations, but one of “oversight” of the tribe’s regulatory efforts.

On September 15th, the Senate took up consideration of S. 555 as amended. The comments of Chairman Inouye, who managed the bill on the Senate floor, are helpful in understanding the underlying intention of the Congress with respect to the limited regulatory role of the Commission. He stated:

“(T)he committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands.” Congressional Record, September 15, 1988, p. S24022.

Throughout the five-year consideration of Indian gaming legislation, the leadership of both the Senate and House made every effort to balance these two goals.

Vice-Chairman Evans also evidenced his understanding of the limited scope of the Commission role. In discussing the amendment to the Federal criminal code made by section 23 of S. 555, he noted:

“It is my understanding that this language (*section 23 of IGRA*) would, for purposes of Federal law, make applicable to Indian country all State laws pertaining to licensing, regulation, or prohibition of gambling except class I and II gambling which will be regulated by a tribe and class III gambling which will be regulated by a tribal-state compact.” Congressional Record, September 15, 1988, p. S24025.

In stating that class II gambling would be regulated by the tribe, he made no mention at all of the Commission. Senator Evans made another comment that day, which reveals his understanding of the primary role of the tribes in regulation class II gaming—

“Given this fact (*tribal success in keeping out organized crime.*), the Indian gaming regulatory act should not be construed, either inside or outside the field of gaming, as a derogation of the tribes’ right to govern themselves and to attain economic self-sufficiency. . . . With that set of important caveats and warnings, Mr. President, I believe the act which we have before us has come as close as we can to providing appropriate regulation while at the same time not stepping over the boundary and derogating rights of Indian people any more than the rights they gave up 150 years ago in the signing of our treaties.” Congressional Record, September 15, 1988, p. 24028

While this paper stands for the proposition that the language of the Act, taken together with the legislative history, confers only a limited, oversight regulatory power on the Commission over Indian gaming, it must be admitted that the statutory language may be, in some respects, ambiguous and unclear. However, as noted earlier in this paper, there are canons of construction applicable to such situations. Vice-Chairman Evans was also familiar with those canons, when he stated on the Senate floor—

“Furthermore, this bill was drafted with the full understanding of the principles of law which guide our relationship with the Indian tribes.

“The inherent sovereign rights of the Indian tribes were reserved by the tribes for the fullest and unencumbered benefit of the Indian people. These rights have been recognized time and time again by the highest courts of our Nation, and they continue in existence except in rare instances where the Congress has exercised its power to restrict them. When this body has chosen to restrict the reserved sovereign rights of tribes, the courts have ruled that such abrogation of tribal rights must have been done expressly and unambiguously.

“Many long hours were devoted to this legislation to iron out any possible ambiguities, and we hope to have achieved a bill both clear and concise in this regard. Therefore, if tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construed. This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the Cabazon decision.” p. 24027

Before the enactment of IGRA, it was admitted that the Federal government had no statutory power to impose its regulations on conduct of otherwise legal gaming activities by Indian tribes on the reservations. This was a sovereign right of the tribes. If IGRA took that right away from the tribes and gave it to the Commission, that would be an abrogation of the right. As Senator Evans so eloquently stated, “If tribal rights are not explicitly abrogated in the language of this bill, no such restriction should be construed.”

On September 15th, the Senate passed S. 555, as amended, by voice vote.

House Passage of S. 555--S. 555, as passed by the Senate was received in the House on September 22nd. In carrying out his agreement, Chairman Udall had the bill held at the desk and did not seek its referral to his committee. S. 555 was, as he stated—

“(A) compromise, hammered out in the Senate after considerable debate and negotiations. It is a solution which is minimally acceptable to me and I support its enactment.” Congressional Record, September 26, 1988, p. H25367.

The bill was taken up under suspension of the rules, the House procedure that permitted no amendments to the bill, but which required a two-thirds vote for passage.

Chairman Udall, the House manager of the bill, also noted that the language of S. 555 was contained in other bills considered in the House—

“While the Interior Committee did not consider and report S. 555, certain members and committee staff did participate actively in negotiations in the Senate which gave rise to the compromise of S. 555. In addition, many of the provisions of S. 555 are included in House legislation which has been considered by the Interior Committee and the House in this and past congresses.” Congressional Record, September 26, 1988, p. H25376.

This statement of Congressman Udall make clear his intention that the legislative history of S. 555 include relevant legislative history on the legislation introduced and considered in the 98th, 99th, and 100th Congresses.

Mrs. Vucanovich of Nevada, who managed the bill for the Republicans, also made clear her understanding of the limited, oversight role of the Commission with respect to class II gaming, stating:

“Under the bill, class II gaming will be regulated by the tribes with oversight by a five (*sic*) member national Indian gaming commission.” Congressional Record, September 26, 1988, p. 25377.

Finally, Chairman Udall set on the record his own awareness of the canons of construction and his intent that they be applied to this legislation when he said—

“Mr. Speaker, while this legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. I would expect that the Federal courts, in any litigation arising out of this legislation, would apply the time-honored rule of construction that ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.” Congressional Record, September 26, 1988, p. H25377

The House debate on S. 555, under suspension of the rules, was completed on September 26th. On September 27th, the bill passed on a roll call vote of 323 ayes and 84 noes. The bill was signed into law by the President on October 17, 1988.

SECTION-BY-SECTION ANALYSIS OF IGRA

With the foregoing history and legislative history of the development, consideration and enactment of IGRA, it may be helpful, in understanding the significant implications of IGRA with respect to Commission authorities and other difficult issues arising from implementation of the Act to look at the Act on a section-by-section basis with respect to pertinent section or provisions.

Section 1. Short Title

Section 1 cites the law as the “Indian Gaming Regulatory Act”.

Section 2. Findings

Section 2 of the Act sets out the congressional findings of the Congress in the consideration and enactment of the legislation. The language and intent of these findings changed very little in the five years between the introduction of H. R. 4566 on November 18, 1983 in the 98th Congress and the enactment of IGRA into law on October 17, 1988. Paragraph (5) provides that Congress finds that:

“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.”

This paragraph, in effect, adopts the holding in the Cabazon case as the foundation of IGRA. As noted earlier, the phrase “not specifically prohibited by Federal law” puts the burden on the Federal government to show that a tribal gaming activity conducted under IGRA is in violation of Federal law.

Section 3. Declaration of Policy

Paragraph (1) provides that one purpose of the Act is to provide a statutory basis for the operation of gaming by tribes to promote economic development, tribal self-sufficiency, and strong tribal government. It would be contrary to that stated purpose to interpret an ambiguous provision in the substance of the law as abrogating or eroding the right of tribal self-government.

Paragraph (2) provides that it is the purpose of the Act to provide a statutory basis for the regulation of gaming by tribes. It is made clear in the substance of the Act that this purpose is achieved by complete regulation of class I by tribe, by regulation of class II by tribes subject only to the minimum standards of the tribal gaming ordinance and oversight regulation by the Commission, and by regulation of class III solely through the terms of a Tribal-State Compact.

Paragraph (3) provides that it is purpose of the Act to establish an independent regulatory authority for such gaming, the establishment of Federal standards and of a National Indian Gaming Commission.

Section 4. Definitions

Section 4 defines various terms used in the Act. Paragraph (7)(A) defines the term “class II gaming”. In the final development of the IGRA legislation, the drafters very carefully included language permitting “electronic, computer, or other technologic aids” to class II gaming. It was the intention of Congress to allow the tribes to take advantage of any new technology developed in the future in the play of such games. The Justice Department and the Commission have resisted efforts of tribes to do so. Recent court decisions on such technologic aids have favored the tribes. The Commission is now engaged in rule making that would result in a denial of the rights the Congress sought to secure to the tribe in this regard. In noting the intent of Congress in this regard, the Senate report on S. 555 noted:

“The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide *maximum flexibility* (emphasis added). . . . Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology *as long as the technology does not change the fundamental characteristics of the bingo or lotto games* (emphasis added) In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.”

The Committee made clear the intent of Congress that, as long as the *fundamental characteristics* game were not changed, technological aids to class II games were to be given wide acceptance. In like manner, as long as those aids did not convert the game into an electronic facsimile of a slot machine, the aid was acceptable. The current efforts of the Commission in the proposed promulgation of its class II definition regulations would defeat this intent.

Section 5. National Indian Gaming Commission

Section 5 provides for the establishment and membership of the Commission.

Section 6. Powers of the Chairman

Section 6 confers on the Chairman, on behalf of and subject to appeal to the Commission, powers relating to temporary closure of facilities, civil fines, approval of management contracts and such other powers as may be delegated by the Commission. The specific powers granted are authorized by other provisions of IGRA.

Section 7. Powers of the Commission

Subsection (a) confers power on the Commission, not subject to delegation, to recommend an annual budget, adopt regulations for assessments and collection of fines, establish rate of fees, authorize the Chairman to issue subpoenas, and to make permanent an order of temporary closure of a gaming facility.

Subsection (b) lists several routine powers of the Commission. Paragraph (10) provides that the Commission shall promulgate such regulations and guidelines as it deems appropriate to implement provisions of this Act. The Commission has seized upon this routine administrative power to enlarge its substantive powers well beyond that which were specifically or impliedly granted by IGRA. The inclusion of paragraph (10) in the law was unnecessary. Under general administrative law, Federal agencies have an inherent power to promulgate regulations to implement laws committed to their execution, whether that is recognized in the law involved or not. However, the inclusion of language such as paragraph (10) is not a grant of substantive power in and of itself. The authority to promulgate the rule itself must be found in some other part of the law. This was made clear in the recent decision of the Circuit Court for the D

Section 8. Commission Staffing

Section 8 provides for the appointment of a General Counsel and other Commission staff.

Section 9. Commission—Access to Information

Section 9 authorizes the Commission to request information from other Federal departments and agencies.

Section 10. Interim Authority to Regulate Gaming

Section 10 provides that the Secretary would continue to exercise any authority he might have with respect to Indian gaming until the Commission was up and running. The Secretary was to provide staff and support assistance to the Commission.

Section 11. Tribal Gaming Ordinances

Although entitled “Tribal Gaming Ordinances”, section 11 is the substance of IGRA, providing for the right of tribes to conduct class I, II, and III gaming.

Tribal Ordinance.—Subsection (a), while leaving class I gaming to the ‘exclusive’ jurisdiction of tribes, provided that class II gaming would ‘continue’ to be within the jurisdiction of the tribe “subject to the provisions of this Act”. It was the intent of Congress, as set out above, that class II gaming was to be subject to tribal regulation subject only to the minimum Federal standards requirements of the tribal gaming ordinance and to specific oversight powers conferred on the Commission. Once an ordinance for a tribe had been approved, it was that tribe’s continuing right to develop its own governmental regulations for that activity. The Commission was only given power to oversee the tribe’s compliance with the terms of the ordinance, not to substitute its own detailed regulations and regulatory requirements upon the tribe.

In addition, it was the intent of Congress that, where a tribe had submitted a gaming ordinance to the Chairman for approval and where the Chairman had given such approval based upon a determination that the ordinance met the minimal requirements of section 11(b)(2), the Chairman’s approval would be final. The Commission is now requiring that tribes with approved ordinances resubmit amended ordinances to ‘comply’ with new Commission requirements.

Proprietary Interest.—Subparagraph (A) of section 11(b)(2) states that the approved ordinance must provide that the tribe has the sole proprietary interest and responsibility for the conduct of any gaming activity. The Commission has taken the position that a tribal gaming enterprise may not enter into a non-management contract in which the contract fee is based upon a percentage of gross or net revenues. The rationale for this position is that providing for such a percentage-based fee gives the contractor a proprietary interest in, and responsibility for, the game. As noted above, section 6(b)(4) H.

R. 4566 in the 98th Congress did, in fact, specifically prohibit any tribal member or non-tribal entity from having any proprietary interest in a tribal gambling operations “or a percentage interest in the gross or net revenues from such operations”. This makes clear that Congress knew the difference between having a proprietary interest in the tribal gaming and having a percentage interest in the revenues. In subsequent versions of the legislation, the prohibition against a percentage interest was dropped while the prohibition against a proprietary interest (or control) was retained.

Environmental Laws.—Subparagraph (E) of section 11(b)(2) provides that the tribal gaming ordinance must include language providing that:

“the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety”.

Based upon this language and the rule-promulgation language of section 7(b)(10), the Commission developed rather comprehensive regulations imposing environmental and public health and safety standards upon tribal gaming activities. As noted earlier, the language of section 11(b)(2)(E) of IGRA is similar to language in H. R. 1920, as reported by the House Interior Committee in the 99th Congress. The Committee report stated:

“It is not intended by this provision that tribal gaming activity be subject to general Federal laws relating to the environment unless it would be so subject under existing law.”

The House Committee clearly intended that, except where existing Federal law such as the Environmental Protection Act specifically applied to the tribes, the tribes own laws relating to the protection of the environment and the public health and safety in the gaming activities would apply, not a whole series of new Federal “laws” dreamed up by the Commission.

Self-Regulation.—Paragraph (3) of section 11(c) of IGRA authorizes the Chairman to issue certificates of self-regulation of class II gaming under certain circumstances. Where a class II tribe could make a showing of ability to carry out the oversight regulatory functions of the Commission, they would be entitled to relief from the Commission’s oversight regulations and a reduction in fees assessed. This provision was added at the urging of the Tulalip Tribes of Washington and was intended to provide class II tribes with a good record of self-regulation under the tribe’s inherent power to be relieved of the additional oversight regulations of the Commission. The Commission, in promulgation of regulations to implement the provision, used it to impose a detailed set of regulations on the tribes requesting the certificate. A provision to provide more self-regulation was transformed by administrative fiat into a provision for abrogating the right of self-government that Congress so assiduously sought to protect in IGRA.

Tribal-State Compacts.—Subsection (d) of section 11 of IGRA comprehensively provides for the conduct and regulation of class III gaming on Indian lands. As discussed above, the anti-Indian gaming forces in Congress eventually conceded the right of tribes to engage in, and regulate, class II gaming free of state control and generally free of Federal regulation. They insisted, however, that class III or what was called casino or ‘hard core’ gaming either be Federally prohibited or subject to State control and regulations. The tribes

insisted on their right to engage in class III gaming, as set out in the *Cabazon* decision, free of State control. This issue was the major source of discussion in the negotiations in the 100th Congress. The compromise adopted set out the Tribal-State compact procedure.

The provision made class III gaming illegal on Indian lands unless conducted pursuant to a Tribal-State compact. However, in recognition that this provision standing alone would put tribes at the mercy of hostile states, the section authorized tribes to sue states that refused to negotiate or negotiated in bad faith. At the time, staff negotiators were familiar with the immunity of the states from suit under the 11th Amendment of the U. S. Constitution. However, the relevant precedent on the issue was the Supreme Court decision in the case of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) in which the Court held that Congress had power to subject states to suit in Federal court when exercising its constitutional power under the Commerce clause of the Constitution. As this clause included Indian tribes, the judgment was that Congress had power to subject states to tribal suit for failure to negotiate or negotiate in good faith. In addition, the staff relied on the Court's 1908 decision in *Ex parte Young*, 209 U. S. 123. The doctrine in that case allowed a suit against a state official to go forward, notwithstanding the Eleventh Amendment's jurisdictional bar, where the suit sought prospective injunctive relief in order to end a continuing Federal law violation.

Unfortunately, eight years after the enactment of IGRA, the Supreme Court, in the case of *Seminole Tribe v. Florida* (1996), overruled its decision in the *Union Gas* case and held that Congress did not have power to subject states to suits under the Commerce clause. In addition, it held that the *Ex parte Young* doctrine was not applicable in the IGRA case. This decision upset the delicate balance Congress had adopted in the Tribal-State Compact provision and, as feared by Congress, put the tribes at the mercy of states in compact negotiations.

Revenue Sharing.—Section 11(d)(3)(C) sets out certain provisions that might be included in a Tribal-State Compact. One of the provisions is an assessment by the State of tribal gaming revenue in an amount needed to defray the cost of State regulation under the compact. Paragraph (4) of section 11(d) provides that, except for assessments under paragraph (3),:

“(N)othing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.”

It was clearly the intent of Congress to prevent the States from hijacking the revenues of Indian tribes through compact negotiations, except for an amount tied directly to the costs of the State in regulating under the compact. In fact, paragraph 7(B)(iii)(II) of section 11(d) explicitly provides that a court, in any suit by the tribe against a State for failure to bargain in good faith, to consider:

(A)ny demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith”.

Yet, since the *Seminole* decision, States have regularly hijacked tribal gaming revenues by insisting upon revenue sharing that has no relation to its direct costs arising from the compact. While there is no way to force compliance after the *Seminole* case, it is clear that these States are in violation of Federal law.

Class III Regulation.—It would seem clear from the text of section 11(d) and from the legislative history set out above that, except for the requirements of a tribal gaming ordinance and oversight by the Commission, class III gaming was to be subject solely to the regulatory provisions of a class III compact. Yet, the Commission has adopted a comprehensive regulatory scheme for class III gaming that it has imposed on Indian tribes. In that regard, it is interesting to note what the Senate Committee report on S. 555 has to say about banking card games.

While IGRA included certain card games in class II, it was careful to exclude from class II gaming the so-called banking card games, i.e., those card games in which participants played against the house, such as Blackjack. On page 9 and 10 of the report, it is stated:

“Subparagraph 4(8)(B) specifically excludes from class II, and thus from regulation by a tribe and the *National Indian Gaming Commission* (Emphasis added), so-called banking card games and slot machines. The Committee’s intent in this instance is to acknowledge the important difference in regulation that such games and machines require and to acknowledge that a tribal-State compact for regulation of such games is preferable to Commission regulations.”

The import is clear. Class III gaming, including house-banked card games and slot machines were to be subject to regulation as provided in a compact and *NOT* by the Commission. Again, on page 11 of the report, it is asserted that:

“All class III gaming will be subject to the terms and conditions of Tribal-State compacts agreed under section 11(d).”

Aside from the power of the Chairman of the Commission to approve gaming ordinances and management contracts, there is nothing in IGRA or its legislative history that recognizes any right in the Commission to impose a regulatory scheme on class III gaming.

Section 12. Management Contracts

Section 12 makes extensive provision for the review and approval or disapproval of gaming management contracts and collateral agreements by the Chairman. The Commission has sought to prohibit non-management contracts between a tribal gaming enterprise and non-tribal entities that feature a contract fee based upon a percentage of revenues. As authority to do so, it asserts that contracts involving a fee based upon a percentage of revenue violates the provision of section 11(b)(2)(A) that requires that the

tribe have the “sole proprietary interest and responsibility for the conduct of any gaming activity”. The Commission asserts that a contract fee based upon percentage of revenue, *ipso facto*, gives an outside entity a “proprietary” interest in the activity. If that were true, then section 12, itself, is a violation of section 11(b)(2)(A), in that it permits the fee under management contracts to be as high as 40% of net revenues. It is clear from the comments under section 11(b)(2)(A) and the legislative history of IGRA that the concern of the Congress was the ownership and control of the assets and operation of the gaming facility, not the kind or amount of fees paid for contract services.

Section 13. Review of Existing Ordinances and Contract

Section 13 simply provided that, within a certain time after enactment of IGRA, all pre-existing tribal gaming ordinances and management contracts would have to come into compliance with relevant portions of IGRA.

Section 14. Civil Penalties

Subsection (a) authorizes the Commission and Chairman to impose certain civil fines against tribal operations or management contractors for violations of IGRA, any regulation prescribed by the Commission “pursuant to this Act”, or tribal regulations, ordinance, or resolutions approved under section 12 or 13. The phrase, “pursuant to this Act”, was intended to emphasize the limitations upon the power of the Commission to promulgate regulatory rules. Any such regulations or rules must be directly founded upon a power explicitly given to the Commission by IGRA. The legislative history of IGRA is replete with admonishments that the right of self-government by the tribes was to be protected and that the canon of construction resolving ambiguities in favor of the tribal right was to be applied. If there was not clear language in IGRA conferring a specific power on the Commission, it did not have such power.

Subsection (b) confers power on the Chairman and Commission to issue orders of temporary or permanent closures of gaming facilities for similar violations.

Subsection (c) makes final decisions of the Commission on fines and permanent closures subject to appeal to the Federal district court.

Subsection (d) makes clear that Indian tribes have the right to regulate gaming establishments in its jurisdiction if not inconsistent with IGRA or with any rules or regulations adopted by the Commission. As explained in other parts of the paper, this has to be read to mean any *valid* rule or regulation.

Section 15. Judicial Review

Section 15 provides that decision of the Commission under sections 11, 12, 13, and 14 shall be deemed a final agency action and may be appealed to the Federal district court.

Section 16. Subpoena and Deposition Authority

Section 16 confers power on the Commission, in carrying out its authorities and powers under IGRA, to issue subpoenas and depose witnesses under oath.

Section 17. Investigative Powers

Section 17 requires the Commission to preserve the confidentiality of information submitted pursuant to IGRA, authorizes the Commission to notify appropriate law enforcement officials of possible crimes in Indian gaming, and authorizes the Attorney General to investigate such alleged violations.

Section 18. Commission Funding

Section 18 authorizes the Commission to assess fees against Indian gaming enterprises to fund its operations, develop an annual budget and seek Federal appropriations for its funding. As originally enacted, section 18 intended that the cost of funding the operation of the Commission be borne equally by Indian gaming tribes, through assessments, and by Federal appropriations. This intent of Congress has long since been violated by Congress itself. No Federal appropriations have been made for the expenses of the Commission for some time.

Section 19. Authorization of Appropriations

Section 19 authorizes the appropriation of such sums as are necessary to fund the Commission. As noted, it has been some time since the Administration has requested, or that Congress has appropriated, any funds.

Section 20. Gaming on Lands Acquired After Enactment of this Act

Section 20, among other things, prohibits gaming on lands acquired in trust for a tribe after October 17, 1988, unless the lands are within or contiguous to a reservation or within the boundaries of the last reservation established for an Indian tribe. Exceptions are made for lands acquired in trust as a part of a settlement of a land claim, as an initial reservation for newly acknowledged tribe, or for a tribe restored to Federal recognition. In addition, land can be taken into trust for gaming purposes outside a reservation if the Governor of the State consents to the use of the land for such purposes.

Section 21. Dissemination of Information

Section 21 exempts Indian tribes from certain Federal laws prohibiting the interstate advertisement of gambling in the same manner as State gaming activities are exempt.

Section 22. Severability

Section 22 provides that, if any provision of IGRA is held invalid, the remainder of its provisions shall continue in force and effect.

Section 23. Criminal Penalties

Section 23 amends chapter 53 of title 18 of the United States Code to make gaming in Indian country, not conducted under IGRA, subject to State criminal laws and enforceable in Federal court; to make it a Federal crime to steal from a tribal gaming enterprise; and to make it a crime for officers or employees to steal from such enterprises.

Section 24. Conforming Amendment

Section 24 simply amends the table of contents of title 18 to conform to the section 23 amendments.

CONCLUSION

From the beginning of the legislative history of IGRA in 1983 to its enactment into law on October 17, 1988, the central purpose and focus of the leadership and staff of the Committee on Interior and Insular Affairs of the U. S. House of Representatives and the Committee on Indian Affairs of the U. S. Senate was to protect, to the extent possible, the sovereign rights of Indian tribes. As was made clear in the Supreme Court's decision in the *Cabazon* case and as so strongly reinforced by the legislative history of IGRA, the right of Indian tribes to engage in, or regulate, gaming was, under Federal-Indian law, grounded in their status as sovereign entities.

Congress recognized that, just as the several States had turned to lotteries and other forms of gambling as a source of governmental revenue, gaming was a legitimate means of generating tribal revenue to meet the growing demands on tribal government. However, as a controversial activity, Indian gaming was also a source of non-Indian resentment and anger that could be translated into anti-Indian efforts in the courts and in the Congress. IGRA was a means by which this non-Indian opposition could be satisfied in a manner that resulted in the least amount of Federal intrusion into the sovereignty of Indian tribes and the least amount of State involvement in tribal gaming activities. IGRA must be viewed in that light.

Unfortunately, the huge success of Indian gaming under IGRA has, in some ways, resulting in the tail wagging the dog. Many now involved in tribal gaming enterprises, and with the huge profits that sometimes come with those enterprises, view Indian gaming as an end, not as a means. Tribal sovereignty, which is the foundation of a tribe's right of self-government including tribal gaming, is too often sacrificed by those individuals for the sake of continued peace in their operation of these lucrative businesses.

The National Indian Gaming Commission has made wholesale, unauthorized raids on the sovereignty and right of self-government of Indian tribes with little resistance from those tribes. In part, this may be due to the lack of knowledge on the part of current tribal leaders and managers about the foundation and history of IGRA. It is to be hoped that this paper can play some part in re-instilling in these leaders the central meaning of tribal sovereignty to the future of their tribes.

The tribes can take some heart from the recent decision of the DC Circuit Court upholding the decision of the Federal district court that NIGC was not given authority to impose its MICS on class III Indian gaming. However, the Commission is still taking a hardliner position on that issue and is developing regulations defining the acceptable scope of technologic aids to class II gaming. These proposed regulations are beyond the scope of IGRA and tribes are currently gearing up for litigation in opposition.