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***251 THE GLOBAL GAMBLING VILLAGE: INTERSTATE AND TRANSNATIONAL GAMBLING**

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INTRODUCTION AND SUMMARY

THIS ARTICLE PRESENTS an overview of law concerning gambling and the difficulties caused by the global aspects of new technology applied to gambling. The analysis suggests that existing national and international law is conflicting and overlapping. Global gambling subjects interactive remote operators to prosecution in multiple jurisdictions. Operators who have a long-term view of their domestic and international regulatory compliance obligations must employ technology that restricts global broadcasting and provides adequate self-policing. To assure suitability for licensure in the most conservative and established gambling jurisdictions, operators must address each individual sovereign's gambling concerns.

The Internet's unique and inherently global properties, accessed by wire and wireless devices, have influenced the movement of goods and information across sovereign borders on an unprecedented scale. As the District Court in *Minnesota v. Granite Resorts Inc.* described the circumstances:

[T]he Internet is a communication medium that lacks historical parallel in the potential extent of its reach and that regulation across jurisdictions may implicate fundamental First Amendment concerns. It will undoubtedly take some time to determine the precise balance between the rights of those who use the Internet to disseminate information and the powers of the jurisdictions in which receiving computers are located to regulate for the general welfare.

[\[FN1\]](#)

While this new technology will cause substantial changes in all areas of public and private transnational and international law, the effects will be most dramatic in areas of conduct in which there are sharp moral disagreements among sovereigns, such as gambling. The current United States gambling laws allow local legalization of some gambling but prohibit most interstate and extraterritorial gambling, the very global aspects of the new technology. United States business entities operate state-regulated bricks and mortar gambling businesses with substantial capital investment. These operators are facing competition from unregulated, somewhat regulated, or newly regulated Internet operators whose electronic gambling services are available globally without large capital investment and without regard for sovereign borders. These operators, based *252 outside the United States in jurisdictions where gambling is legal, may make few or no efforts to turn away United States customers because state or federal law prohibits such gambling.

United States citizens currently play a major role in supporting the Internet gambling industry. There are about 1,400 Internet gambling sites (250-300 operating companies) in approximately 55 different jurisdictions, all of which are outside the United States. [\[FN2\]](#) There were four million Internet gamblers in 1999. By 2004, that number is projected to grow to 15 million. [\[FN3\]](#) Internet gambling expenditures are expected to be \$4.5 billion in 2002 and \$6.3 billion in 2003. [\[FN4\]](#) In 1999, the United States players made up nearly 80% of Internet players. One Australian Internet gambling operator estimated that 98% of its players were persons from the United States. [\[FN5\]](#) The majority of the market is still players from the United States, though the Far East market is growing rapidly.

[\[FN6\]](#)

The Final Report issued by the National Gambling Impact Study Commission in June 1999, noted that "[o]n-line wagering promises to revolutionize the way Americans gamble because it opens up the possibility of immediate, individual, 24-hour access to the full range of gambling in every home." [\[FN7\]](#)

In its attempt to control gambling, a state may prohibit a server from hosting a gambling site within its territory or may prohibit a person located within its territory from downloading or otherwise interacting with a gambling site (ignoring for the moment enforcement issues). A citizen of one sovereign that prohibits gambling may exercise his or her right of travel evasion and journey to a jurisdiction that allows gambling. However, when new technology allows a gambling site to be uploaded or broadcast from a state or a foreign country with a liberal view on gambling, while the bettor physically remains in his home jurisdiction that may prohibit gambling, control over the acts of some or all of the parties involved raises complex questions of law.

Whether Internet gambling or in the broader sense, remote interactive gambling, [\[FN8\]](#) is an offense for the operator or the bettor or both, a critical analysis is where does the act of gambling take place? Does the act of operating such a business, or placing a bet [\[FN9\]](#) with such a business, take place at the physical location of the operator or the bettor, or both?

The definitive answer to the question "Where?" is elusive. The question of jurisdiction over conduct that does not take place wholly within the territory of a single sovereign is in fact, a series of related questions about jurisdiction and conflict of laws under U.S., foreign, and international law. [\[FN10\]](#)

CYBERSPACE: A DESIGNATION OUT OF SCIENCE FICTION, NOT SCIENCE

The network of computers called the "Internet" or "Cyberspace" is a new means of communication that is an interconnecting web of automated transmitters and receivers. Much like a spider web, and unlike a point-to-point telephone connection, the Internet allows a person who enters the web at one location to interact with virtually all points on the web through connecting lines between points. [\[FN11\]](#)

*253 In reality, even when individuals use new technology, they are still conducting human affairs in the same physical world they have always inhabited. People exist in the physical world. They do not exist or interact in an ephemeral place called "Cyberspace," a term coined in a novel and perhaps better left in the realm of science fiction where it was born. [\[FN12\]](#)

Although the immediacy of the communications may create a sensation that the interaction with these machines occurs in some mutual space occupied by the sender and the receiver, data flows back and forth from one remote physical location to another remote physical location.

Net users are not removed from our world. They are no more removed than telephone users, postal users, or carrier-pigeon users. They are in front of a screen in real space using a keyboard to communicate with someone else, often in a different territorial jurisdiction. These real space communications can cause real-world harms. [\[FN13\]](#)

In *Reno v. ACLU*, [\[FN14\]](#) the United States Supreme Court's first opinion about the Internet, the Court ruled that a 1996 statute that sought to protect minors from "indecent" and "patently offensive" communications on the Internet was unconstitutional as it abridged the freedom of speech protected by the First Amendment. [\[FN15\]](#) The Reno Court, in referring to the many forms of communication available on the Internet, i.e., electronic mail, chat rooms, news services, said "Taken together, these tools constitute a unique medium-- known to its users as cyberspace-- located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet." [\[FN16\]](#)

A NON-TECHNICAL REVIEW OF INTERNET PROPERTIES

Unpredictable travel routes

When a user establishes a connection through a computer or a hand-held wireless device, various interconnected forms of electronic transfer support the connection. The particular path-ways through which the data flows are

beyond the control of any user and may include telephone, cable, satellite, microwave, cellular signals, and Integrated Services Digital Network (ISDN) lines. [FN17] The connection would likely involve a route through numerous states, or even countries, following the path of least resistance to achieve the transfer. [FN18] While a telephone connection is considered a single- point to single-point connection despite the use of satellites to support it, an Internet connection has been confused by terminology like "on-ramps" and "portals" suggestive of an alternative universe where Cyberspace exists. These notions, perhaps left over from Cyberspace's science fiction beginning, create enough smoke and mirrors to confuse analysis concerning the Internet. The ambiguity of location is only more confused by dicta like that in the *Reno v. ACLU* [FN19] opinion alluding to cyberspace as nowhere and available everywhere at the same time. Statements like that continue the myth of the Internet as if it were an indefinable dimension reminiscent of Alice in Wonderland that only invites varied comparison such as a glorified telephone, a bookstore, and a bulletin board [FN20] but is otherwise elusive.

*254 A moveable locus

The confusion is also fueled because an Internet address, although necessary to allow navigation among the hundreds of million computers in the vast network, is not anchored to a physical place. Although the domain name initially assigned as an Internet Protocol address usually corresponds to that machine's physical location (for example, a ".us" domain name extension for the United States), the machine may be physically moved without affecting its domain name. The owner of a domain name may even request that the name assigned be associated with an entirely different machine in a different physical location. Thus, a server with a ".us" domain need not be located in the United States, a server with a ".com" domain may be anywhere, and users, generally speaking, are not aware of the location of the server that enables the site. [FN21]

Lack of a sovereign

No single entity--academic, corporate, governmental or non-profit-- administers the Internet. [FN22] Because the Internet is a means, not a location, it exists and functions outside the traditional governmental spheres of central control, sovereignty, and regulation. The Internet's freedom from one direct control presents considerable challenges to any attempt to regulate its use. While this electronic media enables the user to transfer data like print media, to communicate like a telephone, and to broadcast like radio or television, the individual broadcasters, publishers, callers, and all the users exist in one or many different physical jurisdictions, with different sovereigns. Individuals located in a physical location interact with the new technology by putting information into the network, "uploading," or taking information out of the network, "downloading," or some combination of the two.

Global broadcasting

Telephone communication has been viewed as conferring jurisdiction only on the receiving end of a telephone call. [FN23] The person initiating the call knows the destination of the call, but the receiver of the call may not know where the call is coming from or the identity of the caller. The caller purposefully directs his communication effort to the callee. [FN24] With Internet use, the up-loader has no advanced notice of whether his or her data is being received across the street or across several oceans. Dean Henry H. Perritt, Jr. of the Chicago-Kent College of Law makes a convincing argument that while the Internet is a method of communication, it is unique among other information technologies. [FN25] Its properties are inherently more global and its use is more readily available. With a modest outlay for a computer, modem, and connection services, the publishing capabilities for Internet up-loaders are instant and worldwide. Rather than requiring special arrangements for global service like the older technologies, the Internet user must take special steps to restrict publishing that otherwise would be global.

Ubiquitous availability

The nature of the new technology makes it a compelling media for activities that have been restricted by social custom or government control like gambling. [FN26] Users no longer need to go to the physical locations where gambling is legal; they can simply sit at home or carry a hand-held device to connect with a gambling site anywhere

in the world.

THE INTERSECTION OF STATES' RIGHTS AND FEDERAL INTEREST: A LOOK AT THE DYNAMICS

The States

Gambling in the United States has been treated as a state's rights or 10th Amendment *255 issue. [FN27] The various schemes that have been legalized by individual state legislatures [FN28] vary from the prohibition on all forms of gambling that is only the law in Utah and Hawaii, [FN29] to schemes of outright cooption. Each state has a constitutional provision or statutory law, or both, that prohibits gambling, places limitations on the type of gambling allowed, or authorizes particular state sponsored or licensed gambling. Although private lotteries are unlawful in every state, state-run lotteries are operating in 38 states, the District of Columbia and three United States' territories: Puerto Rico, Virgin Islands, and Northern Mariana Islands. [FN30] Twenty-nine states allow casino gambling in either commercial casinos or Indian casinos, or both. [FN31]

State constitutions frequently include a gambling provision that establishes a foundational public policy on gambling and then provides for charitable, state-sponsored and regulated exceptions. Because lotteries were the most prevalent form of gambling in the colonies and in the first two hundred years of the Republic, constitutional provisions are likely to use the term "lottery" as well as other generic terms for gambling. For example, [Article VI, § 27 of Utah's Constitution](#) provides "The Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose."

The Montana Constitution and the New Jersey Constitution are typical of many statutory foundations of state gaming laws. Article III, § 9 of the Montana Constitution states: "All forms of gambling, lotteries, and gift enterprises are prohibited unless authorized by acts of the legislature or the people through initiative or referendum." [Article 4, § VII, para. 2\(D\) of the New Jersey Constitution](#) provides: "No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election"

The [California Constitution, Article IV, § 19](#) states in (a) that "the Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State," at the same time in section (d) it authorizes a California State Lottery. In addition, in (e) it prohibits casinos "of the type currently operating in Nevada and New Jersey," while in (f) it authorizes Indian gaming.

Laws concerning Internet gambling are as varied as the diverse gaming schemes in each state jurisdiction, and even states that prohibit Internet gambling may provide for exceptions for Internet gambling conducted by a state regulated and licensed gaming operator. In Nevada, [FN32] Illinois, [FN33] and South Dakota, [FN34] it may be fairly stated that these states have enacted provisions that criminalize unregulated Internet gambling but leave a door open for regulated Internet gambling conducted by a gaming operator licensed by the respective state. For example, in 2001 the Nevada legislature passed statutory permission for regulated Internet gambling in Nevada but only under the condition that such conduct is legal under all applicable state and federal law and certain technological conditions. [FN35] Some states have *256 passed legislation that expressly concerns gambling by such contemporary media as "telephone, telegraph, cable, wire, the Internet or other similar medium." [FN36]

In Louisiana, gambling by computer is illegal for operators, designers, and producers of related computer services, unless the wagering takes place on the premises of a licensed river-boat, state lottery outlet or pari-mutuel facility. Therefore, the same Louisiana provision that generally prohibits Internet gambling does allow a very limited use of computer networks for gambling restricted to the premises of designated wagering facilities. [FN37]

As to the extraterritorial application of state law, in common understanding, a state's law governs its own territory. Most Americans, when they drive across the border from Pennsylvania to New Jersey, assume that the relevant speed limit becomes New Jersey's, not Pennsylvania's. [FN38] The historical context, contemporaneous commentary, and case law demonstrate that the understanding of the scope of the sovereign power of states before the middle of the twentieth century did not include the right to regulate citizens extraterritorially. For example, while

Utah has established a system that finds no room for gambling of any kind, its neighboring state of Nevada may choose to base a large segment of its economy on the gambling industry. No one seriously doubts that a Utah citizen may exercise his or her right to "travel evasion" of the anti-gambling Utah laws by traveling to the state of Nevada to gamble. Generally, a state does not attempt to impose its rules concerning moral conduct on its citizens who travel to the territory of neighboring states whose rules differ. [FN39] In the criminal context, the federal constitutional structure upholds boundaries between states and provides for jurisdiction to rest in the state where crimes are committed. The Sixth Amendment protections include the right "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." [FN40]

There is, however, a basis under the Model Penal Code that would establish concurrent jurisdiction in a home state despite a policy conflict with a host state if:

- (1) The actor in the host state purposefully or knowingly causes the result within his or her home state. This approach, generally adopted in many states allows the state to exercise jurisdiction over an offense occurring partly outside the state (either an element of the offense or the result of the offense must occur within the forum state); or,
- (2) The converse situation, if the legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result, the home state may treat an act as criminal even if the result occurs or is designed to occur only in another jurisdiction where the conduct charged would not constitute an offense. [FN41]

Federal Legislation: Interstate and Transnational Law

Looking at two hundred years of the federal treatment of gambling in the United States, whenever new communications arise, whether mail, radio, telephone, or a computer network, the federal government has perceived a threat of increased gambling and has passed or attempted to pass prohibiting legislation.

For example, when federal mail service was implemented, federal statutes prohibited the use of United States mail to promote lotteries, the mailing of any newspapers carrying advertisements for lotteries, the importing or transporting of lottery tickets across state lines, and postmasters from acting as lottery agents. [FN42] In 1934, in the first attempt of the federal government to deal with the new technology of *257 broadcasting, radio broadcasting of information about lotteries was criminalized. [FN43]

The federal government also enacted a series of statutes beginning in the 1960's in an attempt to combat illegal gambling by organized crime. The most relevant statutes, the 1961 Wire Act ([18 U.S.C. § 1084](#)), the 1961 Travel Act ([18 U.S.C. § 1952](#)) and the 1970 Gambling Business Act ([18 U.S.C. § 1955](#)) were passed with a direct legislative intent that the laws be applied extraterritorially as demonstrated by the use of broad prohibiting words in each statute including "interstate or foreign commerce."

The Wire Act clearly prohibits:

whosoever being in the business of betting or wagering knowingly uses [using] a wire communication facility for transmission in interstate or foreign commerce of bets or wagers or information assisting in the placement of bets or wagers on any sporting event or contest ...

unless the transmission constitutes either a bona fide news report of a sporting event or contest, or information relating to sports betting that is legal in both the state from which it was sent and the state where it was received. See [18 U.S.C. § 1084\(a\), \(b\)](#).

The Travel Act prohibits interstate or foreign travel or use of an interstate facility in furtherance of an unlawful business enterprise. See [18 U.S.C. § 1952](#).

In the 1970 Illegal Gambling Business Act, a conviction requires a showing that:

there is a gambling operation which, in either interstate or foreign commerce, (1) is in violation of state or local law; (2) involves five or more persons that either conduct, finance, manage, supervise, direct or own all or part of the business; and (3) remains in substantially continuous operation for thirty days or has a gross revenue of \$2,000 in any given day.

See [18 U.S.C. § 1955](#).

When access to computer-generated lottery tickets provided for increased distribution without the transporting of lottery tickets across state lines, the Interstate Wagering Amendment of 1994 was passed to revise [18 U.S.C. § 1301 \[FN44\]](#) and make lottery ticket messenger services, in the absence of a compact between the states involved, unlawful in interstate and foreign commerce. [Section 1301](#) now outlaws not only the physical trafficking of lottery tickets in interstate commerce, but also knowingly transmitting in interstate or foreign commerce, "information to be used to procure such a chance." Exceptions exist for state-approved compacts.

The Executive Branch

Consistent with the enabling legislation passed by the 2001 Nevada Legislature that required a finding by the state regulators that interactive gambling was legal, the Nevada Gaming Commission and State Gaming Control Board sought the guidance of the United States Department of Justice with regard to the Department's current interpretation of relevant federal law on interactive remote gambling. [\[FN45\]](#) The Department of Justice provided a letter opinion that advised the State of Nevada that federal law currently prohibits all gambling over the Internet, including casino-style gambling. [\[FN46\]](#) The Department of Justice took the position that federal law including the Wire Act, the Travel Act and the Illegal Gambling Business Act all prohibit Internet gambling activities. Further, any gambling conducted in the United States would be deemed to take place in both the state or foreign jurisdiction where the bettor is located and the state or foreign jurisdiction where the gambling business is located. [\[FN47\]](#)

*258 Native American gambling: A separate sovereign

The Indian Gaming Regulatory Act of 1988, [25 U.S.C. § § 2701-2721](#) (IGRA) provides for three classes of Indian gambling. Class I gambling is traditional forms of Native American gambling associated with ceremony and tribal activities. Class II gambling is bingo and games related to bingo, lotto, and limited types of card games. Class III gambling is full casino type gambling.

In Class II gambling, the form most prevalent on tribal lands in the United States and therefore the form most relied upon to generate revenue to benefit the tribes, IGRA provides for the use of "electronic, computer or technological aids." [\[FN48\]](#) In comments made in a Senate Report by the Indian Affairs Committee on IGRA, [\[FN49\]](#) the provisions of IGRA referring to "technological aids" were meant to provide the opportunity for Indian tribes to take advantage of modern technology to cooperate with other tribes to enhance revenue possibilities within the confines of the fundamental characteristics of bingo and lotto games.

In a series of federal district court cases brought against Indian tribes and a gambling company, *Unites States v. 162 MegaMania Gambling Devices*, [\[FN50\]](#) the courts upheld the use of electronic player stations that allowed players at various Indian land locations to play a Bingo type game against each other. The courts reasoned that unlike IGRA Class III electronic terminals that provided a "facsimile" of a gambling device that allows a player to wager against the machine, Class II electronic stations employed acceptable technology to allow players to play against each other with the numbers being drawn at a single place located on Indian land. This analysis suggests that IGRA allows the use of technology, including the Internet, to expand player participation in a common game if the game and all the players are on Indian land. However, when a more general access technology was applied by Native Americans in Idaho, the effort failed.

Under the specific procedures detailed under IGRA, the Coeur d'Alene Tribe in Idaho applied for and received approval from the National Indian Gaming Commission (NIGC) to conduct a lottery called the National Indian Lottery (NIL). The proposal included selling tickets to persons not only physically located on Indian lands in Idaho but also to persons located anywhere in the United States by using a telephone or the Internet. [\[FN51\]](#) When the tribe requested that certain common carriers provide 800 telephone numbers service to implement this plan, numerous states sent the management company letters claiming that such service would violate the provisions of the Wire Act. AT&T refused to provide the service claiming the service would be used to transmit or receive gambling information in violation of both state and federal law. After a Tribal decision found that the Wire Act did not apply to lotteries under IGRA, AT&T filed a complaint in federal district court. [\[FN52\]](#) The resolution of that dispute put limits on the broader use of technology under IGRA. A decision at the district court level [\[FN53\]](#) found that if the

bettor is not located physically on Indian lands, the lottery is not conducted within the meaning of IGRA and AT&T cannot provide 800 service where the provision of that service would violate state gambling laws. The tribe appealed.

The Ninth Circuit found that when the NIGC approved the NIL, it was final agency action. That decision is law unless it is overturned in the proper forum (the Federal Communications Commission or federal district court) in an action brought by the correct plaintiffs (the states that had issued letters warning of violations of state and federal law). If a person could purchase lottery tickets at a location other than *259 on Indian land, the purchase of the lottery tickets was gambling that was not taking place on Indian land but rather at the location of the lottery ticket buyer. [\[FN54\]](#)

Apparently, the technological aids supported by IGRA in Class II type gambling to encourage broader based participation are limited to electronic communication from and to Indian lands. The appellate court stated: "[o]nce a tribe leaves its own lands and conducts gambling activity on state lands, nothing in IGRA suggests that Congress intended to preempt the states' historic right to regulate this controversial class of economic activities." [\[FN55\]](#)

Account wagering: exception to prohibition for the sport of kings

When Congress passed legislation aimed at regulating interstate pari-mutuel wagering, a congressional states' rights position was evident. The Interstate Horseracing Act of 1978, [\[FN56\]](#) codified at [15 U.S.C. § 3001](#), et seq. (Oct. 25, 1978) and amended in 2000 specifically found that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." [\[FN57\]](#) The 2000 amendments, passed over strong objections from the Justice Department, allowed "account wagering" [\[FN58\]](#) in the pari-mutuel context if both the state where the bettor was located and the place where the bet was accepted permitted such legal wagering. [\[FN59\]](#) Some states have codified this principle by including direct statutory language that once an account has been established, any wager made with account funds is deemed to be a wager made in the state where the account lies, not where the person who made the bet resides.

"Account wagering" is the practice by which a customer of a licensed racing association or off-track betting (OTB) corporation establishes an account with the facility. Once the account is established, the bettor may cause wagers to be made from that account not only by appearing in person at the facility but also by sending instructions to the facility's operator from a remote location using one or more choices of several different types of wire transmissions. Previously these instructions were sent by telephone but recent advances in technology now allow the instructions to be sent electronically via personal computer or other interactive electronic systems. [\[FN60\]](#)

The plain language of the amended Horseracing Act permits account wagering. The policy of legal account wagering, supported by state and local law, had been functioning in some areas, particularly the mid-Atlantic and Northeast United States for decades. Twelve states (Connecticut, Ohio, Kentucky, Maryland, New York, Oregon, California, Louisiana, Massachusetts, New Hampshire, North Dakota and Pennsylvania), [\[FN61\]](#) have adopted state legislation authorizing the acceptance of account wagering in interstate off-track pari-mutuel racing. For example, Oregon's statutory assertion that "any wager that is made from an account maintained by an Oregon operator in Oregon is considered to have been made in the State of Oregon" is legally valid. [\[FN62\]](#) Allowing states to determine the legal effect of in-coming communications is consistent with many court opinions as old as 100 years ([Lescallet v. Commonwealth, 89 Va. 878, 17 S.E. 546, 547-48 \(Va. 1893\)](#)) and as recent as 1998 ([United States v. Truesdale, 152 F. 3d 443 \(5th Cir. 1998\)](#)). These *260 opinions found gambling takes place at the location where the money changes hands, not necessarily where the person placing the bet is located. [\[FN63\]](#)

The United States Department of Justice has not attempted to prosecute the Wire Act as it concerns domestic pari-mutuel racing. However, the circumstances are dramatically different in the context of sports wagering. In *United States v. Cohen*, [\[FN64\]](#) the defendant was president of a sports bookmaking organization, World Sports Exchange, in Antigua patterned after New York's OTB. Defendant Cohen and 20 other owners, operators, and managers were charged with conspiracy and violation of [18 U.S.C. § 1084](#) for accepting numerous telephone and Internet bets from undercover agents located in New York State. Only Jay Cohen chose to contest the charges at trial. Of the remaining indicted defendants, most pleaded guilty to violating the Wire Act and other misdemeanor charges and some remain fugitives from the United States. Two of the fugitives continue to operate the business. At the District Court, Cohen

was found guilty of the conspiracy charge and seven counts of violating the Wire Act. On appeal, the Second Circuit upheld the convictions, rejecting Cohen's arguments that his operation fell under the exemption to the Wire Act for the transmission of betting information between jurisdictions where betting was legal, [18 U.S.C. § 1084\(b\)](#). The court found that gambling is illegal in New York under its constitution [\[FN65\]](#) and, notwithstanding statutory exemptions granted to the State's own OTB organization, betting remains generally illegal in New York, and therefore, the Wire Act's exemption did not apply. Making requests for bets and having them accepted was actually placing bets, according to the Second Circuit. Cohen was sentenced to 21 months in prison and a fine of \$5,000, the lightest sentence possible.

It is difficult to reconcile this decision with the fact of the State of New York's own telephone-betting accounts for out of state residents as well as similar schemes in other states. After establishing the account, a New York account holder may wager on a race to be conducted that day from a location anywhere on the globe, in the same fashion that he or she could wager on the race if physically present at the track or the OTB facility. For example, as authorized by the New York Racing Association, a quasi-governmental company that operates OTB in New York, when a player calls or uses electronic messaging from in or out of state, he or she informs the OTB facility to place a bet using funds available in a previously established wagering account. Because the OTB facility must withdraw the funds before the wager is placed, New York case law supports the notion that these activities are information to assist in betting, not betting itself. Thus, such conduct falls within the exemption provided by the Wire Act. [\[FN66\]](#)

When Cohen argued this same reasoning, that the bets did not exist where placed but only where accepted so that the exception to the Wire Act applied, the court took the position that "information to assist in placing a bet" was in fact, placing a bet. Cohen's Writ of Certiorari was denied on June 17, 2002. [\[FN67\]](#) Although the Interstate Horseracing Act and a liberal interpretation of the Wire Act seem to protect the horseracing industry, no such special treatment applies to sports wagering.

Interstate interactive gambling in the United States

In summary, an Internet gambling operator and related facilitators, designers, manufacturers, and other peripherally involved persons (not individual bettors [\[FN68\]](#) under existing federal *261 law), no matter where they are located, may be prosecuted under state and federal law for accepting interstate and extraterritorial bets from United States residents. In addition to the states that have law or policy specifically addressing the prohibition of Internet gambling, existing general gambling prohibitory law, state and federal, could be used to prosecute.

The extraterritorial application of home state prohibitory law to reach operators, related facilitators and even individual bettors who physically remain in their home prohibitory states and use a computer to connect with a licensed gambling site in a permissive sister state, has yet to be decided. Compacts between states, similar to the types that allow interstate lotteries, could be employed to avoid home state prosecution for host state conduct.

JURISDICTIONAL PRINCIPLES

Jurisdictional principles derived from a world where physical borders were effective in controlling the authority of sovereigns. In the 20th century, isolationist presence-based jurisdictional rules began to give way to newer jurisdictional theories based on the increased contacts of people across borders. The question to be answered as interconnectedness replaces isolation is: what justifies the exercise of the authority of a state against an individual? [\[FN69\]](#)

When the conduct of the actor wholly takes place in the United States and the victims of the conduct are likewise in the United States, there is no question there is jurisdiction to prosecute in the United States. When conduct occurs in the United States though the victims of the conduct may be outside the United States, jurisdiction is also readily apparent in the United States. However, jurisdiction is more problematic when conduct occurs outside this country but affects persons within this country. Such a prosecution would require the extraterritorial application of United States law. Two considerations determine whether such jurisdiction is permitted. Courts will refer to the plain language of the statute and legislative intent in providing for extraterritorial application and will examine the international bases of jurisdiction theory which are, in order of preference: subjective territoriality, objective

territoriality, nationality, protective principle, passive personality, and universality. [\[FN70\]](#)

Presence-based justifications for jurisdiction (territoriality or subjective)

Traditional jurisdictional principles evolved from assumptions concerning physical borders and the sovereign power defined and isolated within those borders. There was a time when a relationship existed between borders drawn in physical space and the borders where different legal rules applied. [\[FN71\]](#)

A presence-based theory of state authority derives from presumptive authority that the state possesses over persons and property within its borders. In ancient terms, the "King" had authority over any person or property subject to the control of his soldiers. [\[FN72\]](#)

Subjective territoriality (territorial jurisdiction) is the strongest basis for jurisdiction and, by definition, it includes only activity that takes place wholly within one jurisdiction. Generally, if an activity takes place wholly within a territory, that territory has the jurisdiction to prescribe or, specifically, territorial jurisdiction to prescribe, i.e., to create laws to regulate or prohibit activity that takes place within its borders. [\[FN73\]](#)

However, as soon as commerce and industrialization expanded so that commercial transactions that touched two or more states increased and conduct outside a state could have effects inside the state, simple jurisdictional assumptions began to change. Modern rules developed to allow jurisdiction without physical presence as long as there was an act of volition, i.e., "purposeful availment." Jurisdiction continued to be tied to place, but was measured by a more complex relationship with the defendant than simply the physical location of his body at the moment which spawned the litigation. *262 Jurisdiction rules acknowledged that in order to protect persons and property within its borders, under some circumstances, a sovereign must have authority to regulate beyond its borders. [\[FN74\]](#)

Effects-based (regulatory or objective territoriality) justification for jurisdiction

Effects-based (Regulatory or Objective Territoriality) justification for jurisdiction is described as "acts done outside a jurisdiction but intended to produce and producing detrimental effects within it." [\[FN75\]](#) The classic case illustrating effects-based jurisdiction is that of a rifleman in Canada shooting an American across Niagara Falls in New York. The shooting takes place in Canada; the murder takes place in the United States, State of New York. In this circumstance, while Canada would have the territorial jurisdiction to prescribe, the United States would have the objective jurisdiction to prescribe a rule of law to cover the action. [\[FN76\]](#) This "effects test" is not always enough by itself to justify the exercise of jurisdiction. [Section 403 of the Restatement \(Third\) of Foreign Relations Law of the United States](#) includes a requirement that the exercise of jurisdiction be reasonable, taking into account the respective interests of other jurisdictions as well as the one in which the effects are felt. [\[FN77\]](#)

Effects or regulatory justifications for jurisdiction, in contrast to justifications based on presence, raise serious concerns about the autonomy of the defendant. Jurisdiction to prescribe can be based on objective jurisdiction (the Effects Doctrine), if an act's primary injurious effects are felt within the jurisdiction although the act is committed outside the jurisdiction. [\[FN78\]](#) In the context of state to state extraterritoriality, Justice Holmes wrote in the early part of the 20th century for the United States Supreme Court in a case involving crimes committed in one state, the effects of which were felt in another state. He famously declared that "acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect." [\[FN79\]](#)

Nationality

After territorial jurisdiction (subjective territoriality) and objective jurisdiction or the Effects Doctrine (regulatory or objective territoriality), notions of the jurisdiction to prescribe become weaker. The nationality of the actor can provide jurisdiction to prescribe by employing active nationality (the nationality of the actor) which is more favored than passive nationality (the nationality of the victim). Passive nationality, in order of preference, ranks after

protective principle. Nationality jurisdiction is often tied to whether the offense is prohibited in the national's country and also in the country where the offense took place.

Citizenship is a significant factor in assessing the constitutionality of extraterritorial regulation. [\[FN80\]](#) The Restatement (Third) of Foreign Relations Law of the United States provides that states "may apply at least some law to persons outside [state] territory on the basis that he is a citizen, resident or domiciliary of the State" and this principle applies to both extraterritorial criminal and civil legislative powers. [\[FN81\]](#)

In the case of American citizens or corporations, the nationality of the offender could possibly support extraterritorial jurisdiction because the federal government can exert personal jurisdiction over American citizens and American corporations anywhere in the world. Under international law, a nation may ***263** generally assert jurisdiction over its citizens. [\[FN82\]](#) However, if the offender chooses to remain outside the territory of the United States, even with affirmative Congressional intent to extend jurisdiction, prosecution may not happen. In the case of gambling, a gambling operator would likely open for business in a country that favors and licenses such businesses. For example, in the previously discussed Cohen case, gambling is legal in Antigua so that the nationality principle is unlikely to cause cooperation by the Antigua government. Thus, defendants could avoid prosecution by staying outside the territorial jurisdiction of the United States.

Protective Principle

Next in the order of preference is the "Protective Principle," which is disfavored but can be used when the sovereign itself is offended by some action committed outside its territory that is so offensive that the sovereign feels threatened and wants to apply its own laws. [\[FN83\]](#) Gambling is unlikely to be considered highly offensive to any sovereign especially if the sovereign allows some type of gambling within its own territory.

Universal Interest

Lastly, there is a category called "Universal Interest" jurisdiction that has evolved over centuries to cover serious crimes and confers the right to any sovereign to punish the actors, e.g., pirates, and persons involved in slavery, genocide, and hijacking. Although universal jurisdiction may seem naturally extendable to cyberspace crime or civil wrongs, universal jurisdiction traditionally covers only very serious crimes. Consequently, lack of universal agreement on the nature of the activities, for example, the criminality of gambling, would cause due process problems with convictions under this principle. [\[FN84\]](#)

JURISDICTION AND INTERACTIVE REMOTE GAMBLING

While a defendant may be able to control his location, he may not be able to control where his actions have effects. [\[FN85\]](#) With the use of dramatically new technologies, it is even more likely that the citizens of a single sovereign may be subject to the jurisdiction of multiple sovereigns [\[FN86\]](#) and the application of multiple and conflicting laws. When law confronts the new communications technology, the traditional jurisdictional principles do not provide readily workable answers [\[FN87\]](#) and the application of jurisdiction is dependent on respect and cooperation among sovereigns and parties. [\[FN88\]](#)

Public international law addresses rights between and among sovereign states. It is the Law of Nations that regulates the political intercourse of nations with each other. [\[FN89\]](#) International law, in its widest and most comprehensive sense, includes not only questions of rights between and among nations' "public international law," but also concerns questions arising under what is called "private international law." Private international law addresses relations between or among private persons who are citizens of different sovereigns. It is also that part of the law of each state or nation (called "conflict of laws" in the United States), according to [section 2 of the Restatement, Second, Conflict of Laws](#), that determines whether, in dealing with a particular legal conflict, the law of some other state or nation will be recognized, be given effect, or be applied. [\[FN90\]](#)

Through rules of conflict of laws (or "private international law"), public international law ***264** links public and

private law. The boundary between the two, although treated as distinct, has always been indistinct. [\[FN91\]](#) In fact, international commercial law has straddled any gap between the two types of international law because it regulates the activities of both individuals and states.

Under international law, jurisdiction is considered in three parts: jurisdiction to prescribe, to adjudicate, and to enforce. [\[FN92\]](#) Jurisdiction to prescribe relates to a state's power to apply its own substantive law over the subject matter of the dispute. Thus, it relates to conflict of laws, legislative acts and most commonly, to arguments over whether a particular law has "extraterritorial effects." [\[FN93\]](#)

Conflict of laws (private international law) reflects in its rules the public law limitations on the exercise of sovereign power. Therefore, the conflict of laws or private international law rules reflect a "comity" among sovereigns that seeks to preserve the individual attributes of each sovereign's power. [\[FN94\]](#) "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor mere courtesy and goodwill upon the other. But it is the recognition that one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. [\[FN95\]](#)

The generally accepted conflict of laws principle had been that a gambling transaction occurs in the country where the bet or wager is accepted based on contract law analysis. [\[FN96\]](#) In the situation presented by interactive remote gambling, contractual analysis has been abandoned by some sovereigns. Prohibiting sovereigns favor a broader effects-type jurisdictional analysis which allows the federal and state governments to find authority to prescribe at the location of the bettor, where the effects of the gambling will be felt, in addition to, not instead of, the presence-based jurisdiction of the gambling operator.

Yahoo! Inc., a California-based company provides Internet users with access to "on-line resources, including various communication tools, online forums, shopping services, personalized content and branded programming through its network of properties (service provider)." "Yahoo! Auctions" is one of the applications offered through the service provider that allows users to buy and sell items in an online auction. Among many types of items, the California based company in its global broadcast had offered Nazi memorabilia for sale.

In the United States, this type of sale material enjoys protection under the First Amendment. However, in France, the sale of Nazi memorabilia violates French penal code. [\[FN97\]](#) Therefore, the Nazi memorabilia was offered only on American Yahoo!, not the sister Yahoo! site in France. The technology allowed individuals in France to nevertheless access the U.S. site and purchase the items. Several French organizations dedicated to eliminating anti-Semitism filed suit in France against Yahoo! for allowing the items to be sold to French residents. As a result, a French judge ordered Yahoo! to block French access to all sites where Nazi memorabilia would be sold or be subject to a significant fine for each day that access was allowed. While denying that its response was a result of the French order, Yahoo! nonetheless announced it would no longer allow such sales to be broadcast anywhere, but would file a request for a declaratory ruling in U.S. District Court in San Jose, California that France did not have jurisdiction over the Yahoo! site *265 broadcasting from California. [\[FN98\]](#) The Yahoo! court found that:

At issue was whether it was consistent with the Constitution and laws of the U.S. for another nation to regulate speech by a U.S. resident within the United States on the basis that such speech could be accessed by Internet users in that nation. The Internet Service provider sought a declaratory judgment that the First Amendment precluded enforcement It showed that the order was valid under French law, that it could be enforced with retroactive penalties, and that the ongoing possibility of its enforcement in the U.S. chilled its First Amendment rights The court found no basis for abstention. Comity was outweighed by its obligation to uphold the First Amendment. [\[FN99\]](#)

Court decisions in the U.S. like this which protect American law and American citizens will not likely encourage other nations to enforce American court decisions which may conflict with their own laws. For example, an Internet service provider and a gambling operator located in Hong Kong where sports betting is legal are probably not concerned about enforcing U.S. law against a customer from the U.S. who places bets, even though they are aware that using communications wires to make an interstate sports wager is illegal for U.S. residents. Absent a specific agreement between the nations involved, it seems unlikely that a foreign-based business would turn away paying customers from the United States.

JURISDICTION TO ADJUDICATE IN INTERACTIVE REMOTE GAMBLING

Jurisdiction to adjudicate encompasses "personal jurisdiction," or power over the parties, as well as "subject matter jurisdiction," or power over the subject matter of the controversy. [\[FN100\]](#) In American state or federal courts, personal jurisdiction depends on the interaction of statutory or common-law sources of jurisdiction limited by constitutional due process to establish authority over persons physically present within their territorial boundaries who were served with process while they were there. [\[FN101\]](#) Courts also assert jurisdiction over things found within their territorial boundaries and attached while they were there. The first basis is "in personam" jurisdiction; the second is "in rem jurisdiction." [\[FN102\]](#)

As to jurisdiction over nonresidents or a person not within the territory of the state, the foremost domestic case is *International Shoe Co. v. Washington*, 325 U.S. 310 (1945). In that case, the Supreme Court held that due process required the existence of "minimum contacts" between the defendant and the forum state for a court to subject a defendant to its authority. Otherwise, the Court ruled, asserting jurisdiction over a nonresident or a person not physically within the state would "offend traditional notions of fair play and substantial justice." [\[FN103\]](#) This two-part analysis begins with an assessment of the defendant's minimum contacts with the forum. In determining minimum contacts, a court properly focuses on the "relationship among the defendant, the forum and the litigation." The second part of the analysis focuses on these contacts in light of other factors to decide whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." [\[FN104\]](#)

After laying out this standard, the *International Shoe* Court described three different types of contacts within the state that would meet the due process standard:

- (1) Continuous and systematic contacts that give rise to the lawsuit (specific jurisdiction);
- (2) Corporate operations and substantial contacts as to justify suit if the cause of action *266 does not arise out of those contacts (general jurisdiction); and
- (3) The nature and qualities of occasional contacts sufficient to render the defendant liable to suit even if the suit does not arise out of that contact (specific jurisdiction). [\[FN105\]](#)

In later cases, the Court clarified its position and determined whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." [World-Wide Volkswagen Corp. v. Woodson](#), 444 U.S. 286, 297 (1980). In *World-Wide Volkswagen*, in an attempt to exercise specific jurisdiction, the Court held that a corporation that purposefully avails itself of the privilege of conducting activities within the forum state should reasonably anticipate being sued there. A corporation's efforts to directly or indirectly serve markets in other states would be sufficient proof of "purposeful availment" to serve justice. In addition, the defendant must purposefully direct his activities toward the residents of the forum. See [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 472 (1985). [\[FN106\]](#) The Court in *Burger King* held that entering into a contract with someone in the forum state satisfies the constitutional requirements for minimum contacts if the contract calls for a series of transactions.

American courts have grouped Internet cases along a sliding scale to determine "purposeful availment" and "traditional notions of fair play and substantial justice." [\[FN107\]](#) In [Zippo Manufacturing Co. v. Zippo Dot Com, Inc.](#), 952 F. Supp. 1119 (W.D. Pa. 1997), a well-reasoned and often followed analysis of Internet-based jurisdiction cases, the court adopted an approach under which "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." This position on jurisdiction would depend on examining the level of interactivity and commercial nature of the exchange of information that occurs on the website. Purposeful availment would be found easily when "a defendant clearly does business over the Internet with a person from the forum state." For example, if a gambler made a contract with a casino operator that would require "knowing and repeated transmission of computer files over the Internet into the jurisdiction," this would most likely result in a finding of jurisdiction. [\[FN108\]](#) A middle position involving the most uncertainty on the sliding scale as to personal jurisdiction would be mere exchange of information by a user and a host. Rarely would jurisdiction be found for a passive website that does little more than make information available.

Numerous courts have held, consistent with *Zippo*, that a mere passive website, even those that include a "1-800" number, which functions primarily as a worldwide form of advertising, will not satisfy the due process "minimum

contacts" scrutiny required for the exercise of in personam jurisdiction. [FN109] In [United States v. Ross, 1999 WL 782749 \(S.D.N.Y.\)](#), 1999 United States Dist. LEXIS 22351, the court issued an order that found it had subject matter jurisdiction over the offshore Internet sports book, Island Casino, an Internet operator that supplied Internet gambling to United States locations from abroad. The crime charged was "placing bets by telephone" in violation of [18 U.S.C. § 1084](#). In an effort to dismiss the indictment, the defendants argued the following:

- . The bets placed by telephone by F.B.I. agents in New York were not wagers but "information assisting in the placement of wagers" as allowed by an exemption under [18 U.S.C. 1084\(b\)](#);
- . The transmissions were not bets until the bets were accepted by the Curacao sports book (Curacao is an Island in the Netherlands Antilles);
- . The crime required specific intent rather than general intent; and
- *267 . That there was no subject matter jurisdiction since it was not clear that Congress intended the Wire Act to apply to activity occurring out of United States territory. [FN110]

The Ross Court found there was sufficient evidence to show violations of [18 U.S.C § 1084](#) to deny the dismissal of the indictment; that a general intent was all that was required for this crime; and that [18 U.S.C. § 1084](#) applied even if the activity took place solely outside the United States.

Since the ruling in *Pennoyer v. Neff*, 95 U.S. 714 (1877), the state's power to adjudicate a personal action without violating due process was limited to a person's residency or voluntary appearance within a state's borders. [FN111] Under this constitutional norm, the justification for the exercise of the coercive power of state authority over the individual was based on presence. A person could control his or her autonomy and amenability to jurisdiction simply by staying out of the sovereign's border. [FN112]

The most common base of criminal jurisdiction used by United States courts is territorial jurisdiction premised upon the locus of the crime. [FN113] Generally, based on the common law right to be present at trial and a Sixth Amendment right to confront witnesses, a person cannot be tried in absentia for a criminal offense. [FN114] This principle and their absence from United States Territory is keeping the other American citizens indicted with Jay Cohen from trial and possibly incarceration. The United States has only a few extradition treaties [FN115] and those treaties would have to specifically make Internet gambling an extraditable offense to be effective. Measures taken outside the United States would be dependant on the foreign government's jurisdiction and cooperation to apprehend and transport persons to the United States for prosecution of Internet gambling and related crimes. [FN116] Given that many worldwide jurisdictions do not view Internet gambling by either the bettor or the operator as criminal activity, such cooperation seems unlikely.

CONCLUSION

The potential adverse affects on the growth of the global economy and Internet commerce is especially apparent in the multiple and overlapping law that may apply to interactive remote gambling. As Ray August, Professor of Business Law described it, "Conflict and confusion are the order of the day." [FN117] In the United Kingdom, the Gaming Board has stated that measures to outlaw online gambling would be futile and has recommended that the government adopt legislation legalizing Internet gambling sites. Other countries have legalized Internet gambling for only their citizens. At least one country, Australia, has made Internet casino gambling legal for everyone except its own citizens. The United States continues its love/hate relationship with all types of gambling. The current Congress will consider if it can do what the previous legislatures have failed to do and pass a definitive interstate policy on Internet gambling.

Based on existing law, an Internet gambling operator and related facilitators, designers, manufacturers, and other peripherally involved persons who are United States citizens may be prosecuted under state and federal criminal and/or civil laws for accepting bets from residents in virtually every state jurisdiction. Eleven states have law and/or policy specifically addressing the prohibition of Internet gambling. Consumer protection statutes and existing prohibitory law concerning gambling could be used in the remaining jurisdictions. Repeated contacts with persons placing wagers, harm caused by the placement of those wagers, and statutes with expressed legislative intention to control interstate and foreign conduct may support a finding of prescriptive and adjudicative jurisdiction.

Even if a jurisdiction with a law that allowed *268 approved locally regulated Internet gambling was to issue an

Internet gambling license, licensed operators would only be protected from prosecution in that state. Reciprocal agreements would have to be developed for those states that have laws that require local regulatory approval. Prosecution by the federal government and even prosecution by one or more prohibiting state governments, where effects have been felt is possible. Compliance with one jurisdiction's laws will not protect operators from potential liability in numerous other jurisdictions.

Multi-jurisdictional gambling operators cannot afford to rely on one sovereign's benevolent attitude toward gambling in the operational jurisdiction. The vulnerabilities to suit in jurisdictions less friendly to gambling are multiple and global. During this period of jurisdictional exploration, cooperating with government regulators, self-policing, and using available technology to tailor global access are the best ways to operate.

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The opinions expressed in this article are solely the opinions of the author and do not represent the position of the Nevada Gaming Commission, the Nevada Attorney General's Office, or the State Gaming Control Board.

[FN1]. [568 N.W.2d 715, 718 \(1997\)](#) quoted in Beau Thompson [Internet Gambling, 2 N.C.J.L. & TECH. 81, 95](#). The Minnesota Court of Appeals held that the state had jurisdiction over a gambling business, located in California but incorporated in Nevada, because it purposefully availed itself of the forum by directing an advertisement into the state through the Internet. 1997 Minn. LEXIS 829 (Granite Gate Resorts petition for further review granted), [576 N.W. 2d 747](#), Minn. LEXIS 278 (1998), 2 No. 20 Minn. Lawyer 22 (Supreme Court of Minnesota, by an evenly divided Court, affirmed the Court of Appeals decision.) See Scott Olsen, [Betting No End to Internet Gambling, 4 J. TECH. L. & POL'Y 2, 43 \(Spring 1999\)](#).

[FN2]. See Christiansen Capital Advisors, LLC., *Wagering on the Internet: State of the Industry* (visited Jan. 22, 2003) <<http://www.cca-i.com/publications>>. The United States Virgin Islands has recently approved regulations that will implement the Permissive Internet legislation passed there in 2001. The law allows some forms of legalized Internet gambling (no sports betting). Although there are no such operators now, there could be legal Internet gambling based in the Islands in the near future.

[FN3]. See *id.*

[FN4]. See *id.*

[FN5]. See Senate Select Committee on Information Technologies (Austl.), *Report on Information Technologies, Net-bets, A Review of On-line Gambling in Australia* (March 2000) <<http://www.aph.gov.au/senate/committee/itctte/gambling/index.htm>>.

[FN6]. See *id.*

[FN7]. NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT 5-1 (June 18, 1999).

[FN8]. As used in this article, Remote Interactive Gaming includes intra- jurisdiction electronic gaming systems using closed-loop dial-up, DSL, and cable technology as well as Internet technology.

[FN9]. "Betting" or "wagering" are not used herein, as in other jurisdictions, as terms specifically relating to sports betting only or all other kinds of wagering but the terms are used interchangeably to mean "something staked on an uncertain outcome."

[FN10]. See Allen R. Stein, The [Unexceptional Problem of Jurisdiction in Cyberspace](#), 32 INT'L LAW 1167, 1167 (Winter 1998).

[FN11]. See Leif Swedlow, [Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet](#), 22 OKLA. CITY U. L. REV. 337, 370 (Spring 1997).

[FN12]. The term "cyberspace" is generally credited to science fiction author William Gibson in his novel Neuromancer. See Stein, *supra*, note 10, at 1173. Gibson's concept included a direct brain-computer link that gave the user the illusion of vision, moving about in the data "matrix" to obtain information. See also Darrel Menhe, Jurisdiction in Cyberspace: A Theory of International Spaces, 4 MICH. TELECOMM. TECH. L. REV. 69, n.1 (1998).

[FN13]. Sanjay Mody, [National Cyberspace Regulation: Unbundling the Concept of Jurisdiction](#), 37 STAN. J. INT'L L. 365, 367 (Summer 2001) (quoting Jack Goldsmith, The [Internet and the Abiding Significance of Territorial Sovereignty](#), 5 IND. J. GLOBAL LEGAL STUD. 475, 479 (Spring 1998).

[FN14]. [521 U.S. 844, 849 \(1997\)](#).

[FN15]. See [id.](#) at 849.

[FN16]. [Id.](#) at 851.

[FN17]. See John Edmund Hogan, World Wide Wager: The Feasibility of Internet Gambling Regulation, 8 SEATON HALL CONST. L. J. 815, 825 (Summer 1998).

[FN18]. See Jenna F. Karadbil, [Casinos of the Next Millennium](#), 17 ARIZ. J. INT'L & COMP. L. 413, 438 (Spring 2000) (quoting Internet Gambling: Prohibition v. Legalization: Testimony before the National Gambling Impact Study Commission," 105th Cong. (May 21, 1998) (statement of Tom W. Bell, then Director, Telecommunications and Technology Studies, the CATO Institute)).

[FN19]. [Reno v. ACLU](#), 521 U.S. at 851.

[FN20]. See Menhe, *supra*, note 12, at 69-70.

[FN21]. See Tapio Puurunen, The [Legislative Jurisdiction of States Over Transactions In International Electronic Commerce](#), 18 J. MARSHALL J. COMPUTER & INFO. L. 689, at 690-91 (Spring 2000).

[FN22]. See Hogan, *supra*, note 17, at 824.

[FN23]. See Swedlow, *supra*, note 11, at 375.

[FN24]. See *id.* at 376.

[FN25]. See Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 KY. L.J. 885, 886 (1999-2000).

[FN26]. ANTHONY N. CABOT & MARK BALESTRA (EDITORS), *INTERNET GAMBLING REPORT V*, 32, Anthony Cabot, *Challenges for Internet Gambling*, The River City Group LLC, 205 S. Main Street, St. Charles, MO (2002).

[FN27]. See [15 U.S.C. § 3001\(a\)\(1\)-\(2\) \(1994\)](#) ("The Congress finds that ... the states should have the primary responsibility for determining what forms of gambling may legally take place within their borders [and] ... the Federal government should prevent interference by one state with the gambling policies of another.").

[FN28]. An exception is Native American casinos that exist only on sovereign Indian lands. These are operated by the various Native American tribes pursuant to the National Indian Gaming Regulatory Act (IGRA) [25 U.S.C. §§ 2701-2721](#) and regulations there under.

[FN29]. In testimony before the House Financial Services Committee, July 12, 2001, Frank Fahrenkopf, Jr., President and CEO of the American Gaming Association, included Tennessee among the states that have no approved forms of gambling. The statement was later clarified to indicate that there are no operating forms of gambling in Tennessee but unlike Utah and Hawaii, some forms of gambling are allowed in Tennessee. See http://www.americangaming.org/media_update/speeches/speech.cfm/id/32.

[FN30]. See Nelson I. Rose, *Gambling and The Law: The Future of Internet Gambling*, 7 VILL. SPORTS & ENT. L. FORUM 29, 42 (2000).

[FN31]. See *id.* at 31.

[FN32]. [Nev. Rev. Stat. § 465.091](#) et seq.

[FN33]. [720 ILL. COMP. STAT. ANN. § 5/28-1\(12\) \(2001\)](#).

[FN34]. [S.D. Codified Laws § 22-25A-1](#) through [22-25A-15 \(2000\)](#).

[FN35]. See Nevada Assembly Bill 466 (codified at [NRS § 463.750](#) et seq.). This statute provides a permissive authority for the licensing of Internet gaming only if the regulators find interstate Internet gambling legal under applicable federal and state law. Since the United States Department of Justice has determined that interstate Internet gambling is not legal, no enabling regulations have been adopted by Nevada Gaming Regulators.

[FN36]. Rose, *supra*, note 30, at 35.

[FN37]. See [La. Rev. Stat. § 14:90.3](#).

[FN38]. See Seth F. Kreimer, Elines in the [Sand: the Importance of Borders in American Federalism](#), 150 U. PA. L. REV. 973, 975 (Jan. 2002).

[FN39]. See [id. at 978](#). For an opposing view, see Mark D. Rosen, [Extraterritoriality and Political Heterogeneity in American Federalism](#), 150 U. PA. L. REV. 855, 946 (Jan. 2002).

[FN40]. [Id.](#) at 976.

[FN41]. Mark D. Rosen, [Extraterritoriality and Political Heterogeneity in American Federalism](#), 150 U. PA. L. REV. 855, 950 (Jan. 2002).

[FN42]. See [18 U.S.C. § 1301](#), the Act of Mar. 2, 1827, ch.61, 6,4, Stat. 238; Act of July 27, 1868, ch. 246, 13, 15 Stat. 196; Anti-Lottery Act of 1890, Ch. 908, 1, 26 Stat. 465.

[FN43]. See [18 U.S.C 1304](#), the Act of June 19, 1934, Pub. L. No. 73- 416, ch. 652, 316, 48 Stat. 1064, 1088. See also Bruce P. Keller, The [Games the Same](#), 108 YALE L.J. 1569, 1579 (May 1999) (citing [FCC v. ABC](#), 347 U.S. 284, 290 (1954)).

[FN44]. The Violent Crime Control and Enforcement Act, [Pub. L. No. 103- 222](#), 108 Stat. 1796, 2126.

[FN45]. See Appendix A, letter dated March 7, 2002, from Peter C. Bernhard, Chairman, Nevada Gaming Commission, and Dennis K. Neilander, Chairman, State Gaming Control Board to Chris Huff, United States Department of Justice.

[FN46]. See Appendix B, letter dated August 23, 2002, from Michael Chertoff, Assistant Attorney General, United States Department of Justice, Criminal Division, to Peter C. Bernhard, Chairman, Nevada Gaming Commission. The same letter was also sent to Dennis K. Neilander, Chairman, Nevada State Gaming Control Board.

[FN47]. See [id.](#)

[FN48]. [25 U.S.C. 2703 \(7\)\(A\)](#).

[FN49]. See CABOT, [supra](#), note 26, at 301, Michael D. Cox, Native American Issues, (citing Indian Affairs Comm., Indian Gaming Regulatory Act, S. Rep. No. 446, 100th Cong. 2d Sess. 9 (1988), reprinted in 1988, U.S. Code Cong. Admin. N. 3071, 3079)).

[FN50]. CABOT, [supra](#), note 26, at 302, JOSEPH KELLY, CORY ARONOVITZ AND MARK D. SCHOPPER, THE UNITED STATES (citing [United States v. 162 MegaMania Gambling Devices](#), No. 97-C-1140-K, 1998 U.S. Dist. LEXIS 17293 (N. OK. 1998) and [United States v. 103 Electronic Gambling Devices](#), No. C 980-1994 CRB,

1998 U. S. Dist. LEXIS 19135 (N. D. Ca. 1998)).

[FN51]. This aspect of the NIL is subject to litigation in the 8th Circuit and Missouri State Courts. See [State of Missouri ex rel. Nixon v. Coeur d'Alene Tribe, 164 F.3d 1102 \(8th Cir. 1999\)](#).

[FN52]. See [AT&T Corp. v. Coeur d'Alene Tribe, 45 F. Supp 2d 995, 1002-3 \(D. Idaho 1998\)](#).

[FN53]. See [id. at 995](#).

[FN54]. See [Missouri v. Coeur d'Alene, 164 F.3d at 1108](#).

[FN55]. *Id.*

[FN56]. 114 Stat.2762A-108, [Pub.L. 106-553](#), App. B. Sec. 629.

[FN57]. [15 U.S.C. § 3001 \(a\) \(1\)](#).

[FN58]. See Memorandum from Gregory C. Avioli, National Thoroughbred Horseracing Association (August 3, 1999) (on the issue: "Whether Account Wagering may be lawfully conducted by a state-licensed pari-mutuel facility with account holders located in a state other than the state where the account is located") (on file with author).

[FN59]. See *id.*

[FN60]. See *id.*; see also [NRS § 465.091](#), which defines "medium of communication" broadly to include "the Internet or any other similar medium" and [NRS § § 465.093](#) through .094 which allow bets placed for an individual's own benefit or, without compensation, for the benefit of another person from within the state to licensed race book or sports pool or a person licensed to engage in off-track pari-mutuel wagering.

[FN61]. See NEVADA PARI-MUTUEL ASSOCIATION, LAS VEGAS DISSEMINATION CO. AND LIONEL SAWYER & COLLINS, AN OVERVIEW OF OFF-TRACK WAGERING, 27 (July 25, 2002) (presented to the Nevada Gaming Commission and State Gaming Control Board, on file with the author). Since the drafting of this paper, the Nevada legislature has approved account wagering but at publication date, implementing regulations have yet to be adopted.

[FN62]. See [Or. Rev. Stat. § 462.725](#). See also Avioli *supra*, note 58, at 9.

[FN63]. See Jeffrey A. Modisett, A Brief Look at The Past, Present and Future through The Eyes of A Former Attorney General, 6 GAMING L. R. 198, 203 (2002); see also Avioli *supra*, note 58, at 2-8.

[FN64]. [260 F.3d 68 \(2001\)](#); see also Ryan D. Hammer, [Does Internet Gambling Strengthen the U.S. Economy? Don't Bet on It, 54 FED. COMM. L.J. 103, 113](#) and Jon Patterson, [Internet Gambling and the Banking Industry: An Unsure Bet, 6 N.C. BANKING INST. 665, 668 \(April 2002\)](#).

[FN65]. See [260 F.3d at 73](#).

[FN66]. See CABOT, *supra*, note 26, at 286, JOSEPH KELLY, CORY ARONOVITZ AND MARK D. SCHOPPER, THE UNITED STATES.

[FN67]. See 2002 U.S. LEXIS 4472.

[FN68]. During the House of Representatives debate on the bill, Congressman Emanuel Celler, Chairman of the House Judiciary Committee stated, "[t]his bill only gets after the bookmaker, the gambler who makes it his business to take bets or to lay off bets ... It does not go after the casual gambler who bets \$2 on a race. That type of transaction is not within the purview of the statute." [United States v. Baborian, 528 F. Supp.324, 328](#) (quoting the 197th Cong.Rec. 16,534 (1961)).

[FN69]. See Allen R. Stein, [Frontiers of Jurisdiction: From Isolation to Connectedness, 2001 U. CHI LEGAL F. 373, 374 \(2001\)](#).

[FN70]. See Ellen S. Podgor, [International Computer Fraud: A Paradigm for Limiting National Jurisdiction, 35 U.C. DAVIS L. REV. 267, 282 \(January 2002\)](#).

[FN71]. See David R. Johnson and David Post, [Law and Borders-The Rise of Law in Cyberspace, 48 STAN. L. REV. 1367, 1368 \(May 1996\)](#).

[FN72]. See Stein, *supra*, note 69, at 374.

[FN73]. See Menthe, *supra*, note 12, at 71.

[FN74]. See Stein, *supra*, note 69, at 376.

[FN75]. See [Strassheim v. Daily, 221 U.S. 280, 285 \(1911\)](#). See also Ellen S. Podgor, [International Computer Fraud: A Paradigm for Limiting National Jurisdiction, 35 U.C. DAVIS L. REV. 267, 290 \(January 2002\)](#).

[FN76]. The jurisdiction to prescribe a rule of law does not include the jurisdiction to enforce that rule or the right to extradition. Extradition, the surrender, according to the provisions of a treaty, agreement, or statute, by one state of an alleged criminal to another state, the latter state having charged and being competent to try and punish the alleged criminal will not be discussed in this article.

[FN77]. See Henry H. Perritt, Jr., [Will the Judgment-Proof own Cyberspace?, 32 INT'L LAW. 1121, 1125 \(Winter 1998\)](#).

[FN78]. See Menthe, *supra*, note 12, at 72.

[FN79]. See [Strassheim v. Daily, 221 U.S. 280, 281-82 \(1911\)](#). See also Mark D. Rosen, *supra* note 41, at 865.

[FN80]. See *id.* at 866.

[FN81]. Rosen, *supra*, note 41, at 870.

[FN82]. See [United States v. Juda, 46 F.3d 961, 967 \(9th Cir. 1995\)](#). See also *United States v. Kaercher*, 720 2d 5-6 (1st Cir. 1983); [United States v. King, 552 F.2d 833, 850 \(9th Cir. 1976\)](#), cert. denied, [430 U.S. 966, 52 L. Ed. 2d 357, 97 S. Ct. 1646 \(1977\)](#); [United States v. Verdugo-Urquidez, 494 U.S. 259, 270-71, 108 L. Ed. 2d 222, 110 S. Ct. 1056 \(1990\)](#) (treating resident aliens the same as resident citizens for purposes of constitutional analysis).

[FN83]. See *Menthe*, *supra*, note 12, at 72.

[FN84]. See *id.*

[FN85]. See Stein, *supra*, note 69, at 377.

[FN86]. See *id.*

[FN87]. See Adrian Allen, *Internet Jurisdiction Today*, 22 N.W. J. INT'L. & BUS. 69, Fall 2001, at 77.

[FN88]. See Stein, *supra*, note 69, at 377.

[FN89]. See *BALLENTINE'S LAW DICTIONARY*, (3rd ed. 1969) LEXIS.

[FN90]. See *id.* See also *RESTAT 2D OF CONFLICT OF LAWS § 2*, Subject Matter of Conflict of Laws which includes Choice of Law defined as rules to determine the rights and liabilities of parties in a suit resulting from an occurrence involving foreign elements.

[FN91]. See *Perritt*, *supra*, note 25, at 888.

[FN92]. See *Perritt*, *supra*, note 77, at 1131. The jurisdiction to enforce, not discussed in this article, presents yet another formidable obstacle to the effectiveness of traditional rules in the context of remote interactive gambling. Jurisdiction to enforce refers to "inducing or compelling compliance or to punishing noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action." See also Puurunen, *supra*, note 21, at 698, quoting *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 401(c)*.

[FN93]. *Perritt*, *supra*, note 77, at 1125.

[FN94]. See Perritt, *supra*, note 25, at 892.

[FN95]. See Mody, *supra*, note 13, at 386.

[FN96]. See [U.S. v. \\$734,578.82](#), 286 F. 3d 641, at 650 (3rd Cir. 2002) (quoting DICEY AND MORRIS, THE CONFLICT OF LAWS 1468 (1993)).

[FN97]. See Ray August, [International Cyber-Jurisdiction: A Comparative Analysis](#), 39 AM. BUS. L. J. 531, 531, 556 (Summer 2002).

[FN98]. See Allen, *supra*, note 87, at 73.

[FN99]. [Yahoo!, Inc. v. La Lique Contre Le Racisme et L'Antisemitisme](#), 169 F. Supp. 2d 1181 (2001).

[FN100]. See Perritt, *supra*, note 77, at 1126-1127.

[FN101]. See *id.* at 1127.

[FN102]. See *id.*

[FN103]. Perritt, *supra*, note 77, at 1128 (citing [Asahi v. Superior Court](#), 480 U.S. 102, 111-12 (1987)).

[FN104]. Perritt, *supra*, note 77, at 1128 (citing [Madara v. Hall](#), 916 F.2d 1510, 1517 (11th Cir. 1990)).

[FN105]. Terrence Berg, The Impact of the Internet on State Power to Enforce the Law, 2000 B. Y. U. L. REV. 1305, 1309 <<http://www.wildwest.gov>>.

[FN106]. See William Crane, An Analysis of Over-inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix It, 11 J. ART & ENT. LAW 267, 270 (Spring 2001).

[FN107]. Christopher Paul Boam, The Internet, Information and the Culture of Regulatory Change: A Modern Renaissance, 9 COMM. L. CONSPECTUS 175, 2001, at 191.

[FN108]. [Zippo](#), 952 F. Supp. at 1123-24.

[FN109]. See Berg, *supra*, note 105, at 1320.

[FN110]. [United States v. Ross](#), 1999 WL 782749 (S.D.N.Y. 1999).

[FN111]. See Stein, *supra*, note 69, at 374.

[FN112]. See *id.*

[FN113]. See Podgor, *supra*, note 70, at 289.

[FN114]. See ANTHONY CABOT, INTERNET GAMING IV, 267, Anthony Cabot and Kevin D. Doty, The United States, 325 S. 3rd St., Suite 1-3052, Trace Publications, Las Vegas, Nevada (2001).

[FN115]. See [18 U.S.C. § 3181](#) for a list of countries for which the United States has an extradition treaty.

[FN116]. See Restatement (Third) of the Foreign Relations Law of the U.S. at 236-237.

[FN117]. August *supra*, note 97, at 544.

Appendix A

KENNY C. GUINN

Governor

Nevada Gaming Commission

Pete Bernhard, Chairman

Augie Gurrola, Commissioner

Arthur Marshall, Commissioner

Sue Wagner, Commissioner

Radha Chanderraj, Commissioner

State Gaming Control Board
Dennis K. Neilander, Chairman
Bobby L. Siller, Member
Scott Scherer, Member

STATE OF NEVADA

NEVADA GAMING COMMISSION

STATE GAMING CONTROL BOARD

1919 E. College Parkway, P.O. Box 8003, Carson City, Nevada 89702
555 E. Washington Ave., Suite 2600, Las Vegas, Nevada 89101
3650 South Pointe Cir., P.O. Box 31109, Laughlin, Nevada 89028
557 W. Silver St., Suite 207, Elko, Nevada 89801
495 Apple St., Reno, Nevada 89502
March 7, 2002

Chris Huff, Esq.

Office of Intergovernmental Affairs

United States Department of Justice

Main Justice Building

950 Pennsylvania Avenue, NW

Washington, DC 20530

Dear Mr. Huff:

As you are aware, the Nevada State Legislature enacted a bill last year that enabled the Nevada Gaming Commission, with the assistance of the Nevada Gaming Control Board, to commence the process of adopting regulations to legalize interactive gaming, including on-line gambling. However, the Commission may proceed only if certain conditions are met. As part of this legislation, commonly known as Assembly Bill 466, the Legislature directed the Commission to first determine, among other things, whether such gaming is legal. The answer depends in large part on the interpretation and application of current federal law.

As a result, we asked the Nevada Attorney General's Office and specifically, our counsel Assistant Chief Deputy Attorney General Jeff Rodefer, to provide a written overview of the federal law that may affect the legality of Internet gaming. Enclosed for your review is a copy of this article, which will be published in the next few months.

The results of the legal research are somewhat inconclusive. In the absence of any Congressional action that would definitively resolve this issue, we are seeking guidance with regard to your office's present interpretation of these federal laws and particularly the Wire Act. Nevada's regulatory bodies are neither in favor of nor against any specific policy position and would not seek to "lobby" the Department of Justice. We have been delegated the above- described task and are simply attempting to fulfill this responsibility. Towards these goals, it is our sincere hope and desire that you and the other members of the Department of Justice will review the enclosed article and agree to discuss these vital issues in the very near future.

*269 In the meantime, if you have any questions, please do not hesitate to contact either one of us at the telephone numbers listed below or Assistant Chief Deputy Attorney General Rodefer at (702) 486-3420.

Sincerely,

NEVAD GAMING COMMISSION

PETER C. BERNHARD, Chairman

(702) 650-6565

NEVADA GAMING CONTROL BOARD

DENNIS K. NEILANDER, Chairman

(775) 684-7742

PCB:DKN:JRR:dkl

Enclosure

By Federal Express

c/enc: Sue Wagner, Commissioner

Augie Gurrola, Commissioner
Arthur Marshall, Commissioner
Radha Chanderraj, Commissioner
Bobby L. Siller, Board Member
Scott Scherer, Board Member
Frankie Sue Del Papa, Attorney General
Keith E. Kizer, Chief Deputy Attorney General
Jeffrey R. Rodefer, Asst. Chief Deputy Attorney General

Appendix B
U.S. Department of Justice
Criminal Division

Assistant Attorney General

Washington, D.C.
August 23, 2002

Mr. Peter C. Bernhard, Chairman

Nevada Gaming Commission
3980 Howard Hughes Parkway
Suite 550
Las Vegas, Nevada 89109

Dear Chairman Bernhard:

Your office recently spoke to Mr. Matthew Martens, who is the Criminal Division's Chief of Staff to the Assistant Attorney General, regarding the application of federal law to Internet gambling and the article on Internet gambling in Nevada that was prepared by Mr. Jeffrey R. Rodefer, who is an Assistant Chief Deputy Attorney General *270 for the Nevada Attorney General's Office. The Criminal Division was recently informed by the Department of Justice's Office of Intergovernmental Affairs that your office is also requesting a written response.

As a general rule, the Department of Justice is limited by statute to providing legal advice within the federal government and the Criminal Division does not issue advisory opinions with respect to the legality of specific gambling operations. This allows the Department to defer the resolution of legal questions until it is confronted with a concrete situation requiring action in a judicial forum.

We may, however, provide general guidance as to relevant statutory provisions that are applicable to Internet gambling. As set forth in prior Congressional testimony, the Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling. While several federal statutes are applicable to Internet gambling, the main statutes are [Sections 1084, 1952, and 1955, of Title 18, United States Code](#). As stated in Mr. Rodefer's article, [Section 1084 of Title 18, United States Code](#), prohibits one in the business of betting or wagering from knowingly using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers. [Section 1952 of Title 18, United States Code](#), prohibits traveling in interstate or foreign commerce, or using the mails, or using a facility in interstate or foreign commerce with intent to distribute the proceeds of an unlawful activity or otherwise promoting,

managing, establishing, carrying on, or facilitating the promotion, management, establishment, or carrying on, of any unlawful activity and thereafter performing or attempting to perform such act. The term "unlawful activity" is defined in [Section 1952\(b\)](#) to mean "any business enterprise involving gambling ... in violation of the laws of the State in which they are committed or of the United States." [Section 1955 of Title 18, United States Code](#), prohibits illegal gambling businesses, which involve 1) a violation of [state law](#), 2) five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business, and 3) a business that has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2000 in any single day. In addition to criminal convictions, [Section 1955](#) can be used to seek civil forfeiture of gambling proceeds. See [United States v. \\$734,578.82 in United States Currency, 286 F.3d 641 \(3d Cir. 2002\)](#). Moreover, the federal money laundering statutes are applicable to unlawful Internet gambling businesses. Additionally, it is the Department's view that the gambling activity occurs both in the jurisdiction where the bettor is located and the state or foreign country where the gambling business is located.

I trust that this is responsive to your inquiry. Please do not hesitate to contact us if we can be of any further assistance in this or any other matter.

Sincerely,
Michael Chertoff
Assistant Attorney General

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