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Testimony on the Regulation of Indian Gaming, Oversight Hearing on Indian Gaming, before the United States Senate, Committee on Indian Affairs, 109th Congress, 1st Session

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**PREPARED STATEMENT OF KEVIN K. WASHBURN
ASSOCIATE PROFESSOR, UNIVERSITY OF MINNESOTA LAW SCHOOL**

**BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
(JOHN MCCAIN, CHAIRMAN)**

WEDNESDAY, SEPTEMBER 21, 2005

The Indian gaming industry is one of the most important sources of governmental revenues for Indian tribes, but it will remain a healthy revenue source only as long as it is well regulated by tribal and federal officials.

Casino gaming is unlike any other lawful industry in that large amounts of cash are spent and returned each day in millions of transactions by thousands of people all across the country. In an age in which transactions in most other areas of commerce are dominated by less fungible and more secure financial instruments, such as credit cards, debit cards and checks, casinos still predominantly operate with cash. The cash intensive nature of the gaming industry makes it particularly attractive – and particularly vulnerable – to crime and corruption.

Crime and corruption has, for the most part, been carefully kept in check in Indian gaming through vigilant adherence by gaming regulators to two primary regulatory strategies: careful background investigations of the key actors in Indian gaming, and strong internal control procedures for casino operations. It is widely agreed within the industry that background investigations and internal controls are crucial to effective regulation and no reasonable commentator could seriously deny their importance and effectiveness in protecting the industry. Thus, the key question is not whether these regulatory strategies are valuable and important, but which governments (tribal, federal, or state) should bear the ultimate responsibility for implementing these regulatory strategies.

The regulation of gaming has been plagued by a lack of clarity in the roles of the respective regulatory entities. Now is an appropriate time for Congress to clarify those roles to provide better guidance to the industry and to regulators.

I. IN GENERAL, STATE GOVERNMENTS SHOULD NOT BE EXPECTED TO REGULATE INDIAN GAMING.

When IGRA was enacted in 1988, most observers likely anticipated that states would use the compacting process to obtain a strong regulatory presence over Class III gaming. Indeed, some state governments have strong, reliable and effective Indian gaming regulatory bodies that provide vital assistance in insuring the integrity of Indian gaming. However, states have not consistently undertaken regulatory efforts. Congress should not count on states to handle these important tasks, for three main reasons. First, while tribal and federal regulators view Indian gaming as an important tribal asset that they have a special obligation to protect, state regulators may not feel any particular responsibility to insure its long-term vitality. Instead, they may view Indian gaming activity as simply another economic activity that must be regulated, reflecting less of a commitment to the integrity of the industry. Second, through tribal gaming revenue sharing with state governments, states may have an interest in maximizing gaming revenues, an interest that often overshadows any interest in strong gaming regulation. This sets up a potential conflict of interest. Meeting regulatory requirements does, after all, affect the bottom line and can reduce gaming profits. Finally, the lack of a clear focus and strong state interest in the integrity of Indian gaming leaves the industry vulnerable. The quality of regulation of Indian casinos ought not exist at the mercy of state budgetary cycles.

Through the compact process in IGRA, states had the opportunity to become heavily involved in Indian gaming regulation. While most states have shown a strong interest in tribal gaming revenues, few have shown significant interest in the actual regulation of gaming. By and large, states have been “no-shows” in the important area of regulation. Congress should respect their decision to “opt out” of Indian gaming regulation.

II A TRIBAL/FEDERAL REGULATORY MODEL IS LIKELY TO BE MOST RELIABLE.

In my judgment, **the primary responsibility for insuring that Indian casinos adopt and adhere to adequate internal controls ought to lie with tribal gaming regulators who already exercise a variety of regulatory functions within Indian gaming operations.** In the past ten years, a large and sophisticated community of professional tribal gaming regulators has taken root across the country. Tribal gaming regulators have proven themselves, in the main, as effective regulators. In most circumstances, tribal regulators work conscientiously, competently and independently in providing strong regulation of Indian casinos. Recognizing their primacy in undertaking these sovereign responsibilities is likely to produce the most effective regulation. **However, tribal regulatory structures have some obvious regulatory weaknesses and vulnerabilities that justify a strong oversight role for federal regulators, including the ability to take independent enforcement action where a tribal gaming commission fails to meet its sovereign responsibilities.**

While, in most areas of policy, the important moral and legal principle of tribal sovereignty ought to protect the right of a tribal government to make regulatory decisions without federal oversight, Indian gaming is an exception to this principle. I justify exceptionalism on

this basis: one of the practical ramifications of tribal sovereignty is that no tribe can be held accountable to any other tribe. Yet, despite their legal insulation from one another and their lack of mutual accountability, Indian tribes most certainly can take individual actions that harm other tribes. In the highly politicized world of Indian gaming, no tribe is an island unto itself. Indeed, the political fallout from incompetent or corrupt actions of one tribe may well impact hundreds of other tribes across the country. Indian gaming exists at the sufferance of Congress and state legislatures and the public whom those bodies represent. If one Indian casino succumbs to corruption, then the entire Indian gaming industry may well be tainted. The integrity of the industry – and even the *perception* of integrity – must be guarded with vigilance.

In Indian gaming, tribes are linked inextricably to one another. Yet tribal sovereignty means that each tribe is independent of one another and insulated from any legal responsibility to other tribes for its actions. Because no tribe has the ability to regulate other sovereign tribes, this problem is one that tribes cannot solve themselves. In my view, this lack of accountability of one tribe to another justifies federal oversight to accomplish what tribes cannot achieve through collective action. In other words, the federal government's own sovereign authority in this area can offer sound regulatory coverage that tribes could never achieve on their own.

Because of the tremendous value of gaming to Indian tribes, Congress and Indian tribes share a responsibility to ensure the continued health of the Indian gaming industry. While ninety-nine percent of tribes may regulate responsibly ninety-nine percent of the time, the occasional lapse affects not only the tribe that behaves irresponsibly, but also taints the regulatory efforts of the hundreds of tribes that exercise consistent and rigorous gaming regulation. In this case, the stakes are sufficiently high to justify strong federal regulatory involvement.

The risk of occasional irresponsible behavior is quite real, for a couple of reasons.¹ First, the Indian Gaming Regulatory Act does not currently require that Indian tribes have independent tribal gaming commissions. Many tribes have created gaming commissions, but the relative independence of these commissions varies. Tribal commissioners are sometimes directly accountable to tribal leaders and/or tribal voters. While, in most circumstances, the tribal interest in the long term health of the gaming operation will give each tribal regulator a strong incentive to regulate responsibly, there may occasionally be overwhelming temptation to cut regulatory corners for short term gains.

In the licensure context, for example, I am aware of one tribal gaming commission that denied a gaming license to persons with ties to organized crime and then reversed itself and granted the license apparently after feeling pressure from tribal leaders. While such circumstances are troubling, the dynamics that cause such action are entirely understandable. Where a lucrative opportunity is available to the tribe, the pressure on the tribal gaming commission to find a way to facilitate that opportunity may simply be overwhelming, even

¹ I addressed these issues in greater detail in my testimony before this Committee on April 27, 2005. A link to this testimony can be found at <http://www.law.umn.edu/facultyprofiles/washburnk.htm>.

though it poses serious risks. In some circumstances, there may be a clear conflict of interest for tribal regulators. For those tribes that make per capita payments of gaming revenues to individual members, tribal regulators may have a direct financial interest in seeing a gaming development happen. Such pressures, which are not unique to tribal governments, can undermine the quality of regulation at the tribal level.

Because of these pressures and the natural conflicts of interest of tribal regulators, federal regulators have a comparative advantage. Federal regulators are largely disinterested and objective; they have no significant conflicts of interest because they achieve no direct or significant benefit from the development of any particular Indian gaming facility. Thus, having federal regulators serve an oversight role can help protect Indian gaming from the occasional lapses that might occur when tribal regulators succumb to pressures to cut corners. Federal regulations can also serve another valuable function.

Unlike individual tribal or state rules, uniform federal standards can assure the integrity of gaming on a national scope and indirectly increase the quality and independence of tribal regulators. In the context of internal controls, for example, the adoption of uniform federal standards creates a baseline for quality of regulation nationwide. Creation of such standards not only helps the consumer, it facilitates the independence of tribal gaming commissioners by insuring that knowledge and expertise is portable from one reservation to another. Nationwide standards assure a national network of training and job opportunities that collectively serve to improve the professionalism of tribal gaming regulators. If a tribal regulator is fired from one reservation for applying the rules too rigorously, for example, he may well be able to find work with a gaming commission at another reservation.

Admittedly, federal regulators cannot be as responsive to the unique needs and circumstances of each individual tribe. Moreover, technology and other relevant circumstances will change much more quickly than regulators can update a complex and comprehensive regulatory regime, such as the federal minimum internal controls standards. To address these disadvantages, tribal gaming commissions and federal regulators should be open-minded and sensible about allowing reasonable variances to the federal standards. **Federal regulators should adopt standards that allow adequate flexibility at the tribal level.**

III. CLARIFYING FEDERAL REGULATORY AUTHORITY AND IMPROVING FEDERAL REGULATION.

While all businesses chafe at regulation, Indian tribes are different than other regulated entities. This difference is the source of some key problems in Indian gaming and counsels in favor of a unique approach. First, as sovereign nations, Indian tribes are entitled to a greater level of clarity than ordinary businesses when Congress mandates legal requirements. And the NIGC needs a clear Congressional mandate to establish its legitimacy. Because it is in the best interest of Indian gaming for an independent and objective regulator to oversee all significant gaming activity, Congress should strengthen the NIGC's mandate over Class III gaming. **Congress should recognize that NIGC's authority to assure the integrity**

of Indian gaming extends to Class III gaming activity for all purposes, including background investigations of management contractors, minimum internal control standards, and health and safety regulations.

Second, federal Indian gaming regulators must be cognizant of the fact that it is sovereign *governments* they are regulating. In my experience, many disputes between Indian tribes and the NIGC have arisen when federal regulators have behaved in a heavy-handed fashion. While such heavy-handedness is the norm within the commercial gaming industry in Nevada and New Jersey and other jurisdictions, the circumstances are far different in Indian gaming. Regulators in Nevada and New Jersey are regulating private actors, not sovereign nations. Federal regulators must behave much more carefully and much more respectfully toward the regulated industry. **To be effective, NIGC regulators must not merely be regulators, but also educators and diplomats.** While federal regulators must utilize a variety of skills to achieve tribal compliance, over-reliance on aggressive regulatory tactics sometimes simply masks ineffectiveness. Federal regulators should treat tribal regulators and tribal officials with the same respect and deference that they would show to state officials.

CONCLUSION

While each tribe has a moral right to the exclusive regulation of its own affairs, this moral right clashes with political reality in the field of Indian gaming where the actions of one tribe can harm many other tribes.

To protect the value of Indian gaming as a resource for all tribes, Congress should recognize a clear and strong role for federal regulators. For most tribes, which engage in responsible regulation of Indian gaming, the NIGC role will be nearly invisible. While a strong role for the NIGC clearly treads on tribal sovereignty, it is a pragmatic and necessary step to insure the long-term viability of gaming as a resource for all tribes.

Thank you for asking for my views on this important subject.²

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² I offer the views set forth above solely as an individual academic and do not purport to speak for the University of Minnesota, the State of Minnesota, or any other entity or person.