4-27-2005

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

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BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

WEDNESDAY, APRIL 27, 2005

Thank you for inviting me to appear before the Committee. In the seventeen years since enactment of the Indian Gaming Regulatory Act, the scope and size of the industry has grown dramatically. Our understanding of good gaming regulatory policy has developed substantially. And experience has brought to light serious flaws in IGRA that must be addressed if Indian gaming is to remain a well-regulated industry and a useful resource to tribal governments.

There is a striking divergence between the expectations of the Congressional authors of the Indian Gaming Regulatory Act and the actual practice that has developed during the last seventeen years. I will address, first, the unexpected distribution of regulatory responsibilities between the federal, state and tribal governments, and discuss the ways that IGRA ought to be amended to deal with the current reality of gaming regulation. Second, I will explain why I believe that one of IGRA's most glaring failures is the well intentioned but unworkable and ultimately harmful scheme addressing review of gaming management contracts. I will offer a suggestion as to how to improve the effectiveness of NIGC contract review and simultaneously lower the costs of gaming related services to tribes by eliminating unnecessary uncertainty in the business climate created by these provisions. Finally, in keeping with the uncertainty theme discussed in critiquing the NIGC contract review provisions, I will address the problem created by uncertainty as the legality of Class II technological aids in light of the ambiguity of the application of the Johnson Act.

I. THE NEED TO SHORE UP NIGC AUTHORITY AND TO GUARD AGAINST THE THREAT OF REGULATORY CAPTURE OF TRIBAL REGULATORS.

Because of its unsavory past and its questionable moral pedigree, gaming has correctly been subject to tremendous regulatory scrutiny. As one former federal prosecutor from Nevada testified in 1987 in the early Senate hearings on Indian gaming regulation, "the respectability of gaming is hard won and easily lost . . . the smallest scandal has ripple effects throughout

the industry."[1] Even more than in other industries, proper regulation is fundamental to the survival of the gaming industry.

Because of the tremendous value of gaming to Indian tribes, Congress and Indian tribes have an even greater interest in insuring that gaming on Indian reservations, in particular, is well regulated. As a result, providing for the proper regulation of Indian gaming was a primary focus of the Indian Gaming Regulatory Act.

When IGRA was enacted, it was anticipated that tribes and the federal government would regulate Class II gaming (that is, bingo, pull tabs and similar games) and that states and tribes would regulate Class III casino-style gaming through relationships worked out through tribal-state compacts. In many respects, the division of authority anticipated by Congress in 1988 never materialized.

A. The Role of States

IGRA was enacted at least partially at the behest of states that asserted legitimate regulatory concerns about Indian gaming. In preparation for my testimony, I reviewed some of the hearing testimony from 1987. At that time, numerous witnesses testified that states would make better primary regulators of Class III casino-style gaming, primarily because state governments were performing such regulatory functions well in Nevada and New Jersey. Moreover, since state governments are physically closer to tribal casinos, commentators argued that they would provide a stronger regulatory presence. The compromise that was ultimately hammered out and that became law allowed states to take a regulatory role over Class III casino style gaming if they negotiated such a role in tribal-state compacts. Indeed, IGRA expressly anticipated that states would negotiate for robust regulatory roles.

By and large, however, the states have been no-shows in Indian gaming regulation. With a couple of notable exceptions, such as Chairman McCain's home state of Arizona, state governments never took up the mantle of tribal gaming regulation. This is curious in hindsight. One of the most persistent positions taken by state officials during the debate over federal Indian gaming legislation was the concern that Indian gaming be well regulated and the subtext was that states needed substantial regulatory authority over such gaming to insure that it was. Yet, when IGRA gave states an opportunity to address this problem head on in tribal state-compacts (by regulating tribal gaming and assessing tribes lawful regulatory fees to cover the costs), states widely declined to assert the powers that they had most aggressively sought.

B. The Ambiguous Role of the NIGC

Because of the vacuum in state regulatory leadership in Indian gaming, the NIGC and the tribes sought to meet this important responsibility themselves. By and large, the federal-tribal partnership has been adequate. The divergence between Congressional expectations and regulatory reality, however, has created a couple of problems. First, the scope of the NIGC's authority over Class III casino style gaming is unclear. NIGC authority was greatest over Class II gaming; NIGC authority was thought to be more circumscribed over Class III

[1] Testimony of Stanley Hunterton, Testimony before the Select Committee on Indian Affairs, United States Senate, Hearing on S. 555 and S. 1303, 100th Cong., 1st Sess. (June 18, 1987).

gaming because the states were expected to fulfill that role. According to this theory, the Congress that created the NIGC likely anticipated that it was creating a National Indian *Bingo* Commission and not really a National Indian *Gaming* Commission. Thus, while the NIGC has stepped into the breach created when the state governments failed to show up, the tribes have often questioned the legitimacy of the NIGC authority over Class III gaming. As a practical matter, NIGC authority has usually been adequate to confer authority over Class III gaming because most tribes that conduct Class II gaming also conduct Class III gaming. While Class II gaming thus gives the NIGC an adequate regulatory hook, this explanation has not been unsatisfactory to the regulated industry, which views the NIGC as over-reaching.

To explain the importance of the legitimacy question, let me offer one fundamental truth about regulated industries. Regulated communities rarely like to be regulated. No one likes Big Brother looking over his or her shoulder. AT&T does not like the FCC looking over its shoulder; used car dealers do not like the state attorneys general looking over their shoulders; and Goldman Sachs likely does not like the SEC looking over its shoulder. It is a natural reaction.

Tribal lambasting of the NIGC sounds different because it often takes on the language of tribal sovereignty. If one strips away the sovereignty rhetoric, however, the complaints are little different than those raised in any regulated industry. Consider, for example, the controversy in the financial industry regarding Sarbanes-Oxley. One of the key areas of dispute regarding Sarbanes-Oxley is Section 404 of that law which provides for mandatory auditing of internal controls for financial reporting of publicly traded companies. This issue bears a striking resemblance to the substance of the dispute over NIGC authority to apply the Minimum Internal Control Standards to Class III gaming. Neither tribal casinos nor corporations wish to endure the expense or the trouble of reporting their internal control failings to a regulatory body, or to the constituents to whom they ought to be accountable, whether they are stockholders of a corporation or members of the Indian tribe. As sovereign nations, tribes are entitled perhaps to a greater level of clarity than ordinary businesses when they are subjected to federal legal requirements. The bottom line, however, is that no business likes to be regulated.

Given the natural skepticism by any regulated community, it is imperative that regulators have a clear mandate. Because it is in the best interest of tribal gaming for an objective regulatory agent to oversee all significant Indian gaming, Congress should strengthen the NIGC's mandate in this area. **Recommendation: Congress should clarify that NIGC authority over Class III gaming is as broad as it is over Class II gaming.**

In sum, states, by and large, have been no-shows in the regulation of Indian gaming; the NIGC has worked hard, but its authority related to Class III casino-style gaming has been challenged as uncertain and illegitimate. There is, however, another key player in the regulation of Indian gaming: tribal gaming regulators.

C. The Potential Obstacles to Successful Tribal Regulation

In the Indian Gaming Regulatory Act, Congress presumably did not anticipate that the utter absence of state regulatory authority, or the ambiguity of federal authority, would require

tribal regulators to take such a pervasive role in regulating Indian gaming. Indeed, while Congress imposed on Indian tribes numerous responsibilities, IGRA did not call for – and did not require – that Indian tribes have tribal gaming commissions. To be sure, Congress contemplated that Indian tribes would exercise some sort of regulatory authority over Indian casinos, but it was left to the tribes themselves to figure out how best to go about exercising that authority. The heavy reliance on tribal gaming regulators was not only unexpected by Congress, it poses serious risks from the standpoint of sound regulatory policy that are not addressed in the existing language of IGRA.

Indeed, the uneasy relationship between the regulator and the regulated community mentioned above is true for tribal gaming regulators as well. Tribal casinos may not appreciate being regulated, even by tribal regulators. And one of the problems, of course, is that a regulated community can sometimes get upset at the manner in which a gaming commission regulates. One potential problem, which this Committee has heard about before, is that tribal gaming regulators often lack the legal separation that allow them to act independently of the casino itself or the tribal government.

To be effective, tribal gaming regulators must focus with singular clarity, like a laser beam, on their responsibility to maintain the integrity of Indian gaming. A tribal regulator who lacks independence may be influenced by the tribal government to take action that is politically expedient but inappropriate from a regulatory perspective. It may be influenced by casino managers to take action that helps the short-term financial interest of the casino managers, but is inconsistent with sound regulatory policy. To provide a concrete example, consider a tribal council member who leans on the regulator to approve a license application for someone who lacks the character traits that would make him suitable to be involved in a cash intensive gaming operation. Or consider also a casino manager that cuts regulatory corners to save money and asks the tribal gaming regulator to turn a blind eye to such actions. Such risks may be avoided if the regulators act independently and objectively, but not if they fear for their jobs. In a sound regulatory scheme, regulators must not be concerned with pleasing those who are responsible for tribal economic or political interests, but must act solely pursuant to legitimate regulatory interests.

While this may sound like a criticism of Indian tribes or Indian gaming, it seeks only to recognize that the Indian gaming industry is not fundamentally different than other industries with regard to the dynamics of regulation. We can expect as a structural matter that Indian casinos will chafe at regulation like all businesses do. We must therefore create regulatory structures that protect the independence of tribal regulators.

Here, the academic literature on "regulatory capture" is relevant. "Regulatory capture" is the term used to define a regulatory agency's tendency to collude with the firms it is ostensibly regulating, to the detriment of the public interest. The academic literature on this subject is rich and diverse. It tends to support the notion that a regulated community will attempt influence the regulator to prevent the regulator from enforcing vigorously the regulatory regime with which he is entrusted. Some scholars say "capture" is unavoidable: regulators will become instruments of the regulated community and will inevitably act in favor of the regulated community even when it is against the public interest. Others take a pragmatic view that "capture" will exist to a greater or lesser degree depending on the legal structures

that are used to guard against it, but that the threat of capture can be managed with prudent laws and sound regulatory structures.

Upon reviewing the literature on regulatory capture, one can conclude that the structure of Indian gaming markets renders tribal gaming regulators tremendously vulnerable to capture. One risk factor for capture is a high degree of discretion by regulators. Broad discretion not only creates the opportunity for regulators to rule in favor of the regulated community, but also provides cover for doing so because the essence of discretion is power unconstrained by enforceable legal authority. The regulation of gaming almost always involves a high degree of discretion by regulators. Consider that many gaming regulators assert as a legal matter that their discretion to grant or deny gaming licenses is unfettered by requirements of providing due process because involvement in gaming is not a right, but a privilege. Though such a legal argument is less compelling under modern notions of due process, it is widely held among gaming regulators and it serves to justify enormous unchecked discretion in the hands of the gaming regulator. Such discretion is deemed to increase the risk of capture.

Another risk factor relates to the number of groups interested in the regulator's performance. A regulatory agency that has many regulatory entities within its jurisdiction and many other interested groups interested in its work is less likely to succumb to capture by any one group, because it will be held accountable to some degree by each of the entities and interested groups and each will scrutinize agency action. So, for example, when the FCC makes a decision related to a communications license, AT&T, MCI and Sprint may cry foul if Qwest gets favorable treatment that the others perceive as unfair. Such competition within the regulated industry makes the regulator more accountable and thus serves as an important check on regulatory capture. In contrast, many tribal regulatory agencies have authority over only a single entity. Such regulators will not face the same kind of scrutiny that other regulators will face; they will face less scrutiny and will hear only one voice, rather than many, when they make regulatory decisions. Likewise, while outside interest groups can sometimes have an impact in preventing capture, there are few independent interest groups looking out for tribal members or casino patrons in the Indian gaming industry.

As a result, regulatory capture is a serious risk within the Indian gaming industry. To combat some of these dangers, the NIGC has developed a bulletin that urges tribes to create independent gaming commissions that will insure the proper regulation of Indian casinos. The bulletin sets forth some of the best practices in the industry and the modern thinking as to sound regulatory policy, but the bulletin does not carry the force of law. I would encourage the Committee to consider enacting laws to address the independence of tribal gaming regulators.

I would note that even a fully independent tribal gaming commissions may not remain free of the risk of capture if it works in a closed system in which a commission regulates only one entity. Thus, it is important to have an independent authority, outside of the influence of the tribal government, that independently evaluates and perhaps oversees tribal regulatory policy-making and decisions. The obvious candidate for such a role is the NIGC, though an autonomous quasi-governmental body or a multi-tribal organization might be able to provide some independent oversight of decisions by tribal gaming commissions to discourage regulators from engaging in questionable behavior.

While one might wish to see such an argument justified by a lengthy catalogue of serious problems that have occurred because of the lack of an effective regulatory structure, a "parade of horribles" has not materialized. With a few exceptions, the Indian gaming industry has had few serious regulatory problems. Tribal gaming regulators have generally shown that they are up to the task of being primary regulators and have implicitly demonstrated that state regulators are unnecessary. However, the industry has grown explosively, and such rapid growth is bound to come with growing pains and strains on a regulatory structure that has serious flaws. Congress should not wait for serious problems to develop before correcting these flaws and shoring up the regulatory structure. **Recommendation: Congress should require independent tribal gaming commissions and should expand NIGC oversight authority and capability, especially over those tribal casinos that decline to create effective and independent tribal gaming commissions.**

The changes I advocate, clarifying NIGC authority and creating a positive legal requirement for independent tribal gaming commissions and additional independent oversight, are sound as a matter of regulatory policy and would safeguard the regulation of this rapidly growing industry.

II. ADDRESSING THE NIGC'S TRUST RESPONSIBILITY

The management contract review process provides another example of reality diverging from Congressional expectations expressed in 1988. These provisions may represent IGRA's most spectacular failure.

IGRA's management contract provisions recognized that Indian tribes would contract with outsiders to run casinos. Given that the commercial gaming industry in Nevada and elsewhere had been largely successful in ridding this cash-intensive industry of the influence of organized crime, Congress enacted the management contract review provisions to insure that a federal agency, not the tribe, would scrutinize the outside parties who contract with tribes to run Indian casinos. In other words, Congress did not want organized crime figures that had been banished from commercial gaming (or other bad actors) to target Indian gaming operations.

Congress also sought to insure that outside parties did not take advantage of tribes and walk away with the lion's share of gaming revenues. To insure that Indian tribes were the primary beneficiaries of Indian gaming, Congress capped revenue participation by outside investors at a maximum rate of 30 percent of net gaming revenues over a maximum five year term (it allowed a revenue participation of up to 40 percent and up to a seven year term in extraordinary circumstances).

Seventeen years later, it is patently obvious that these provisions did not have the intended effect. Though more than 200 tribes currently engaging in Indian gaming, the NIGC has approved only about 45 management contracts between tribes and outside parties. The low number of approved management contracts is not a sign that Indian tribes are constructing and operating gaming operations alone and independent of outside assistance. Rather, most outsiders that do business with Indian tribes have found vehicles other than management contracts to become involved in Indian gaming. Parties have worked to avoid the

management contract review process and have been creative in drafting arrangements that give the outsiders tremendous revenue participation in Indian casinos, yet without any federal regulatory scrutiny.

I would argue that the management contract review process was a failed experiment and that the underlying issue presents a serious problem that ought to be more closely examined. Solving this problem requires, first, examining the reasons that parties seek to avoid the NIGC management contract review process.

Parties may wish to avoid NIGC scrutiny for a variety of reasons. Some may wish to hide checkered backgrounds or criminal records that would prevent them from being involved in Indian gaming if they were subject to a suitability determination. Other parties may seek to evade the NIGC review process for more legitimate reasons, such as the inordinate length of time for NIGC review and the uncertainty of the outcome, as well as the uncertainty of the legality of the contract pending review. The review process is difficult for the outsiders who subject themselves to it. During the review process, these outside contractors must tie up millions of dollars that could be invested elsewhere, all the while facing substantial uncertainty as to the outcome of the process. Often, they must renegotiate contracts in mid-stream to satisfy the NIGC. The result is that many potential participants in Indian gaming decide to leave Indian gaming and pursue less risky ventures. Because of the smaller pool of parties willing to bid on tribal gaming business, tribes face a less competitive market from which to draw talent and they pay higher prices for that talent. In other words, the lengthy and uncertain review process obstructs the free market that otherwise would have developed for the provision of gaming-related services. As a result, tribes pay a premium created by the risks and delay created by the regulatory structure.

The NIGC has also been frustrated by its inability to scrutinize contracts other than management contracts. Because it has a legitimate concern about its obligation to maintain the integrity of Indian gaming and to protect Indian gaming against outsiders who pose a threat to the industry, it has searched for means of addressing the problem. It has recently asserted a new legal theory to invalidate such contracts. In the last three years, the NIGC has begun to argue that contracts that provide a substantial revenue share to an outside party other than a management contractor violate the provision of IGRA that requires tribes to insure that Indian tribes have the "sole proprietary interest" in Indian casinos. In other words, the NIGC argues that substantial participation in casino revenues amounts to ownership. One problem with this approach is that the NIGC has not adopted clear standards to determine which kinds of provisions do – and which do not – violate the "sole proprietary interest" principle. The lack of clear standards exacerbates the existing problem of uncertainty that outside parties face related to regulatory approval and thus further increases the risk premium for doing business with Indian casinos. As a result, the fees for the services the tribes require – even under contracts subsequently found lawful – are higher than the tribes otherwise might have had to pay.

Rational actors in the business community appreciate clear legal standards as to regulatory requirements. Clear standards allow business entities to appraise the value of a business opportunity and determine how much to bid for that work. In the absence of clear standards, outside parties to tribal contracts face uncertainty and will charge tribes a premium related to the perceived risk. If the risk is unquantifiable, outside parties may

refuse to bid at all, reducing the competition that otherwise might contribute to a favorable economic environment for tribes. Currently, the uncertain regulatory climate related to certain kinds of contracts creates a perception of high risk in entering gaming-related contracts with Indian tribes. This uncertainty drives out some of the mature and sophisticated gaming companies that would otherwise be willing to invest in Indian gaming and creates opportunities in the industry for those who are comfortable with a high degree of risk, such as the foreign investors that have had a high profile in several Indian gaming operations.

NIGC scrutiny of management contracts and other gaming-related contracts has been justified as an exercise of the federal government's trust responsibility. However, the NIGC lacks clear standards as to how to exercise such authority. Moreover, one major development in the past seventeen years is the increasing sophistication of Indian tribes. Congress recognized this sophistication in 2000 when it amended Section 81 (25 U.S.C. § 81) to remove the requirement for Secretarial approval of tribal attorneys and their fees. Indeed, there is a real question whether regulation of the fees charged by outside contractors and paid by tribes ought to be regulated by the federal government at all. For several reasons, the answer is likely to be negative.

First, the theory behind such regulation is based on dubious and out-dated economic principles. The fee caps in IGRA's management contract provisions are essentially price caps imposed on the seller rather than the buyer. Price caps have fallen out of favor with economists and government policy-makers as inefficient. Indeed, Chicago School price theorists tell us that parties will generally sign contracts only when it makes both parties better off. Any attempt by the government to regulate contracting with Indian tribes bears the burden of explaining why this fundamental economic truth does not apply to Indian tribes. If the argument is that tribes cannot make rational decisions, then the obvious question is whether the federal government can make decisions better than tribes can. Since it is tribes that must bear the costs of such contracts, it is likely that they are much better at evaluating the costs and benefits than a disinterested federal decision-maker. Moreover, because of the size of the Indian gaming industry, tribes now have access to a broader spectrum of legal counsel and business advice. Most gaming tribes are able to obtain substantial expertise that rivals or even exceeds the talent of government analysts. For run-of-the-mill business decisions involving contracts for gaming services, the federal government likely cannot make better decisions than tribes. In the main, federal regulators should trust tribes to strike deals that are advantageous to them.

Second, in a legal environment shaped by the Indian trust fund debacle and numerous other actions by federal officials, such as the unseemly acts documented in the Supreme Court's Navajo Nation case of 2003, the federal government's legitimacy is in serious doubt when it purports to make economic decisions on behalf of tribes. Even setting aside the question of federal legitimacy when it purports to act on behalf of tribes, the tribes might be better off making their own decisions with private counsel. If the tribe's counsel commits malpractice in advising the tribe as to matters related to tribal economic concerns, the tribe may be able to sue the advisor. On the other hand, if the government errs in regulating tribal economic decisions, the tribe may have difficulty obtaining any redress.

Third, it is inevitable that insertion of federal regulators into tribal economic decisions will slow economic development because it takes additional time after a deal is struck between the parties for the government to perform its review. For reasons discussed above, this dynamic may also increase the cost to tribes.

That is not to say that there ought not be a substantial role for federal regulators related to such contracts. Rather than scrutinizing economic decisions, however, the federal government can assist tribes best by independently scrutinizing the outside parties involved in such deals.

Because of its nationwide and worldwide reach and its access to federal law enforcement, the federal government has a tremendous comparative advantage over tribal regulators in performing background investigations. One can easily imagine that a federal background investigator, with federal credentials, will have greater access to information than a tribal investigator who travels outside his jurisdiction. Moreover, with clear federal standards for suitability, a person entering such contracts has a greater ability to evaluate the likelihood of successfully completing the suitability review. Finally, the NIGC provides a greater safeguard to Indian gaming because it is much less likely to suffer from capture-related myopia that might afflict tribal gaming regulators.

To sum up, under the current regulatory regime, the NIGC's authority is far too circumscribed over licensure of outside people involved in Indian gaming contracts and yet NIGC authority is far too broad over tribal economic decision-making. I would thus encourage Congress to expand the NIGC's role in the background investigation and suitability context by extending the NIGC's authority to conduct background investigations and issue licenses to outside parties involved in Indian gaming. In sharpening the focus of NIGC authority, Congress should also eliminate the role NIGC is currently playing in regulating tribal economic decisions. **Recommendation: Congress should give the NIGC licensure authority over a wide range of persons involved in substantial contracts related to the development and operation of Indian casinos and expand the NIGC's capability for conducting background investigations so as to minimize delay in that proceess. At the same time, Congress should eliminate NIGC review of the economic aspects of those agreements.**

III. THE HIGH COSTS OF UNCERTAINTY

The NIGC contract review process is not the only area in which uncertainty plagues Indian gaming and imposes tremendous costs on Indian tribes. The Department of Justice's persistent, unsuccessful attempts to apply the Johnson Act to Class II "technological aids" also creates an atmosphere of uncertainty. Despite the Department of Justice's repeated losses in the federal courts of appeal, the threat of federal prosecution causes prudent gaming companies to stay out of that market. In other words, the Department of Justice has succeeded in driving out of the market only those companies that respect the Department of Justice's role in interpreting the rule of law, leaving the market dominated by a few companies that are willing to operate in this legally gray area. As a result, the companies with the largest involvement in Class II tribal gaming are those that are willing to tread close to the thin line separating lawful and unlawful gaming. This approach has rewarded these companies with extraordinary profits that would not be available in a market

with full and open competition. These profits have come at the expense of Indian tribes whose choices of business partners are constrained by the Department of Justice's actions and threatened actions.

Indian tribes and the entire Class II Indian gaming market are ill-served when reputable companies refuse to enter the market. Tribes engaged in lawful behavior should be able to work with reputable companies. In short, the Department of Justice interpretation of the law has created a transfer of wealth from many relatively poor Class II gaming tribes to those particular companies willing to operate in the shadow of the law.

The rule of law in Indian country is undermined by the ongoing dispute related to the lack of clarity of the application of the Johnson Act to Class II technological aids. The Department of Justice's legal position is tenable only because Congress was not crystal clear when it drafted IGRA. Congress should give the Department of Justice the clarity it craves with regard to the applicability of the Johnson Act to Class II gaming involving technological aids. Congress should indicate clearly that the Johnson Act does not apply to Class II technological aids. This is a sensible solution to a problem that has festered for a decade and has consumed hundreds of thousands of federal and tribal dollars in litigation costs that could be better spent elsewhere. **Recommendation: Congress should explicitly indicate that all forms of Class II gaming recognized in IGRA are exempt from the Johnson Act.**

Thank you for inviting me to testify today.

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Appendix - Publications by Professor Washburn on Indian Gaming:

The Mechanics of the Indian Gaming Management Contract Approval Process, 9 GAMING LAW REVIEW 333 (2004) (explaining the lengthy process involved in the NIGC's review of gaming management contracts and discussing the relevance of "collateral agreements" in this process).

Federal Law, State Policy and Indian Gaming, 4 NEVADA LAW JOURNAL 285 (2004) (Essay in Symposium on Cross-Border Issues in Gaming) (describing the ultimate dependence of tribal gaming on state law and state political processes).

Recurring Problems in Indian Gaming, 1 WYOMING LAW REVIEW 427 (2001) (describing problems related to compacts, revenue-sharing, the *Seminole Tribe* decision, and the scope of lawful gaming).