THE PENDING FEDERAL INTERNET GAMBLING BILLS ARE INCONSISTENT WITH CONGRESS' HISTORIC SUPPORT OF STATES' PREROGATIVE TO REGULATE GAMBLING WITHIN THEIR BORDERS

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As is well known, currently pending in Congress are two federal bills that would authorize certain types of interstate Internet gambling. They are H.R. 1174, the "Internet Gambling Regulation, Consumer Protection, and Enforcement Act," introduced in March, 2011 by Representative John Campbell (R-CA) and H.R. 2366, the "Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011," introduced in June, 2011 by Representative Joe Barton (R-TX). In addition Senate Majority Leader Harry Reid (D-NV) prepared a Bill for possible introduction in December, 2010, entitled the "Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2010." It is widely believed that Senator Reid is interested in attaching this bill, in substantially the same form, to other legislation being considered by Congress in this session.

I. THE DEPARTMENT OF JUSTICE'S DECEMBER 23, 2011 OPINION

Moreover, the Department of Justice's ("DoJ") opinion announced December 23, 2011 (but dated September 20, 2011) has been interpreted by some as creating an urgent need for the federal regulation of Internet gambling. For example, the American Gaming Association ("AGA") has stated that the opinion "validates the urgent need for federal legislation to curb what will now be a proliferation of domestic and foreign, unlicensed and unregulated gaming websites without consistent regulatory standards and safeguards against fraud, underage gambling and money laundering."[1]

The DoJ opinion changed significantly the legal environment related to Internet gaming in the United States. In it, the DoJ examined exhaustively the Wire Wager Act of 1961 (the "Wire Act")[2] – which prohibits gaming businesses from using wire communications facilities such as the Internet to transmit certain wagers and related information across state lines – and renounced its long-standing position that the Wire Act applied to all types of wagering and not solely wagering on sporting events. The DoJ's historic position, coupled with its claim that the Wire Act applies to transmissions between points in the same state when intermediately routed out of the state, had effectively frustrated the efforts of states and state lotteries that sought to expand gaming within their borders via the Internet in order to generate more revenues for good causes and help address state budget deficits.[3]

While the DoJ opinion was written with respect to certain games sought to be implemented on the Internet by the State Lotteries of New York and Illinois, because it declared the Wire Act applicable only to betting on sporting events, the opinion removed all doubt as to the legality under federal law of state-authorized non-sports Internet gaming conducted on an intrastate basis (i.e., where the wager is made and received within the same state, regardless whether intermediately routed out of the state). As a result, states and state lotteries may now conduct wagering games via the Internet on an intrastate basis if authorized to do so by their respective constitutions and state laws. In addition, by entering into compacts with other states, state lotteries could conduct such Internet gaming on an interstate basis.

1) The American Gaming Association's "Statement on Department of Justice Letter Clarifying Scope of the Wire Act" dated December 23, 2011. See also the statement of John Pappas, Executive Director of the Poker Player's Alliance, reading in part: "[T]his ruling makes it even more important that Congress act now to clarify federal law, and to create a licensing and regulation regime for Internet poker, …" 2) 18 U.S.C. § 1084. 3) See, for example, letter dated May 13, 2005 from Laura H. Parsky, Deputy Assistant Attorney General, U.S. Department of Justice, Criminal Division, to Caroline Adams, Illinois Lottery Superintendent, in which the DoJ's representative stated: "Although [wagering via the Internet] might be considered to be lawful in the State of Illinois, we [the DoJ] believe that the acceptance of wagers through the use of a wire communication facility by a gambling business, including that operated by a component of the government of a state, from individuals located … within the borders of the state (but where transmission is routed outside of the state) would violate federal law." Similar letters in respect of proposed intra-jurisdiction Internet gambling were written by DoJ representatives in 2004 (to the U.S. Virgin Islands Casino Control Commission) and in 2002 (to the Nevada Gaming Commission).

II. SALIENT FEATURES OF THE FEDERAL BILLS

As discussed below, the bills introduced by Representatives Campbell and Barton, and the bill drafted by Senator Reid, would federalize Internet gambling ("Igaming") and establish a federal infrastructure unlike any other in history with respect to legal gambling conducted within state borders. Moreover, in certain respects the bills would dictate to the states and limit them in regard to what types of Igaming they could conduct or license – i.e., they would limit the effect of the DoJ's December 23rd opinion. This article shows that passage of any of these bills would be a departure from positions Congress has taken in the past with respect to states' prerogative to regulate gambling.

While comprehensive summaries of each of the foregoing bills have been provided elsewhere, it is useful to mention certain salient features of each bill.

A. H.R. 1174 (the "Campbell Bill")

The Campbell Bill would authorize the licensing of Igaming operators to conduct all types of gambling via the Internet other than wagering on sports events (although currently lawful pari-mutuel wagering on racing events would remain lawful). States that did not wish to permit Igaming by persons within their borders would be required to "opt out" of the scheme within a specified period of time. The Department of the Treasury would have regulatory oversight over the licensing of operators, and would delegate much of the licensing and investigative responsibilities to state and tribal regulators that qualified under later-promulgated Treasury regulations. A companion tax bill, H.R. 2230, sponsored by Representative Jim McDermott (D-WA), would impose two principal taxes – a 2% tax on player deposits to be paid to the federal government and a 6% tax on player deposits that would be distributed among participating states in the same proportion as the amount of player deposits from each participating state bears to the total of all player deposits.

The Campbell Bill is expressly made inapplicable to intrastate Igaming conducted by state and tribal lotteries in accordance with the intrastate and intertribal Igaming exceptions (collectively, the "UIGEA Intrastate Igaming Exception") contained in the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA").[4] Such intra-jurisdiction Igaming is expressly permitted, and operators of any state or tribal lottery conducting such intra-jurisdiction Igaming are not required to be licensed under the Campbell Bill.

B.H.R. 2366 (the "Barton Bill")

Unlike the Campbell Bill, the only Igaming the Barton Bill would authorize is Internet poker, and then only poker when played by two or more people playing against each other and not against a "house" or "bank." Licenses would be issued under the oversight of the Department of Commerce (through a newly-created "Office of Internet Poker Oversight"), although it is contemplated that much of this authority would be delegated to state and tribal regulators that qualified under later-promulgated federal regulations. States that did not wish to allow licensed operators to take wagers from persons located within their borders would have to "opt out" of the scheme within a specified period of time.

No tax scheme is included in the Barton Bill. Presumably the taxation scheme would be addressed in later-filed companion legislation. The Barton Bill's treatment of intrastate Igaming is discussed below.

C. The Reid Bill

In many ways, the Barton Bill borrowed from the earlier-drafted Reid Bill. Like the Barton Bill, the Reid Bill would only authorize Internet poker, and again, only poker played by two or more people playing against each other and not against a "house" or "bank." The Commerce Department would supervise licensing, and the primary licensing authority would be delegated to established state and tribal licensing authorities. States that currently permit licensed poker play in "bricks and mortar" facilities – i.e., 15 specifically named states – would be deemed to permit federally licensed interstate Internet poker play from within their borders unless they "opted out" within a specified period of time. Licensed operators could take wagers from persons located in other states only if those states had specifically "opted in" to the federal scheme.

Under the Reid Bill, licensed operators would be required to pay an Internet poker activity fee equal to 16% of Internet poker receipts (i.e., poker commission fees and tournament fees, less prizes paid). Of that 16%, one-eighth (i.e., 2% of Internet poker receipts) would be the federal share used to administer the program, and the remainder would be allocated as follows: 70% would be distributed to the states and tribes in the proportion that the number of players in the applicable jurisdiction bears to the total number of players and 30% would be distributed to each state and tribe in the proportion that the amount of Internet poker receipts from customers in the applicable jurisdiction bears to the total amount of Internet poker receipts.

The Reid Bill's treatment of intrastate Igaming is discussed below.

III. THE BARTON AND REID BILLS, IN PARTICULAR, RESTRICT THE PREROGATIVE OF STATES TO REGULATE GAMBLING

The Barton and Reid Bills would create an unprecedented federal framework for legal gambling, dictating the licensing standards, terms and conditions to be met by Igaming operators and their vendors. Either Bill, if enacted, would usurp the historic prerogative of states to regulate legal gambling within their borders. Apart from (and notwithstanding) provisions allowing states to "opt-out" (or refuse to "opt-in," as the case may be under the Reid Bill), the Bills would limit the Igaming that states could conduct themselves (e.g., through their lotteries) or authorize others to conduct.

Each Bill provides that an Internet system that does not process "bets or wagers" would not be an "Internet Gambling Facility," and thus would not be covered under the Bill. In addition, each Bill excepts from the term "bet or wager" the following:

> **Intrastate Lottery Transactions.** A bet or wager that is …
>
> (I) a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance) authorized by a State or Indian tribe; and

…continued on page 46

4) The UIGEA explicitly excepts from "unlawful Internet gambling" Internet gambling conducted as follows: (i) the bets or wagers are placed and received exclusively within a single State; (ii) the bets or wagers and the method by which they are placed and received is expressly authorized by and placed in accordance with the laws of such State; (iii) the State law or regulations include (a) age and location verification requirements reasonably designed to block access to minors and persons located out of the State; and (b) appropriate data security standards to prevent unauthorized access; and (iv) the bets or wagers do not violate any provision of: (a) the Interstate Horseracing Act of 1978 (15 U.S.C. § 3001 et seq.); (b) the Professional and Amateur Sports Protection Act (28 U.S.C. § 3701 et seq.); (c) the Gambling Devices Transportation Act (15 U.S.C. § 1171 et seq.); or (d) the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.). A similar and analogous exception is provided with respect to wagers sent and received within the Indian lands of a single tribe or between the Indian lands of two or more tribes to the extent intertribal gaming is authorized by the Indian Gaming Regulatory Act (the "IGRA").

(II) [carried out pursuant to the UIGEA Intrastate Igaming Exception].[5]

Thus, each Bill would exclude from its scope intrastate Igaming conducted by state lotteries only if the outcome of the games depended predominantly on chance. Games whose outcome depended predominantly on skill (or in which skill and chance played an equal role) would not be excluded from the federal scheme, and a federal license would be required to conduct them. However, state lotteries would be ineligible for licensing under either Bill until at least two years after the first license had been issued, and then only if allowed by the Secretary of Commerce.[6] (Even then, poker would be the only game that could be licensed.) Thus, for at least that two-year period, state lotteries would be prohibited from offering skill games, and thereafter, the offering of such games would require a federal license (if allowed by the Secretary of Commerce). Moreover, if the Barton Bill were enacted, state lotteries could not include poker among their games even if applicable state statutes or case law had determined poker to be a game of chance in their respective state. This is because the Congressional findings contained in the Barton Bill declare poker to be a game determined predominantly by skill, and this finding would presumably take precedence over state law determinations.[7]

It is acknowledged that each Bill provides: "No provision of this [Bill] shall be construed to have any effect on the rights, privileges, or obligations of a State or tribal lottery as may be provided under other applicable Federal, State or tribal law."[8] However, the more specific language discussed above conflicts with this general language, and under the usual rules of statutory construction, the more specific language would be deemed to govern. In addition, a court interpreting the Bills could be of the opinion – incorrectly, in this author's opinion – that state lotteries did not have the right to conduct intrastate Igaming prior to the Bill's enactment, and that, therefore, the language addressing the conduct of intrastate Igaming actually expands the rights of state lotteries. In either case, the ability of states to decide what type of games could be offered online via their state lotteries would be restricted.

Not only would intrastate Igaming by state lotteries be restricted under the Barton and Reid Bills, other (non-lottery) intrastate Igaming would be limited as well. The Barton and Reid Bills each also except from the term "bet or wager" the following:

Certain Intrastate Transactions. Placing, receiving, or otherwise transmitting a bet or wager …

(I) [pursuant to the UIGEA's Intrastate Igaming Exception]; and

(II) authorized under a license that was issued by a regulatory body of a State or Indian tribe on or before the date of the enactment of this Act. [9]

The implicit result of this exception is that intrastate Igaming (other than that conducted by state or tribal lotteries) would be prohibited absent a license under the federal Bill unless such intrastate Igaming had been authorized pursuant to a state or tribal license on or before the date the Bill was enacted. In other words, if such intrastate Igaming had not been "grandfathered in," it could not be conducted outside of the federal scheme, and since the federal scheme would only allow Igaming on poker games, all other forms of intrastate Igaming not conducted by a state or tribal lottery would be prohibited. This would preclude (absent a license under the federal law) the intrastate Internet poker contemplated by bills introduced in California by State Senators Rod Wright[10] and Lou Correa,[11] (except to the extent "grandfathered in"), and it would preclude entirely (except to the extent "grandfathered in") the intrastate Igaming contemplated by the New Jersey intrastate Igaming bills introduced by State Senator Ray Lesniak (to the extent they contemplate games other than poker – e.g., black jack and slot games).[12]

In summary, if enacted, the Barton and Reid Bills would limit the effect of the DoJ's December 23rd opinion and dictate to the states what forms of intrastate Igaming could be conducted within their borders. Each Bill would prohibit state lotteries from offering games of skill, and would allow non-lottery intrastate Igaming only if it had been "grandfathered in" (unless the non-lottery intrastate Igaming was licensed under the federal scheme, but even then, only gambling on poker could be offered). Although not as heavy-handed, the Campbell Bill – like the Barton and Reid Bills – would require state lotteries and other Igaming businesses seeking to offer common games across state lines to submit to a federal licensing and taxation scheme, inconsistent with Congress' long-standing position that the states should have the power to regulate for themselves the gambling activities being conducted within their borders.

IV. THE HISTORIC PREROGATIVE OF STATES TO REGULATE GAMBLING WITHIN THEIR BORDERS

Unsurprisingly, state lotteries and governors have written letters to federal legislators opposing the creation of a federal scheme to regulate and oversee Igaming.[13] They have noted in their opposition that regulating Igaming at the federal level would usurp what has historically been the prerogative of states to regulate gambling occurring within their borders. Also, on July 1, 2011, the North American Association of State and Provincial Lotteries ("NASPL") passed a resolution "oppos[ing] federal legislation that would encroach on the traditional state prerogative to regulate gaming within each state's borders."[15] The resolution states:

Bills such as this would federalize the Internet as a gaming portal, and create a costly and duplicative federal gaming-licensing regime, and moreover, they would impair the ability of states to represent the sensibility of their citizens, which states are uniquely qualified to do

5) Barton Bill, Title I, § 101(2)(B)(iii); Reid Bill Title I, § 102(2)(B)(iii). 6) Barton Bill, Title I, § 104(f)(3); Reid Bill Title I, § 104(f)(3). 7) Barton Bill, Section 2 ("Findings"), paragraph (5). 8) Barton Bill, Title I, § 112(c)(2); Reid Bill Title I, § 115(b)(2). 9) Barton Bill, Title I, § 101(2)(B)(ii); Reid Bill Title I, § 102(2)(B)(ii). 10) California Senate Bill SB 45. 11) California Senate Bill SB 40. 12) New Jersey Senate Bill S. 490, which passed both houses of New Jersey's legislature, before being vetoed by Governor Chris Christie in early 2011, and S. 3019, introduced by Senator Lesniak in August, 2011. 13) As of the date of this Article, the Governors of Idaho, Maryland and New Hampshire, and the state lotteries in Iowa and Kentucky have written such letters. In addition, the Executive Director of the New Hampshire Lottery Commission, Charlie McIntyre, testified in favor of states' prerogative to regulate gambling at hearings held by the House Energy and Commerce Committee, Subcommittee on Commerce, Manufacturing and Trade on November 18, 2011. 14) See, for example, letter from Martin O'Malley, Governor of Maryland, to Senator Patty Murray and Congressman Jeb Hensarling, dated October 20, 2011 ("Historically, states have had the right to make their own decisions about whether to offer gambling and how to regulate the industry. These proposals would strip states of those rights."); and letter from John H. Lynch, Governor of New Hampshire, to Senator Harry Reid and Congressman John Boehner, dated December 13, 2011 ("[S]tates have traditionally had the right to make their own decisions about what type of lotteries and gaming to allow and how to regulate the industry. This legislation would usurp state rights to regulate this area.") 15) NASPL Resolution, adopted July 1, 2011. 16) Id. 17) Testimony of Frank Fahrenkopf, President and CEO of the American Gaming Association, submitted to the U. S. House Committee on Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade Hearing entitled: "Internet Gaming: Regulating in an Online World," November 18, 2011. 18) Id. 19) Article I, § 8, clause 3 of the United States Constitution – the so-called "Commerce Clause – provides that "Congress shall have the

and which they accomplish, by regulating gaming within their borders to, among other reasons, raise revenue for worthy causes. We believe that the use, regulation, and ultimate beneficiaries of the Internet for gaming are best left to the legislative determination of each state.[16]

Proponents of regulation on a federal level, such as the American Gambling Association, believe that "federal guidelines [should be established] so there will be consistent regulations for online poker in all states. Without a federal overlay, [they argue,] there will be a patchwork quilt of rules and regulations that will prove confusing for customers and difficult for law enforcement to manage."[17] These proponents also assert that the ability of states to determine whether online poker should be legalized within their jurisdictions – i.e., the ability of states to "opt out" – preserves states' ability to decide for themselves matters relating to gambling within their borders.[18]

There is little doubt that Congress has the legal right under the Commerce Clause of the Constitution[19] to regulate gambling within state borders if it affects interstate commerce. As stated by the federal Court of Appeals for the Fifth Circuit in rejecting a 10th Amendment[20] challenge to the Illegal Gambling Business Act, a federal law that can apply to illegal gambling activity that is entirely intrastate):[21]

The power of Congress to legislate under the Commerce Clause of the Constitution "is not confined to the regulation of commerce among the states." It also extends to intrastate activities which affect interstate commerce to such an extent "as to make regulation of them appropriate means to the attainment of a legitimate end …"[22] As Mr. Justice Jackson stated in Wickard v. Filburn,[23] even if [a person's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'[24]

The Court in that case determined that illegal gambling, "even if intrastate in character," was rationally determined by Congress to be a type of activity that affects interstate commerce, and thus was properly subject to federal regulation pursuant to Congress' Commerce Clause power.[25]

However, the Illegal Gambling Business Act was passed to assist states in combating illegal gambling, not to regulate lawful gambling occurring within their borders. Prudence and reason – as well as historic precedent – dictates that the regulation of legal gambling be left to state legislatures. As stated in the NASPL July 1, 2011 resolution, "states are uniquely qualified to [represent the sensibility of their citizens] … [26] Moreover, unlike the federal government, state legislatures are accountable to the state electorate in respect of their decisions as to what types of gambling should be permitted within their respective borders.

Congress recognized this in 1978, when it passed the Interstate Horseracing Act. Declaring expressly that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders,[27] Congress passed the IHA to "ensure states will continue to cooperate with one another in the acceptance of legal interstate wagers."[28] As discussed in the September 2011 issue of this magazine,[29] such cooperation under the IHA has indeed occurred. Several states have passed legislation authorizing their membership in or participation with the cooperative interstate organization known as the "National Racing Compact," which is an independent, interstate governmental entity, composed of pari-mutuel racing regulators from participating states, which has been authorized by the states and approved by the Federal Bureau of Investigation to receive criminal history information from the FBI. The Compact is empowered to set standards for individual licenses, accept applications and fingerprints, analyze criminal history information and issue a national license which will be recognized by all member states and other states that may elect to recognize the license. [30]

Congress recognized that the regulation of legal gaming should be left to the states again in 1994, when it passed the Interstate Wagering Amendment[31] to close a loophole in existing federal law which was being exploited by Pic-A-State Pa., Inc. ("Pic-A-State"). Pic-A-State was a Pennsylvania retail business with which customers placed orders for tickets in the state lotteries of other states. The Pic-A-State retailer would transmit the orders to purchasing agents in the other states via the Internet, and those agents would purchase the out-of-state lottery tickets on behalf of the customers. Pic-A-State avoided a federal law prohibiting the interstate transportation of lottery tickets by keeping the actual tickets within the state of origin and transmitting to the customer only a computer-generated "receipt." Pennsylvania had tried to stop Pic-A-State's business through the passage of a state law that prohibited the sale of any interest in another state's lottery.[32] However, the state law was struck down in federal court on the grounds that it violated the dormant Commerce Clause.[33] Congress then intervened, passing the Interstate Wagering Amendment, and as a result, the lower court's decision was reversed.[34] Pic-A-State then challenged the Interstate Wagering Amendment on the grounds that its passage exceeded Congress' power under the Commerce Clause.

The Interstate Wagering Amendment expanded the scope of existing law prohibiting the interstate transportation of lottery tickets to also prohibit one engaged in the business of procuring for a person in one State … a ticket, chance, share, or interest in a lottery … conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), [from] knowingly transmit[ting] in interstate or foreign commerce information to be used for the purpose of procuring such a chance, share or interest.[35]

Recounting the purposes for which the Interstate Wagering Amendment was passed, the Third Circuit federal Court of Appeals stated: Senator [Arlen] Specter identified two other purposes for the Interstate Wagering Amendment. First, that the Amendment was necessary to

Power …To regulate commerce with foreign Nations, and among the several States, and with Indian Tribes." 20) The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." 21) The Illegal Gambling Business Act, 18 U.S.C. 1955, makes it a federal crime for anyone to conduct, finance, manage, supervise, direct or own all or part of an "illegal gambling business," defined, generally, as a gambling business (1) which is in violation of the law of the State in which it is conducted, (2) which involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of the business, and (3) which has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." 22) United States v. Harris, 460 F.2d 1041, 1047 (5th Cir. 1972), cert. den., 409 U.S. 877, 93 S Ct. 128 (1972) (quoting from United States v. Darby, 312 U.S. 100, 118, 61 S. Ct, 451, 459 (1941)). 23) 317 U.S. 111, 125, 63 S.Ct. 83, 89 (1942). 24) Harris, at 1047. 25) Harris, at 1048. 26) See footnote 15. 27) 15 U.S.C. §3001(a). 28) 15 U.S.C. §3001 (a)(3). 29) See, Hichar, "A Model for Respecting States' Rights in Regard to Internet Gambling – The Interstate Horseracing Act," Public Gaming Magazine, September 2011. 30) See http://racinglicense.com/info.html, last accessed December 19, 2011 (emphasis added). 31) The Interstate Wagering Amendment amended 18 U.S.C. § 1301. 32) 72 Pa.Stat.Ann. § 3761-9(c) (1995). 33) Pic-A-State Pa., Inc. v. Pennsylvania, 1993 WL 325539 (M.D.Pa. 1993). The dormant Commerce Clause is a doctrine inferred by the Supreme Court from the Commerce Clause of the U.S. Constitution. It prohibits states from regulating in ways that unduly burden interstate commerce. According to the Supreme Court, the dormant Commerce Clause bars states from discriminating against interstate commerce and favoring in-state economic interests over out-of-state economic interests. United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority, 127 S. Ct. 1786, 1793 (2007).

preserve "the right of a State to regulate lottery [sic] and gambling within its borders." He stated, "Federal laws should continue to limit the proliferation of interstate gambling to preserve the sovereignty of States that do not permit certain forms of gambling." Second, that businesses such as Pic-A-State's would "undermine [the States'] ability to realize projected revenues." Senator Joseph Biden echoed Senator Specter's concerns, noting the interstate sale of interests in lottery tickets "hurts the operation of lotteries in smaller States."[36]

The Court specifically rejected Pic-A-State's claim that "the protection of the states' ability to regulate gambling within their own borders is an impermissible purpose for federal lawmaking."[37] The Court stated:

Congress rationally believed that the Interstate Wagering Amendment served the purpose of preserving state sovereignty in the regulation of lotteries. Senator Specter explained: the right of a State to regulate lottery [sic] and gambling within its borders must be preserved. Federal gambling laws have traditionally enabled the States to regulate in-State gambling. Federal laws should continue to limit the proliferation of interstate gambling to preserve the sovereignty of States that do not permit certain forms of gambling.

The Interstate Wagering Amendment furthered these goals by giving the states the sole right to regulate lottery sales within their borders. The states need not permit the sale of interests in out-of-state lottery tickets, but may do so by concluding an agreement for that purpose with other states. The Interstate Wagering Amendment thus allows the various states to gauge the economic effects of their own lotteries without out-of-state interference, to form their own judgments about the propriety of lotteries, and to regulate the types of state-sponsored gambling they wish to allow within their borders.[38]

Thus, in passing the Interstate Wagering Amendment, Congress expressly recognized the need to preserve the prerogative of states to regulate legal lotteries and gambling within their borders. Also, consistent with the policy espoused in the IHA, Congress recognized that if states wished to allow their citizens to purchase gambling products from other states, they "may do so by concluding an agreement for that purpose with other states."[39]

In connection with the pending bills that would federalize the licensing and regulation of Igaming, state lotteries and governors are correct in pointing out that, historically, states have been allowed to decide for themselves what types of lotteries and gaming shall be permitted within their borders. The Campbell, Barton and Reid bills represent a marked departure from historic precedent by substituting federal regulation and decision-making with respect to lawful gambling for that of state legislatures and regulators.

V. NONE OF THE PENDING BILLS ADEQUATELY PROTECT THE PREROGATIVE OF STATES TO REGULATE GAMBLING

From the discussion above, it is apparent that none of the Campbell, Barton or Reid Bills preserve the historic prerogative of states to regulate lawful gambling occurring within their borders. Each of the Bills would create a federal licensing framework, thus restricting states' historic prerogative to determine their own regulatory requirements in respect of gambling conducted within their borders. Moreover, the Barton and Reid Bills would limit the types of Internet wagering games states could authorize – even when conducted on an intrastate basis pursuant to the UIGEA Intrastate Igaming Exception.

Even the AGA, one of the most notable proponents of federal legislation with respect to Internet poker, should oppose the Barton and Reid Bills if it examined them in respect of the AGA's own stated policies. In testimony submitted to the U.S. House Committee on Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade, AGA President and CEO, Frank J. Fahrenkopf Jr. testified as follows:

[T]he AGA has a long-standing policy of putting any gaming legislative proposal through three tests: 1) The legislation must not create competitive advantages or disadvantages between and among legal commercial casinos, Native American casinos, state lotteries and pari-mutuel wagering operations; 2) No form of gaming that currently is legal shall be made illegal; and 3) The legislation must respect fundamental states' rights in an appropriate manner. Any online poker legislation must pass these three tests to gain AGA support.[40]

Clearly, the Barton and Reid Bills disadvantage state lotteries. Indeed, they exclude them entirely from participation in Internet poker – whether on an interstate or intrastate basis. (State lotteries would be ineligible to receive licenses under either Bill.) Thus, the Barton and Reid Bills fail the AGA's tests.

The AGA also asserts – as does the Poker Players Alliance – that a federal licensing overlay is necessary to prevent states from creating "a patchwork quilt of rules and regulations that will prove confusing for customers and difficult for law enforcement to manage."[41] This is belied by the IHA, however, which provides a light federal framework and leaves entirely to the states the licensing and regulation of Igaming system operators. However, this does not mean that operators must comply with a "patchwork of rules and regulations." As mentioned above, pursuant to the IHA, the states have cooperated, and many of them have entered into the "National Racing Compact" pursuant to which there is a standard national license for participants in horseracing with pari-mutuel wagering. Its very purpose achieves what proponents of a federal scheme seek – i.e., The purpose of National Racing Compact is

To establish uniform requirements for and issue licenses to participants in pari-mutuel racing to ensure that all participants who are licensed meet a uniform standard of honesty and integrity, and to reduce the regulatory burden on those participants in pari-mutuel racing who are indisputably welcome to race in every state and province by providing them with a single license recognized in all racing states and provinces.[42]

The National Racing Compact currently is recognized in 24 jurisdictions – 15 member states and 9 participating states,[43] and a national racing license now exists for several participants in the pari-mutuel racing industry (e.g., owners, jockeys and trainers). Although the National Racing Compact currently does not establish requirements or issue licenses to businesses that accept Internet wagers on horse races, a law enacted in Kentucky in March, "2011 contemplates the establishment pursuant to an additional state compact of "an interstate governmental entity of the member states, to coordinate the decision-making and actions of each member state racing commission …"[44]

34) Pic-A-State, Pa., Inc. v. Pennsylvania, 42 F.3d 175 (3rd Cir. 1994). 35) Interstate Wagering Amendment of 1994, amending 18 U.S.C. § 1301. 36) Pic-A-State, Pa., Inc. v. Reno, 76 F.3d 1294, 1297-1298 (3rd Cir. 1996), cert den. 517 U.S. 1246, 116 S.Ct. 2504 (1996), quoting from 139 Cong.Rec. S15247 (emphasis added). 37) Id., at 1301. 38) Pic-A-State, at 1302, quoting from 139 Cong.Rec. S15247 (emphasis added). 39) Id. 40) Testimony of Frank J. Fahrenkopf, Jr., President and CEO of the AGA, submitted to the U.S. House Committee on Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade, in connection with the November 18, 2011 hearing entitled "Internet Gaming: Regulation in an Online World." 41) Id. and Interview with former U.S. Senator Alfonse D'Amato,

In this way, the IHA respects the prerogative of states to regulate gambling within their borders, and at the same time provides federal support. Moreover, state cooperation in respect of gambling is not limited to interstate pari-mutuel wagering pursuant to the IHA. States have shown that they can work together on other gambling licensing and regulatory issues – witness multi-state lottery games such as "Mega Millions" (involving the cooperation of 42 states, the District of Columbia and the U.S. Virgin Islands)[45] and "Powerball" (operated by the Multi-State Lottery Association, with membership including 31 states, the District of Columbia and the U.S. Virgin Islands).[46] In any event, different rules and regulations in different states – if that were to occur – would not be "confusing for customers and difficult for law enforcement to manage." Internet bettors on horse races and their Igaming system operators deal with different regulations in different states today, without confusion, and state law enforcement agencies have proven able to enforce the laws and regulations of their states. Also, Igaming system operators are familiar with and can accommodate different rules and regulations existing in different jurisdictions. Many successful Igaming businesses operate in Europe today, meeting different requirements imposed by different jurisdictions. Igaming system operators are able to determine the location of their customers, and they are able to make available to bettors different games depending on the jurisdictions in which they are located. A system with different games being available in different states would be no different and no more confusing than it is today, with different gambling states permitting different mixes of gambling products within their borders.

Any federal Igaming legislation should not adopt an approach – as offered under the Barton and Reid Bills – where states are forced to choose between permitting no Internet gambling (other than pari-mutuel wagering on horse races) and permitting only those Internet games deemed appropriate by the Federal Government.

V. CONCLUSION

As set forth above, historically it has been left to the prerogative of states to determine the types of gambling that shall be authorized within their borders. The Barton and Reid Bills are inconsistent with this historic precedent, and, indeed, would dictate to the states in regard to what Igaming they can allow on an intrastate basis. Moreover, they would create an uneven playing field, restricting the games state lotteries could offer and making them ineligible for federal Igaming licenses. The Barton and Reid Bill, and the Campbell Bill as well, would, for the first time, create federal regulation with respect to lawful gambling in the states. Congress has shown, through the IHA, that the prerogative of states to regulate gaming can be better protected, and that a federal law could be passed that would leave to the states entirely the ability to regulate the wagering occurring within their borders. Congress should consider this model when considering federal legislation authorizing Igaming. ◆

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for themselves. BCLC, for instance, does not use web-cash and its retail network continues to be strong even while its internet sales are increasing. Retailers are key to the continuing success of lotteries, so gaining their active support is imperative. There are lots of different approaches to accomplishing that.

Wouldn't the retailer still be concerned that internet distribution would redefine the lottery's relationship with the consumer in ways that might end up hurting them? Wouldn't they feel vulnerable for losing control of their customer?

M. Carinci: I understand this concern and that is why communicating fact-based information based on the actual experience of others is so important while lotteries venture into new territory. First, nobody really has control over the customer. Consumers have choices and they expect to have options. All of us, lottery operator and retail store proprietor alike, need to be flexible and open-minded to deliver optimal value and convenience to the consumer. Second, retail continues to be very strong, and not just with the proverbial core player. While consumers are active on the internet, and it is clear that consumers will continue to shop at retail for a different experience. That is where cross promotion between channels can take advantage of both experiences. Third, internet sales remain a fraction of overall lottery retail product sales. Retail will continue to get the vast majority of draw games. Depending on the introduction and execution, the internet can be a tremendous tool to promote visits and sales at retail and retail can promote sales on the internet. There are lots of options!

We have been focusing on integrating internet into the distribution of the existing traditional lottery products. Massively multi-player online games are taking the internet by storm. What implications does that have for lottery?

M. Carinci: Over the past decade online poker and casino games have become mainstream, poker players have become front page news and lead stories. World of Warcraft has a massive following as do the social games such as Farmville and then there is Angry Birds! But think about this for a minute ... a very small percentage of consumers players play poker and casino games online, and it is a very small percentage of consumers that will ever play traditional draw games online. Now add to that group the 10% to 14% of consumers that will never play any games at all, on or off line. That leaves somewhere in the neighborhood of 80% that will be looking for lottery and gaming related products that offer a fresh, new, different kind of entertaining experience. What have operators got in mind for them? And what about the players coming of age? We have begun to see the introduction of what I will call soft lottery games and social games on the internet using the unique attributes of the internet to create an entirely new gaming experience. This digital space includes opportunities that go way beyond the internet. This is a very exciting time in our industry with lots of opportunities to offer smart, responsible, and entertaining gaming experiences. Someone will have the strategic foresight to provide that experience. I hope it will be the regulated operators!

In the meantime, both the retailer and the lottery have the opportunity to benefit by creating an integrated approach to serving the consumer. Everyone wins. ◆

Chairman of the Poker Players Alliance, published in Public Gaming Magazine, January 2012. ("As a practical matter, we need a uniform regulatory framework that the federal agents and departments of law enforcement can implement. If states all have different rules and reg's, it becomes difficult for all operators to comply with the patchwork of different laws, and so it becomes difficult for the federal law to enforce them.") 42) See http://racinglicense.com/info.html, last accessed December 19, 2011. 43) See http://racinglicense.com/accepted.html, last accessed December 19, 2011. 44) KY S.B. 24, enacted March 16, 2011, Article III(B). 45) http://www.megamillions.com/about/history.asp, last accessed December 19, 2011. 46) http://www.musl.com/musl_members.html, last accessed December 19, 2011.