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**Before the**  
**United States Senate**  
**Committee on Indian Affairs**  
  
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Good morning. We thank the Committee and its members for this opportunity to appear before you today to discuss an issue of great importance to this Committee and to American Indian tribes throughout the United States: the regulation of Indian gaming. My name is Kathryn Rand, and I am an associate professor and the Associate Dean for Academic Affairs at the University of North Dakota School of Law. With me is Steven Light, an assistant professor of political science and public administration at the University of North Dakota. We are the co-founders and co-directors of the Institute for the Study of Tribal Gaming Law and Policy, a component of the Northern Plains Indian Law Center at the University of North Dakota School of Law.

The Institute for the Study of Tribal Gaming Law and Policy provides legal and policy assistance related to tribal gaming enterprises to all interested governments and organizations, assists tribes with gaming enterprises in pursuing reservation economic development and building strong tribal governments, and contributes to the scholarly and practical research and literature in the area of tribal gaming. The Institute's primary focus is on the particular issues faced by tribes in the Great Plains, including North Dakota, South Dakota, Nebraska, Iowa, Kansas, Wyoming, and Montana. As the only university-affiliated research institute dedicated to the study of Indian gaming, the Institute offers an interdisciplinary perspective on tribal gaming, incorporating law, political science, and public administration.

Our testimony today is based on our research in the field of Indian gaming law and policy over the last nine years<sup>1</sup> and on short excerpts from two forthcoming books, Steven Andrew

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<sup>1</sup> See Steven Andrew Light, Kathryn R.L. Rand, and Alan P. Meister, "Spreading the Wealth: Indian Gaming and Tribal-State Revenue-Sharing Agreements" *North Dakota Law Review* 80 (forthcoming 2005); Steven Andrew Light, "The Third Sovereign: Indian Gaming as a Teaching Case in Intergovernmental Relations and Public

Light and Kathryn R.L. Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise* (Lawrence: University Press of Kansas, forthcoming Fall 2005), and Kathryn R.L. Rand and Steven Andrew Light, *Indian Gaming Law and Policy* (Durham: Carolina Academic Press, forthcoming Winter 2005/2006).

Our research suggests that discussions of Indian gaming regulation often overlook three important points: first, that there currently is an elaborate “web” of governmental agencies and regulatory authorities that administer the law and policy that applies to Indian gaming at three governmental levels, federal, state, and tribal; second, that criticism of Indian gaming regulation often focuses on tribal regulation but fails to take into account the unique status of tribes in the American political system; and third, that tribal regulation of Indian gaming plays a primary role in tribal government institution building, a necessary exercise of tribal sovereignty that serves tribal and federal interests in strong tribal governments as well as tribal self-sufficiency and self-determination. Our testimony today covers each of these points in detail. Finally, we suggest that any policy reform in the area of Indian gaming fundamentally should be based on accurate and complete information, informed by tribal opinions and interests, and guided by tribes’ inherent right of self-determination.

### **Government Regulation of Indian Gaming**

Tribal gaming is the only form of legalized gambling in the United States that is regulated at three governmental levels: under the federal Indian Gaming Regulatory Act of 1988 (IGRA), tribal, federal, and state agencies and actors determine the regulatory environment in which tribal gaming occurs. IGRA assigns regulatory authority over Indian gaming according to the type of gaming involved. Tribes maintain exclusive regulatory jurisdiction over Class I gaming, or traditional tribal social or ceremonial games of chance, while Class II bingo and other similar games fall under tribal regulatory jurisdiction with National Indian Gaming Commission (NIGC) oversight. Class III casino-style gaming requires both tribal regulation and a tribal-state compact, thus giving the state regulatory authority as well. The NIGC and the Secretary of the Interior also have regulatory roles regarding Class III gaming. Various other tribal, state, and federal agencies enforce applicable laws with regard to all three classes of gaming.

This regulatory web is designed to further Congress’s overarching stated goals for Indian gaming: to promote tribal economic development, self-sufficiency, and strong tribal governments. Through IGRA, Congress also sought to provide a basis for the regulation of Indian gaming to prevent the infiltration of organized crime or other corrupting influences, to

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Administration,” *Journal of Public Affairs Education* 10 (2004): 311-27; Steven Andrew Light and Kathryn R.L. Rand, “Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy,” *Nevada Law Journal* 4 (2004): 262-84; Kathryn R.L. Rand, “There Are No Pequot on the Plains: Assessing the Success of Indian Gaming,” *Chapman Law Review* 5 (2002): 47-86; Kathryn R.L. Rand, “At Odds? Perspectives on the Law and Politics of Indian Gaming,” *Gaming Law Review* 5 (2001): 297-98; Steven A. Light and Kathryn R.L. Rand, “Are All Bets Off? Off-Reservation Indian Gaming in Wisconsin,” *Gaming Law Review* 5 (2001): 351-63; Kathryn R.L. Rand and Steven A. Light, “Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota,” *Gaming Law Review* 5 (2001): 329-40; Kathryn R.L. Rand and Steven A. Light, “Do ‘Fish and Chips’ Mix? The Politics of Indian Gaming in Wisconsin,” *Gaming Law Review* 2 (1998): 129-42; Kathryn R.L. Rand and Steven A. Light, “Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity,” *Virginia Journal of Social Policy and the Law* 4 (1997): 381-437.

assure honest and fair gaming, and to ensure a tribe is the primary beneficiary of its gaming enterprise. IGRA's policy goals created a regulatory environment for Indian gaming in which the exercise of government authority reflects a markedly different intent than does that for the regulation of commercial gaming, which primarily seeks to facilitate profit maximization and the minimized infiltration of organized crime. Although IGRA, too, expresses Congress's concern about organized crime, the regulatory foundation for Indian gaming was intended to further the goals of federal Indian policy and to improve reservation life. By fostering economic development and strengthening tribal governments, IGRA's regulatory scheme promotes healthy reservation communities and effective and culturally appropriate tribal institutional capacity building, the hallmarks of tribal sovereignty and tribal self-determination.

The multi-layered and complex regulatory web governing Indian gaming has many actors whose roles span numerous federal, tribal, and state agencies. Although regulation of Indian gaming sometimes is equated with the NIGC and its extensive authority, the web of regulatory authority involves a number of other federal agencies, actors, and resources, along with extensive tribal and state agencies, actors, and resources.

### ***Federal Agencies***

#### *Department of the Interior*

A number of the U.S. Department of the Interior's functions and responsibilities directly relate to Indian gaming. Under IGRA, only federally recognized tribes may conduct tribal gaming, and then only on federally defined Indian lands. The Interior Department, through its Bureau of Indian Affairs (BIA), administers the tribal recognition process and accordingly plays a fundamental role in controlling which groups qualify as acknowledged Indian tribes and thus may conduct gaming on their reservations. The Interior Secretary also has primary authority to take lands into trust for the benefit of tribes, and therefore has power to effect the acquisition of Indian lands under IGRA. Although IGRA generally prohibits gaming on lands acquired by a tribe after 1988, it allows for several exceptions, including when the Secretary determines that gaming on newly acquired lands is in the best interest of the tribe and its members, and would not be detrimental to the surrounding community. The Secretary's authority to formally recognize tribes and to place land in trust, and its determinations under IGRA's newly acquired lands exceptions, have become increasingly contentious political issues.

IGRA charges the Interior Secretary with other specific duties related to Indian gaming, including, for example, the authority to approve a tribe's plan for per capita distribution of gaming revenue. With regard to IGRA's compact requirement for Class III gaming, the Secretary has power to approve tribal-state compacts and to adopt an administrative "compact" when a state fails to negotiate in good faith.

Within the BIA is the Office of Indian Gaming Management (OIGM), charged with implementation of the responsibilities assigned by IGRA to the Interior Secretary. The OIGM develops policies and procedures for review and approval of tribal-state compacts, per capita distributions of gaming revenue, and requests to take land into trust for the purpose of

conducting gaming. The OIGM coordinates with the NIGC as well as state, local, and tribal governments.

### *National Indian Gaming Commission*

Also located within the Interior Department, the NIGC is the federal agency empowered by IGRA to regulate Indian gaming. The Commission's three members are appointed by the president and the Interior Secretary. The NIGC has expansive authority to promulgate rules and regulations to implement IGRA. The Commission exercises wide-ranging oversight of tribal regulation of gaming operations, including its power to approve tribal regulatory ordinances and to oversee tribal licensing of key employees and management officials. Through its authority to close Indian gaming operations and to impose civil fines, the Commission is further empowered to enforce IGRA's provisions, federal regulations promulgated by the NIGC, and tribes' own gaming regulations, ordinances, and resolutions.

Despite its broad authority, the NIGC variously has been accused of being underfunded, understaffed, and underempowered to regulate tribal gaming. The Commission, some assert, has overlooked numerous regulatory problems and created opportunities for the possible infiltration of organized crime in some casino operations. It also has been accused of granting too much deference to inadequate tribal regulatory authorities or improperly serving as a guardian for tribal sovereignty more generally. Others see the Commission as overzealous, asserting that it uses its powers under IGRA to promulgate regulations that effectively remove or override tribal authority over Indian gaming and thus undercut tribal sovereignty. Still others simply see the Commission as lacking the resources necessary to be a fully effective regulatory authority.

### *Department of Justice*

As the executive official charged with enforcing federal laws, the U.S. Attorney General plays a role in ensuring compliance with IGRA and other applicable federal laws related to gaming. The Attorney General heads the U.S. Department of Justice, which includes federal law enforcement agencies, such as the Federal Bureau of Investigation (FBI) and the nation's prosecutors, the U.S. Attorneys.

The FBI exercises federal jurisdiction in investigating criminal activity on tribal lands, including crimes related to Indian gaming. With the NIGC, the FBI created in 2003 the Indian Gaming Working Group, which reviews pending cases for "national importance," or significant impact on the tribal gaming industry, and coordinates federal resources in the investigation and prosecution of such cases.

Located in federal judicial districts in each state, the U.S. Attorneys serve as the principal prosecutors on behalf of the United States and at the direction of the Attorney General. Working in conjunction with federal law enforcement agencies, including the FBI, the U.S. Attorneys prosecute criminal and related cases involving Indian gaming. The U.S. Attorneys have power to initiate criminal prosecutions and forfeiture actions under IGRA's criminal provisions, the Johnson Act, and other federal statutes.

## *Department of the Treasury*

The Treasury Department's Financial Crimes Enforcement Network (FinCEN) regulates financial transactions and assists in investigation of money laundering under the federal Bank Secrecy Act. Tribal casinos, like commercial casinos, are subject to the Act's money-laundering controls, including recordkeeping and reporting requirements for large transactions. Besides FinCEN's regulatory role, the Internal Revenue Service (IRS) enforces civil regulations under the Bank Secrecy Act as well as federal tax laws and regulations that apply to tribal gaming operations. The Treasury Department's law enforcement agencies, including the Secret Service and the IRS's Criminal Investigation Division, coordinate with the U.S. Attorneys in bringing appropriate enforcement actions in federal court.

### ***Tribal Gaming Commissions***

Before a tribe may operate either Class II or Class III gaming, IGRA requires that the tribe adopt a gaming ordinance that must be approved by the NIGC Chair. The ordinance must address a number of issues, including the tribe's proprietary interest in and responsibility for gaming, use of gaming revenues, audits, vendor contracts, facility maintenance, and background checks and licensing. Typically, tribes create gaming commissions to implement the tribal gaming ordinance and to ensure compliance with IGRA, tribal-state compacts, and other relevant tribal and federal laws. A tribe's certificate of self-regulation issued by the NIGC under IGRA creates additional tribal responsibility for regulating Class II gaming, while a tribal-state compact may further detail the tribe's obligations with regard to Class III gaming. Tribes, of course, also are free to adopt additional ordinances and regulations governing their gaming operations.

Tribal gaming commissioners are either elected or appointed. Although commissions are funded through tribal budgetary allocations, they usually are otherwise independent of the tribal political bodies. A Gaming Commissioner typically serves as chief administrative and enforcement officer, with responsibilities that include monitoring and enforcement of employee background checks, surveillance, inspection, auditing, compliance, licensing, and rule promulgation. Tribal ordinances authorize the hiring of professional commission staff and may establish appointive gaming review boards that approve regulations and hear appeals concerning licensing, fines, and patron disputes.

As regulatory, rather than managerial, agencies, tribal gaming commissions are empowered to promulgate regulations and to hold hearings. Commissions monitor compliance with tribal internal control standards (ICS) and the NIGC's mandatory minimum internal control standards (MICS). They have unrestricted access to the tribe's gaming facility and its records, and have authority to enforce regulatory provisions through such means as license suspension or revocation.

Tribal regulators interact with tribal, state, and federal law enforcement agencies, tribal casino surveillance and security operations, and tribal court systems, as well as state and federal regulatory authorities. New commissioners may receive on-the-job training from current commissioners, take courses, or enroll in a formal training program. In 2000, the National Indian Gaming Association (NIGA) created a commissioner certification program at which tribal

regulators receive training on such topics as jurisdiction, human resource management, due process, MICS, compliance auditing, avoiding scams, budgeting, and rule promulgation. Commissioners may belong to such organizations as the National Tribal Gaming Commissioners and Regulators Association, the North American Gaming Regulators Association, or similar state-level organizations, such as the Arizona Tribal Gaming Regulators Association.

According to NIGA's *Analysis of the Economic Impact of Indian Gaming in 2004*, more than 220 tribal gaming agencies currently employ at least 2,800 commissioners and regulatory staff. Tribes in 2004 spent more than \$150 million on regulatory activities and reimbursed states over \$58 million for their regulatory costs. Through IGRA-mandated fees, tribes funded the NIGC with more than \$11 million. Despite the extent and sophistication of tribal regulation, critics of Indian gaming frequently are dismissive of tribal government authority, as we discuss in greater detail below.

### ***State Gaming Commissions***

The scope and extent of state regulatory authority concerning tribal gaming is defined and limited by IGRA. Because both Class II and Class III gaming is allowed only in states that permit such gaming, state gaming commissions, along with state policymakers, play a role in determining the overall regulatory environment of legalized gambling within a state's borders. With NIGC and Interior Secretary oversight, Class III gaming falls under state as well as tribal jurisdiction as set forth in the negotiated tribal-state compact.

Tribes' sovereign status, according to the U.S. Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*, rendered states without regulatory authority over tribal gaming independent of congressional delegation. Under IGRA, however, Congress authorized states, through the tribal-state compact requirement, to regulate casino-style gaming. Typically, state gaming commissions are responsible for monitoring compliance with governing tribal-state compacts in concert with state law and public policy as well as IGRA.

State gaming commissions implement, monitor, and enforce state law and public policy regarding all types of legalized gambling allowed in a state. State commissions (or variously, agencies, departments, divisions, and gaming control or racing and wagering boards) often are composed of officials appointed by the governor and confirmed by the state legislature. Commissioners may be required by state law to have different political and professional backgrounds. Commissions are supported by a professional staff that may include auditing, compliance, inspections, law enforcement, legal, licensing, and taxation personnel or divisions. Some commissions report directly to the governor or to the state's attorney general. Commissions may interact with tribal regulatory or law enforcement agencies, state public safety, law enforcement, or other regulatory agencies, local regulatory and law enforcement agencies, and the NIGC or other federal agencies concerning regulatory and enforcement issues related to Indian gaming.

Although the responsibilities and authority of state gaming commissions vary with the type and scope of legalized gaming within a state, there are several similarities. State regulation of commercial casinos typically follows one of two models: the "Nevada" model, which

encourages maximization of economic benefits to the state, and the “New Jersey” model, which focuses on addressing or mitigating negative social and economic impacts associated with gambling. Both approaches include developing and overseeing minimum internal control standards, conducting audits, issuing licenses, and so on. State regulation of Indian gaming, of course, varies under individual tribal-state compacts, but similar requirements typically apply to tribal casinos.

Through numerous regulatory agencies at the federal, tribal, and state levels, Indian gaming is subject to an elaborate, multi-layered web of governmental regulation. Despite this extraordinary regulatory scheme, involving regulators and law enforcement at three levels of government, critics charge that Indian gaming is under- or even unregulated. A closer look at such criticism, particularly as it is lodged against tribal regulation, reveals further misapprehensions about Indian gaming.

### **Criticism of Indian Gaming Regulation**

Indian gaming and “casino Indian” imagery have become a phenomenon widely visible in popular culture, the mass media, and the discourse used by public policymakers. A number of pervasive anti-Indian gaming themes dominate the public debate over tribal gaming. Our research suggests that how we talk about Indian gaming informs how we act on Indian gaming. Before allowing public discourse to set agendas for tribal gaming policy, policymakers should assess carefully the accuracy and context of criticisms of Indian gaming regulation.

Before the Indian gaming industry exploded, discussion of the complexities of federal Indian policy and the legal and political issues facing tribes had long been isolated to tribal governments, the BIA, this Committee, and the U.S. Supreme Court. Today, on any given day, one can open the newspaper or a magazine and read about how gaming tribes throughout the nation are interacting with federal, state, and local government officials as well as local economies. That Native Americans have assumed such a prominent place in non-tribal public and policy discourse is almost entirely an artifact of Indian gaming. What is said about tribal gaming reflects the vigorous political activity, primarily at the tribal, state, and local levels, that is reshaping federal Indian law and policy. For better or worse, Indian gaming determines how we talk about tribes today – and how we talk about tribes governs how we act on Indian gaming.

Indian gaming is a magnet for criticism. In examining the charges levied against tribes and tribal regulation of Indian gaming, we rely extensively on the actual words, reflecting a lexicon of skepticism and accusation, used by those commenting on tribes and on the Indian gaming industry.

#### *Tribal Governments Cannot Be Trusted*

One pervasive theme in the public debate over Indian gaming is that tribal governments cannot be trusted. Tribal governments are portrayed as untrustworthy stewards of newfound gaming wealth and political clout. Somewhat incongruously, they are variously accused of being too naïve or inexperienced to realize their own best interests, easily corruptible, guilty of seeking to influence the political system to their own benefit, and out for “revenge.”

At perhaps their most benign, expressed concerns revolve around tribes' naïveté in dealing with outside interests, or inexperience in starting, owning, and operating successful businesses and handling the resultant influx of revenue. As relative business ingénues, tribes are seen as too unsophisticated to deal with crafty outside investors, or unscrupulous management companies all-too-eager to take advantage of tribes. Asserted the *Providence Journal*, tribes "fall into hands of investors far more interested in making quick bucks . . . than in plowing profits into local Indian projects and development."<sup>2</sup> The *Boston Globe* described the Mohegan Tribe in Connecticut as being "outmaneuvered" and "taken" by an outside management company,<sup>3</sup> while *The Progressive* magazine characterized a tribe as "buffaloed" and "taken for a ride" by "casino cowboys."<sup>4</sup>

A more serious accusation is that tribal governments are corrupted or corruptible, as manifested in a lack of casino oversight, the misuse of gaming revenues, and tolerance of criminal behavior generated by casinos. Indian gaming is portrayed as unregulated or, alternatively, regulated by corrupt tribal government officials. *Time* magazine's 2002 exposé, for instance, acknowledged tribal regulation of Indian gaming, but added, "[T]hat's like Enron's auditors auditing themselves."<sup>5</sup> As the fox guarding the henhouse, tribal governments are perceived as likely to misappropriate funds and bury evidence of wrongdoing. Critics' claims often reach hyperbolic levels. As *Time* continued, "[t]he tribes' secrecy about financial affairs – and the complicity of government oversight agencies – has guaranteed that abuses in Indian country growing out of the surge of gaming riches go undetected, unreported and unprosecuted. Tribal leaders sometimes rule with an iron fist. Dissent is crushed. Cronyism flourishes."<sup>6</sup> The calculus of cash flow means that "[t]ribes now coldly eject members, sometimes so that fewer members can split the dough," according to one media commentator. Recently recognized tribes are so corrupt that "[e]ach new 'reservation' introduces government in direct conflict with California notions of healthy civic life."<sup>7</sup> An editorial in the *Detroit News* described one tribal government as "more like Moscow 1936 than Michigan 2001."<sup>8</sup>

Among the social ills ascribed to tribal casinos is a rise in crime, whether inside the casino or in the community. Tribal governments are portrayed as unwilling or unable to control criminal behavior. An op-ed in the *L.A. Daily News* asserted that "betting in casinos is unregulated by officially sanctioned watchdogs," while "widely publicized rules, laws, inspections, and strict police background checks for employees. . . . are absent from reservation wagering."<sup>9</sup> While some see gambling-related crime as inevitable, others imply that tribes are inclined to tolerate drug-related or even violent crime. In 1999, Donald Trump financed a series of advertisements opposing a proposed Mohawk casino in upstate New York. The ads depicted cocaine and drug needles and asked, "Are these the new neighbors we want?"<sup>10</sup> Testifying

<sup>2</sup> "Revisiting Indian Casinos" [Editorial], *Providence Journal* (RI), August 2, 2001, B06.

<sup>3</sup> Sean P. Murphy, "Mohegan Sun Buyout Deal Remains Mystery," *Boston Globe*, January 31, 2001.

<sup>4</sup> Bill Lueders, "Buffaloed: Casino Cowboys Take Indians for a Ride," *Progressive*, August 1994, 30.

<sup>5</sup> Donald L. Barlett and James B. Steele, "Playing the Political Slots," *Time* (December 23, 2002), 59.

<sup>6</sup> Donald L. Barlett and James B. Steele, "Wheel of Misfortune," *Time* (December 16, 2002), 48.

<sup>7</sup> Jill Stewart, "New 'Tribes' Shopping for Casino Sites" [Op-ed], *L.A. Daily News*, June 12, 2004.

<sup>8</sup> "Chippewa Strife Argues for Limiting Casinos" [Editorial], *Detroit News*, August 8, 2001.

<sup>9</sup> Joseph Honig, "Arnold Could Have Played Cards Better" [Op-ed], *L.A. Daily News*, June 5, 2004.

<sup>10</sup> Neil Swidey, "Trump Plays Both Sides in Casino Bids," *Boston Globe*, December 13, 2000.



before Congress in 1993, Trump asserted, “That some Indian chief is going to tell Joey Killer to get off his reservation is unbelievable.”<sup>11</sup>

But under IGRA’s mandates, tribes’ gaming operations are subject to extensive tribal, state, and federal regulations that do not tolerate lax enforcement, at the price of being audited or even shut down by the NIGC, prosecuted by the federal government, sued by the state, or, of course, subject to penalties under tribal law. Further, concerns raised about “self-regulation” in the context of commercial casinos are inappropriate and inapplicable, as tribal government-owned and -operated Indian gaming is more akin to state lotteries – and no one raises self-regulation as an issue in that context. A gaming tribe simply is not Enron, nor is it MGM Mirage or Harrah’s Entertainment. Tribes also stress that regulations promulgated by the NIGC, adopted by the tribe, and required by the tribal-state compact concerning such subjects as MICS and background checks are exceedingly stringent. When it comes to the prevention of gambling-related and other types of crime in and around a casino, no matter how large or small, tribal regulation and security is pervasive and extensive, again pursuant to the mandates of federal, tribal, and state law. As an MGM Mirage vice president observed, “From a security and surveillance standpoint, [tribal casinos] are as sophisticated as we are.”<sup>12</sup>

### *Tribal Sovereignty Is an Unfair Advantage*

Criticism of tribal regulation of Indian gaming often is grounded in ignorance, purposeful or otherwise, of tribal sovereignty. Rather than an accurate understanding of tribal regulation as a reflection of tribal sovereignty and self-determination, these critiques often rely on the assertion that tribal sovereignty is simply an unfair advantage, rather than the defining aspect of tribes’ unique status in the American political system.

In an article on growing opposition to Indian gaming, the *New York Times* reported that tribal sovereignty is a “major element” contributing to public objections to tribal casinos.<sup>13</sup> Sovereignty, in the minds of many Americans, simply means unearned money for tribal members. “[P]eople have learned that that phrase ‘sovereign rights’ translates to ‘special interests,’” said Brett Fromson, the author of one of a handful of exposé-style books purporting to debunk the Mashantucket Pequots’ tribal status.<sup>14</sup> “Sovereignty promotes unfair competition in the business community,” asserted citizen group Stand Up for California!’s Cheryl Schmit.<sup>15</sup> Under the heading “Nightmare Neighbors,” an article in *Time* charged, “Indian casinos are overloading other communities across the country. One exacerbating factor: because of tribal sovereignty, if a casino overwhelms local emergency services, draws down the local water supply or pollutes the environment, local authorities have no recourse.” Said a California resident of the tribes, “They use sovereignty as a shield.”<sup>16</sup> One freelance journalist, writing for the American Enterprise Institute, characterized sovereignty as allowing tribes “to operate outside American law.” Tribal sovereignty, according to vociferous critics, “is a profoundly

<sup>11</sup> Swidey, “Trump Plays Both Sides.”

<sup>12</sup> James P. Sweeney, “High Stakes Showdown,” *San Diego Union-Tribune*, July 22, 2001.

<sup>13</sup> Iver Peterson, “Resistance to Indian Casinos Grows Across U.S.,” *New York Times*, February 1, 2004.

<sup>14</sup> Brett D. Fromson, “California Must Hedge Its Bet” [Editorial], *Los Angeles Times*, November 25, 2003, B15.

<sup>15</sup> Matt Krantz, “Indian Tribe Bets on Diversification for Longevity,” *USA Today*, January 30, 2004, 5B.

<sup>16</sup> Barlett and Steele, “Playing the Political Slots,” 58.

flawed body of federal law – some say an outright scam – that creates bogus tribes, legalizes race-based monopolies, creates a special class of super-citizens immune to the laws that govern others, and Balkanizes America.”<sup>17</sup>

Some critics have asserted that Indian gaming amounts to “race-based” “special rights,” and that tribes are able to use their sovereignty to exclude commercial competitors from the marketplace. In 2001, Arizona race tracks sued Governor Jane Hull to prevent her from negotiating any further tribal gaming compacts. Said an attorney for three of the tracks, “There are no commercial slots in the state except on Indian land. No privilege, no business opportunity, can be based on race.”<sup>18</sup> Similar assertions are made in other states. “Whatever happened to one nation under God indivisible?” asked a town selectman from Connecticut. “I have a real problem with this country being set up where there are different rights for different groups – different privileges, different immunities.”<sup>19</sup> Asked one unidentified “analyst,” quoted in the American Enterprise Institute article, “Should we give Hispanics the liquor industry? Should blacks get cigarettes? What about the Asian boat people?”<sup>20</sup>

An article in the *Boston Globe* series implied that tribal sovereignty amounted to corporate misconduct, stating that “tribes have been using sovereignty to claim the right to act as the primary overseers of their own casinos, and to hide financial information about gambling operations that is routinely disclosed by commercial gambling houses.” The article also linked tribal sovereignty to crime, asserting without substantiation that “inadequate oversight of Indian casinos and increasingly vociferous sovereignty claims could open the door to a new wave of criminal activity.”<sup>21</sup>

Rich Lowry, in an editorial for the *National Review*, lambasted tribes, calling for the outright demise of tribal sovereignty:

It’s time to ditch the fiction of tribal sovereignty, and recognize the tribes for what they are: good, old-fashioned, all-American sleaze merchants and scam artists. . . . The ultimate answer to the Indian scam is to end the fiction of tribal sovereignty. . . . Sovereignty has not only allowed tribes to make an end-run around laws against gambling, but has perpetuated arbitrary third world-style government on reservations that makes it impossible for businesses to operate there. End tribal sovereignty and perhaps Indians can begin to find ways to make money less sketchy than slot machines, and our image of Indians can again become something more noble.<sup>22</sup>

As these criticisms of Indian gaming clearly demonstrate, tribes face substantial obstacles rooted at best in misinformation and ignorance and at worst in prejudice and racism in their

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<sup>17</sup> Jan Golab, “The Festering Problem of Indian ‘Sovereignty,’” in *One America* (Washington DC: American Enterprise Institute, 2003).

<sup>18</sup> Carol Ann Alaimo, “Race-Based Monopoly?” [Op-ed], *Arizona Daily Star*, April 14, 2001, B7 (quoting Neil Wake).

<sup>19</sup> 60 Minutes II, “Are Pequots Really Pequots?”, CBS television broadcast, May 23, 2000 (quoting Preston, Connecticut selectman Bob Congdon).

<sup>20</sup> Golab, “Festering Problem of Indian ‘Sovereignty.’”

<sup>21</sup> Michael Rezendes, “Tribes Make Easy Criminal Targets,” *Boston Globe*, December 13, 2000.

<sup>22</sup> Rich Lowry, “Indian Scam,” *National Review*, August 25, 2003.

efforts to realize the promise of tribal sovereignty. Tribes and Indian people alternately are put in an educational or a defensive posture in which they are required to explain the history and meaning of tribal sovereignty, how it differs from state sovereignty, and what are its practical ramifications in the context of Indian gaming. Tribal sovereignty has a legal and political status that must be respected, both as a practical matter and one of principle. As former NIGA chair Rick Hill reminded critics,

Our first principle is that Indian Nations and Tribes are sovereign political communities that were here before Columbus. . . . To understand Indian Nations and Tribes, you must be clear that while the Constitution, Treaties, and Laws of the United States acknowledge Indian sovereignty, our traditional right to self-government comes to us from the Creator and reflects the will of our Native peoples who established our societies in Pre-Columbian times. . . . Indian gaming is an exercise of sovereign governmental authority by Indian tribes.<sup>23</sup>

### **Tribal Regulation of Indian Gaming as Institution Building**

Broadly speaking, sovereignty is a nation's ability to chart its own legal, political, economic, and social future without illegitimate or unjust constraints. Our research indicates that the exercise of tribal sovereignty underpins tribal self-determination and self-government, the goals of current federal Indian policy. Effective and responsive tribal self-governance necessitates strong institutions. Governing institutions with the capacity to exert legitimate authority in the name of tribal members are at the heart of building healthy reservation communities, an interest appropriately shared by tribes, states, and the federal government.

Tribal sovereignty's legal and political dimensions require strong government institutions to give meaning to tribal self-governance and tribes' government-to-government relations with the United States and state governments. But strong institutions of governance also are necessary to effect tribal sovereignty's cultural and spiritual dimensions, as tribal self-determination is embodied in culturally specific and appropriate institutions.

One of the largely untold success stories of Indian gaming is the role it has played in tribal institution building. The NIGC frequently is spotlighted as the agency "in charge" of regulating Indian gaming. This overly simplistic characterization overlooks both the more complex and far-reaching requirements for government regulation of Indian gaming under IGRA and the fact that each gaming tribe has created its own regulatory authorities that are responsible for administering the myriad regulatory challenges of Indian gaming. In assuming responsibility for gaming regulation, tribes determine the character and capacity of their own governmental institutions. The political branches of many tribal governments have separated themselves from regulatory and economic development commissions and boards. Tribal governments are in a position today to make continual and informed decisions about how to provide essential public services to their members, how to negotiate and contract with non-tribal commercial vendors, banks, and investors to determine the trajectory of economic development, and how to interact with state and local governments on a range of issues.

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<sup>23</sup> Rick Hill, "Some Home Truths About Indian Gaming," *Indian Country Today*, December 27, 2000.

## Policy Implications

We believe it is plain that there are key distinctions to be drawn between the regulation of commercial gambling and that of Indian gaming. Three main points are relevant in this regard.

First, a frequently expressed concern in regulatory administration is the evolution of a capture effect – that is, regulatory agencies begin to partner with the industry to create a regulatory environment that maximizes the benefits to industry players. The regulatory agency becomes subject to the use of political power for private gain. Although similar accusations have been levied against tribal gaming commissions, there is little credible evidence of agency capture. Many tribes effectively maintain separation between regulatory and law enforcement authorities and elected public officials. Additionally, IGRA conditions how tribes can use gaming revenue for the benefit of tribal members. Gaming profits, therefore, are channeled directly into the provision of essential public services or community infrastructure. A profit motive does not become the sole determinant of how tribal casino enterprises, tribal gaming commissions, and elected tribal governments interact. As our research shows, this perhaps is exemplified by tribal gaming enterprises in the Great Plains, where job creation is the primary impetus for gaming. Moreover, by contrast to the regulation of the non-tribal gaming industry, there are three levels of regulation mandated by IGRA. State gaming commissions and law enforcement entities monitor and enforce a tribe's compliance with the existing tribal-state compact. And, of course, the NIGC and other federal agencies exercise overarching regulatory authority, as well.

Related to this first point, the policy goals of Indian gaming, and thus the regulatory scheme established by IGRA, are fundamentally different than are the goals and regulatory scheme governing commercial gambling. The vast majority of gaming tribes, such as those in the Great Plains, by necessity are in the business of job creation and economic development. Up to 100 percent of gaming revenues are turned back to the tribal government, and IGRA stringently governs how those revenues are to be used. The congruence between IGRA's stated policy goals and the regulatory scheme intended to facilitate them simply creates a regulatory environment that differs significantly than that for commercial gambling, a key distinction that we believe policymakers would do well to bear in mind.

Third, critiques of Indian gaming also seem to rest disproportionately on the thesis that tribes themselves are ill-equipped to regulate their gaming operations, or unwilling to do so. Again, there is little credible evidence to back up these assertions. Many studies show that crime is neither rampant in and around tribal casinos, nor more prevalent at tribal casinos than at commercial casinos. It appears that tribes have been successful in preventing the infiltration of organized crime. Subject to three levels of regulation and law enforcement authority, the Indian gaming industry perhaps is better equipped to deter or deal with potential crime and corruption than is any other form of legalized gambling.

We do not suggest that the regulation of Indian gaming is perfect. We do, however, encourage policymakers to critically assess the critiques of Indian gaming. At times, the claims made by tribal gaming's opponents may be ill-informed, strident, and one-sided and, although certainly subject to rebuttal, set the tone of the public conversation about Indian gaming. They

also may set the agenda for public policy. Misapprehensions about tribal governments, tribal sovereignty, and Indian gaming should not set the terms for public policy.

In our forthcoming book, *Indian Gaming and Tribal Sovereignty: The Casino Compromise*, we caution that the plainly apparent need for accurate and complete information on Indian gaming, coupled with the dangers of ill-informed and hasty policymaking in the face of mounting political pressure for reform, create a challenging environment for federal policymakers. We call on Congress to be guided by high-quality information and analysis as well as tribal opinions and interests, and to look to tribes' inherent right of self-determination as a lodestar for effective Indian gaming policy. Today, too, we urge that a clear and full understanding of tribal sovereignty is a necessary foundation for any policy concerning Indian gaming.

One standard criticism of regulatory administration is that it stifles productivity, growth, and innovation, and dampens economic performance. We believe IGRA's regulatory scheme has accomplished precisely the opposite. The complex and comprehensive regulatory web created by IGRA, in which tribal governments play a primary role, has reinforced tribal sovereignty and comports with the Supreme Court's holding in *Cabazon* and the congressional goals expressed in IGRA. Providing a foundation for tribal initiative and enterprise, IGRA has catalyzed the dramatic growth of an industry and created opportunities for economic growth and development for tribal and non-tribal communities across the United States. It is extraordinary that more than 200 tribes have benefited from this new economic engine; it also is remarkable that some 30 states and myriad non-tribal communities have as well.

Although by electing to open and operate gaming enterprises within IGRA's regulatory framework tribes have been forced by definition to give up some aspects of tribal sovereignty, the trade-off for many tribes has been the realization of the heretofore unthinkable: the creation of well-paying jobs, a viable revenue stream with which to provide essential government services, a means to leverage economic growth, development, and diversification, the chance to revitalize culture and tradition, and the opportunity to strengthen the institutions of tribal governance that facilitate meaningful government-to-government relations with federal and state governments on a more level playing field. In this sense, IGRA has accomplished exactly what it was intended to do, and more – and therefore represents an unparalleled regulatory success story.

These issues surrounding the regulation Indian gaming are of vital importance to tribes and American Indians throughout Indian country. We wish to express our appreciation to the Committee for engaging in a thoughtful discussion of Indian gaming law and policy, and for allowing us to contribute to that dialogue. We thank you for this opportunity to testify before the Committee.