The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas

by Alex Tallchief Skibine

The Indian Gaming regulatory Act (IGRA),[1] is a unique piece of legislation. Historically, the Indian nations have had a trust relationship with the federal government. The problem with this relationship is that it is an exclusive binary relationship between the Indian nations and the federal government. There is no room for the states in this relationship. Yet Indian nations are considered, rightly or wrongly, as being within the geographical limits of the states where their lands are located. Similarly, our constitutional system has been described as one of dual federalism. A union of states forming a federal system recognizing only the sovereignty of the states and the United States. While Indian tribes are mentioned in the U.S. Constitution's Commerce Clause along with other sovereigns, thereby at least inferring

some sovereign status,[2] their sovereignty is neither directly addressed nor guaranteed in the Constitution. Yet, Indian tribes have been acknowledged as possessing a certain amount of inherent sovereignty. IGRA is unique among all federal Indian legislation in that it is the only national Indian legislation that included the states in the federal-tribal relationship while also acknowledging the sovereignty of Indian nations, and in the process attempted to balance tribal and state sovereign interests.[3] Part I of this article explains the political context at the time IGRA was enacted. Part II goes over the pros and the cons of IGRA from a tribal perspective. Part III evaluates the major unresolved legal issues IGRA has generated. Finally, Part IV addresses itself to the potential collateral damages IGRA has created for tribal sovereignty.

I: The Political Context

Although it is commonly agreed that IGRA was enacted in 1988 as a result of the 1987 landmark U.S. Supreme Court decision in *California v. Cabazon Band of Mission Indians*,[4] the U.S. Congress began considering Indian gaming legislation four years before *Cabazon* when Rep. Morris Udall (D-Ariz.), the chairman of the House Interior and Insular Affairs Committee which at the time was the committee with jurisdiction over most Indian legislation, introduced the first Indian gaming bill, H.R. 4566, in 1983. I was serving as the committee's deputy counsel for Indian affairs at the time. As one of the staff involved in drafting the bill, I remember that our idea behind the bill at the time was a simple one: enact an Indian gaming bill before the issue reached the Supreme Court and establish a federal scheme that would pre-empt state regulation of Indian gaming. In the wake of decisions like *Rice v. Rhener*,[5] upholding state concurrent regulations of liquor sales on Indian reservations, some of us did not trust the Supreme Court to decide such state jurisdictional issues in favor of tribal interests. Ultimately, the legislation passed by the U.S. House of Representatives died in the U.S. Senate because by then the *Cabazon* case was pending at the Supreme Court and some in the Senate believed that the Court would decide *Cabazon* in favor of the states.[6] Of course, this did not happen. The tribe won. The Court held that the state of California had no regulatory jurisdiction over Indian gaming. The same senators who had stopped the House bill were now more than eager to enact an Indian gaming bill. The Senate passed an Indian gaming bill, the House concurred, and the President signed IGRA into law.[7] At the time of passage, most of the tribes were on record as being against the bill while the states were generally in favor. Most of the tribal leadership believed IGRA represented a serious infringement on tribal sovereignty for the following reasons:

1. Class II gaming (IGRA divided gaming into three classes) which consisted of bingo, bingo-like games, and non-banking card games, was to be regulated by a quasi-independent federal commission, the National Indian Gaming Commission (NIGC). Because until then, such bingo and bingo-like games had been solely regulated by the tribes, most tribes perceived such federal regulation as an infringement on tribal sovereignty.
2. Class III gaming, which basically consists of everything else including the potentially very lucrative Las Vegas casino type of gaming such as slot machines, could only be conducted pursuant to a tribal state compact that would have to be approved by the Secretary of the Interior. In other words, states would have to agree, or consent, before the tribes could conduct such gaming on their very own tribal lands.[8]
3. IGRA contained a number of other provisions potentially infringing on tribal sovereignty such as restrictions on the way tribal gaming revenues could be spent and federal approval of tribal gaming ordinances.
4. IGRA has a prohibition on gaming conducted on off-reservation land acquired by tribes after enactment of the law unless such land qualified under some strictly defined exceptions.

Yet at the time of IGRA's passage, many tribal attorneys and lobbyists supported the bill and it is because of such support that influential pro-tribal legislators like the late Sen. Daniel Inouye (D-Haw.) and Representative Udall, the chairmen of the two key congressional committees, ended up agreeing to the bill. So what were the key components of the legislation that justified such endorsements?

First, while some may have been under the impression that before IGRA, Indian gaming was left solely to tribal regulation, this was not the case. Gaming devices on all federal lands, including Indian lands were prohibited under the Johnson Act, and gaming conducted on Indian lands but in violation of the public policy of a state was subject to federal prosecution under the Organized Crime Control Act (OCCA). This is the reason why before IGRA, Indian gaming was only about a $200 million a year industry which consisted almost exclusively of bingo, bingo-like games, and non-banking card games like poker. In other words, it was exclusively a Class II type of industry. Under IGRA, the prohibition of the Johnson Act and OCCA are waived for Class III gaming conducted under a tribal state compact.

Second, although Class II was to be regulated by the NIGC, two of the three commissioners had to be members of Indian tribes. Furthermore, the powers of the commission are somewhat limited,[9] and there is a provision allowing tribes to obtain a certificate of self-regulation, 25 U.S.C. § 2710(c).

Third, the states have a duty to negotiate tribal state compacts in good faith, 25 U.S.C. § 2710(d)(3)(A) and the tribes were allowed to sue the states in federal court for breach of good faith. 25 U.S.C. § 2710(d)(7)(A). Furthermore, if after a rather complicated dispute resolution mechanism, a state still refused to agree to a compact, the Secretary of the Interior was given the power to issue gaming procedures for the conduct of Class III gaming for such tribe, 25 U.S.C. § 2710(d)(7)(B)(vii).

Fourth and finally, at least from the perspective of people like me who always look at the glass being half empty, *Cabazon* may not have been a truly solid precedent. It relied on an Indian pre-emption balancing test that can be easily manipulated. Although in *Cabazon*, California was not able to put forth a state interest strong enough to overcome the tribal and federal interests, this did not preclude another state in the future from coming up with a better case. Besides, the composition of the Court could and did change in a direction not favorable to tribal interests. Thus, I have in previous writings identified 1988, a year after *Cabazo*n came down from the Court, as the year the Court turned solidly anti-tribal.[10] In fact, *Cabazon* is still the very last case in which tribal interests won at the Supreme Court level using the Indian pre-emption balancing test, which is discussed in depth later in this article.

II: Assessing the Success of IGRA 25 Years Later

What Went Right or Wrong for the Tribes

If the purposes as stated in the bill were indeed the true purposes, there is no question that IGRA has been a success. IGRA had two main purposes. The first one was to establish a statutory framework that would allow gaming to generate tribal revenues as a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The second purpose was to shield tribal gaming from "organized crime and other corrupting influences." 25 U.S.C. § 2702(2). I think it is fair to say that in the last 25 years, tribal gaming has not been infiltrated by organized crime and has been largely free of corrupting influences. Furthermore, Indian gaming has been a financial success for many Indian tribes. Since 2007, Indian gaming has generated approximately $26 billion a year in net revenues.[11] Along with such revenues, Indian gaming has also generated close to 700,000 jobs. In a recent article, Profs. Steven Light and Kathryn Rand detail how gaming revenues have been used by Indian tribes to first, boost services provided by tribal governments, second, build up governmental administrative capabilities and institutions, and, finally, to provide opportunities for tribes to diversify their economies so as not to be solely relying on gaming for tribal governmental revenues.[12] I would also add to their conclusions this: greater independence from the federal government and less reliance on federal governmental programs.

The major setback has obviously been the Supreme Court decision in *Seminole Tribe v. Florida*[13] which held that Congress could not authorize the tribes to sue states in federal court because it could not abrogate the states' Eleventh Amendment sovereign immunity from suit using its Commerce Clause power. This has resulted in some legal uncertainty as to what remedies are available to tribes in cases where states fail to negotiate a compact in good faith and that uncertainty has given the states the upper hand in re-negotiating tribal state compacts. As a result, the states have been receiving increasing amounts of revenue from the tribes using the controversial revenue sharing agreements.[14] One also has to mention the fact that gaming has not been a success for all tribes. As noted by Ezekiel Fletcher, 22 gaming facilities account for 42 percent of all tribal gaming revenues while there were 210 tribal casinos which accounted for less than 2 percent of all tribal gaming revenues.

What Went Right or Wrong for the States

If the intent of the states during the negotiations that led to IGRA was to somehow stop or derail Indian gaming, then IGRA has been a failure from that point of view. If, however, their intent was the promotion of economic development within the states through Indian gaming, the Act has been a success. One study reported that 75 percent of all jobs generated by Indian gaming are held by non-Indians. In addition, these controversial revenue sharing agreements have generated a substantial amount of revenues to the states. Professors Light and Rand reported that in 2007 alone, "tribes made over $1 billion in revenue-sharing payments to states and another $155 million in payments to local governments." Although tribes may rightly feel that these revenue sharing agreements give out too much cash to the states, the silver lining here is that such arrangements have ensured that both tribes and states have a vested interest in the success of Indian gaming.

III: Major Issues in Need of Clarification

IGRA has never been substantially amended in its 25-year history and the current congressional gridlock does not generate a good prognosis that any substantial amendments are going to see the light of day any time soon. This last Congress appeared to have been the least productive Congress since records have been kept. It only passed 218 laws, about 100 less than the next least productive Congress. Yet, there are some serious unresolved issues concerning the interpretation of IGRA and because the Supreme Court has shown nothing less than vitriolic animus toward tribal rights, tribes should be concerned if any of the following issues ever got the Court's interest.

The most important unresolved issue is the validity of the secretarial regulations for issuance of Class III gaming procedures when a state claims sovereign immunity after being sued for failing to negotiate in good faith. After *Seminole Tribe*, IGRA's abrogation of the states' sovereign immunity is no longer constitutional. The Secretary of the Interior has taken the position that if a state invoked sovereign immunity in such situations, the tribes can directly petition the Secretary of the Interior to issue Class III gaming procedures. Under IGRA, the Secretary can issue such gaming procedures but only after a court ruled that a state has not negotiated in good faith and has rejected the court-appointed mediator's proposal. The few lower courts that have reached this issue have disagreed. While the U.S. Court of Appeals for the Fifth Circuit in *Texas v. United States*,[15] held that the Secretary had no power to

issue gaming procedures in such cases, the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the Eleventh Circuit indicated that they would probably uphold the regulations.[16]

Another area that has been very controversial, has generated much litigation, and could use some clarification, has been the process of placing off-reservation fee land into trust for the purpose of gaming.[17] Unfortunately much of this litigation has involved tribes against other tribes.

Another still unresolved issue is the meaning of "good-faith negotiation" when it comes to tribal state negotiation over the scope of gaming and the validity of revenue sharing agreements. This issue concerns what type of Class III games a state has to negotiate with a tribe. Under IGRA "Class III gaming shall be lawful on Indian lands only if such activities are … located in a State that permits such gaming for any purpose by any person." There are currently two judicial views on the meaning of this sentence: A broad view adopted by the U.S. Court of Appeals for the Second Circuit in *Mashantucket Pequot Tribe v. Connecticut*,[18] under which any state allowing one type of Class III gaming activity has to negotiate over all Class III gaming activities, and a narrow view (a.k.a. as the game-specific approach) adopted by the U.S. Court of Appeals for the Eighth and Ninth Circuits, where a state should only have to negotiate over the types of Class III gaming that are specifically authorized under state law.[19]

The other good-faith issue involves the validity of the revenue sharing agreements that some states have been insisting on as a condition of agreeing to a tribal state Class III compact. Although these revenue sharing agreements sound like a form of state taxation, something that is prohibited under IGRA, courts have held that they will not be considered taxation as long as they are directly related to the operation of gaming activities and are not "imposed" on the tribes because the tribes have acquired in return some meaningful concessions from the states. Two Ninth Circuit decisions, *In re Gaming Related Cases*,[20] and *Rincon Band v. Schwarzenegger*,[21] epitomize the difference between what is legal and what is not when it comes to revenue sharing agreements. The agreements were held valid in the first case but not valid in the second.

Another issue that has generated a substantial amount of litigation and could use some legislative clarification has been the difference between Class II and Class III gaming when it comes to distinguishing between various electronic bingo machines. Some have argued that technological innovations in this area have rendered distinctions between some of these machines meaningless, at least from a policy point of view.[22] The key issue here is distinguishing between electronic or electromechanical facsimiles of any game of chance or slot machines which is considered Class III and bingo that has been enhanced by electronic, computer, or other technological aids which is allowed under Class II. This issue has gained much importance for tribes after the *Seminole Tribe* decision since compact negotiations with the states has been rendered much more difficult as a result of the legal uncertainties created by the decision. As long as an electronically aided bingo machine can be classified as Class II, it does not need to be approved by a state pursuant to a tribal state compact.

A somewhat related issue that could use some clarification is whether the Johnson Act prohibition on gaming devices, which has been lifted when gaming is conducted pursuant to a tribal state compact, has also been lifted when a gaming device is considered a Class II machine. There is currently a split in the circuits on this issue. The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in *Diamond Game v. Reno*,[23] and the Tenth Circuit in *Seneca-Cayuga Tribe v. NIGC*,[24] ruled that the Johnson Act does not apply to Class II gaming while the Eighth Circuit in *United States v. Santee Sioux*,[25] took the position that the Johnson Act's prohibition did apply to Class II machines. The NIGC has sided with the D.C. and Tenth Circuits' position. Its views are set out at 67 Fed. Reg. 41,166 (2002).

IV: Collateral Damages to Tribal Sovereign Interests

Some commentators have observed that for tribes the economic success of Indian gaming had become a double-edged sword which would damage tribal sovereign interests.[26] In this part, I look at whether the success of Indian gaming has had some detrimental impacts on three well-established doctrines of federal Indian law: the trust doctrine; the Indian pre-emption doctrine; and the doctrine of tribal sovereign immunity.

The Trust Doctrine

The success of Indian gaming certainly has changed the overall perception of non-Indians that Indians are all poor and dependent on the United States. This perception may be responsible for a changing judicial attitude toward the federal-tribal trust relationship. It seems that there is a misperception out there that the trust doctrine only exists because Indians are "weak and defenseless," a view that no doubt originated with the use of such term in *United States v. Kagama*,[27] where the Court stated "[f]rom their very weakness and helplessness ... and the treaties in which it has been promised, there arise a duty of protection." Thus, according to this view, once Indians and Indian tribes no longer can be described as weak or financially defenseless, there goes the reason or need for the existence of the trust doctrine. I have written elsewhere as to why this should not be so.[28] The trust doctrine has its judicial origin not in *Kagama* but in Chief Justice John Marshall's opinions in *Cherokee Nation v. Georgia*[29] *and Worcester v. Georgia*,[30] where Chief Justice Marshall derived the doctrine principally from three elements: (1) international law and the doctrine of discovery; (2) the history of relations between the Indian nations and the European "discovering" nations; and (3) last but not least, as even the *Kagama* Court acknowledged, the trust doctrine is mostly derived from the hundreds of treaties signed between the United States and the Indian nations. The doctrine does arise partly from the Indian nations acknowledging their political dependence on the United States in these treaties but under Chief Justice Marshall's view of the doctrine, this had nothing to do with being weak and defenseless, whatever the *Kagama* Court meant by these terms.

One of the main advantages of the doctrine from a legal perspective is that it is the reason for the Indian canon of statutory construction according to which statutes enacted for the benefit of Indians are supposed to be liberally construed while ambiguous terms in such statutes are supposed to be construed to the benefit of the Indians.[31] These days, the Indian canon of statutory construction has all but been abandoned by the Supreme Court as evidenced by its decision in *Chickasaw Nation v. United States*,[32] where the Court interpreted IGRA as allowing federal taxation of tribal gaming activities. Two more recent and important cases where use of the Indian canon would have resulted in victories for tribal interests instead of defeats are *Carcieri*

v. Salazar,[33] and *Match-E-Be-Nash-She-Wish Band of Pottawatomi v. Patchak*.[34] In *Carcieri*, the Court held that in order to be eligible to have land taken into trust under the 1934 Indian Reorganization Act (IRA), an Indian tribe must have been under federal jurisdiction as of 1934. In *Patchak*, the Court held that the Quiet Title Act (QTA), which preserved the sovereign immunity of the United States in a lawsuit challenging federal title to land held in trust for the benefit of Indians, was not applicable to shield the United States as long as the lawsuit was filed under the Administrative Procedure Act and the party challenging the U.S. title was not asserting its own title to the land. I believe that both Acts, the IRA and the QTA, could have easily been interpreted differently. The IRA could have easily been interpreted to allow any tribe to have land taken into trust as long as it was under federal jurisdiction by the time the land transfer occurred. As for the QTA, it could have easily been interpreted as preserving the sovereign immunity of the United States even if the party challenging the federal title was not asserting its own title to the land. At the most, the Court should have acknowledged that both Acts were ambiguous and apply the Indian canon of statutory interpretation to resolve the case in favor of tribal interests.

Even more damaging to the trust relationship is that the Supreme Court's current concept of the trust doctrine seems to be deeply flawed as revealed by its decision in *Jicarilla Apache Nation v. United States*.[35] In *Jicarilla*, the tribe was suing the federal government for breach of trust for mismanagement of trust funds. In order to make its case, the tribe needed to have access to some internal documents which the United States claimed were protected under the attorney client privilege. Invoking what is known as the fiduciary exception, the tribe claimed the privilege did not apply to the case because the United States was its trustee. The Supreme Court disagreed and held that since the fiduciary exception was derived from the common law of trust and is applicable to common-law trustee, it was not available to the tribe because the United States was not analogous to a private trustee. The Court mentioned that the duties of a private trustee are defined by the common law while the duties of the United States as a trustee for Indian tribes are only defined by statutes. The Court further mentioned that the United States was not akin to a private trustee because its trust function was a sovereign function subject to congressional plenary power and Congress had structured that function to pursue its own policy goals and sovereign interests. Also disturbing is the Court's statement to the effect that from now on, when evaluating the U.S. administration of its Indian trust duties, it "will only apply common law trust principles where Congress has indicated it is appropriate to do so" and that "the government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statutes." In other words, the Court now takes the position that the trust relationship is solely a statutory creation. But that is not the case. The trust doctrine is a doctrine of federal common law and as mentioned earlier, it is derived from the treaties, principles of international law, and the historical relationship between Indian nations and the European discovering nations. As I have written elsewhere "[p]roperly conceived, the trust doctrine should be viewed as a quasi-constitutional doctrine incorporating tribes as political sovereigns within the greater political system of the United States."[36]

Invoking what is known as the fiduciary exception, the Jicarilla Apache Nation claimed the privilege did not apply to the case because the United States was its trustee. The Supreme Court disagreed and held that the since the fiduciary exception was derived from the common law of trust and is applicable to common-law trustee, it was not available to the tribe because the United States was not analogous to a private trustee.

The Indian Pre-emption Doctrine

The Indian pre-emption doctrine is used to determine if state regulations on Indian lands have been pre-empted by the operation of federal law. It has been at times defined as a balancing of the interest test. As stated by the Supreme Court in *New Mexico v. Mescalero Apache Tribe*,[37] "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." Although some decisions such as the recent opinion in *Mashantucket Pequot v. Town of Lleydard*,[38] have used the Indian pre-emption doctrine to prevent state taxation of activities related to gaming, others cases have been more problematic for Indian tribes. One such case is the Ninth Circuit opinion in *Barona Band v. Yee*,[39] where the state was successful in taxing construction materials purchased by a non-Indian contractor involved in the construction of a tribal casino expansion. What struck me in the opinion was the anti-tribal tone of the decision. After mentioning that the tribe's "right of territorial autonomy is significantly compromised by the Tribe's invitation to the non-Indian subcontractor to theoretically consummate purchases on its tribal land for the sole purpose of receiving preferential tax treatment," the court added that the tribal interest in economic self-sufficiency was diminished because the commercial activity was "rigged" to trigger a tax exemption, and that such tribal interest "lessens in the specific context of a multi-million casino expansion." Finally the court mentioned that the state did have a strong interest in preventing an Indian casino from "manipulating" its tax laws to shop tax exemptions to local businesses.

The Tribal Sovereign Immunity Doctrine

This may be the last frontier as far as being the last doctrine favoring tribal sovereignty that has been more or less left intact by the Supreme Court. However, tribes should be worried about the next case should such case reach the Supreme Court. When cases involve rich or gaming tribes, engaged in business transactions

involving an arm of the tribe instead of the tribe itself, and the doctrine is being used by the tribes to potentially gain an economic advantage over non-Indian competitors, the reason for the doctrine may become harder to perceive.

One case that did push the sovereign immunity envelope over the edge was *Fair Political Practice Commission v. Agua Caliente Band of Cahuilla Indians.*[40] Another that may push the envelope right to the edge is the recent U.S. Court of Appeals for the Sixth Circuit decision in *Michigan v. Bay Mills Indian Community*.[41] In *Agua Caliente*, a gaming tribe had made over $16 million in various political contributions to various state political campaigns and after refusing to report such expenditures as mandated under California law, invoked its sovereign immunity when it was sued over such refusal. In a decision which greatly stretched the boundaries of constitutional law as well as federal common law, the California Supreme Court held that tribal sovereign immunity did not apply to this case because such immunity only applied to cases involving tribal self-governance and tribal economic development. In addition, the California court claimed that the case also involved powers reserved to the state under the Tenth Amendment and the Guarantee Clause which guarantees to the states a republican form of government. Interestingly, the Supreme Court denied certiorari even though there was no precedent supporting the California court Tenth Amendment and Guarantee Clause analysis as well as its new-found federal common law limitations on tribal sovereign immunity.

In *Bay Mills*, the Sixth Circuit held that because of tribal sovereign immunity, Michigan could not sue the tribe even though the tribe had opened a casino not located on "Indian land" as required under IGRA. The court found that IGRA only allowed states to sue tribes in violation of tribal state compacts when such gaming was conducted on "Indian land" as defined in IGRA. Furthermore, the court also held that Michigan could not bring a common law lawsuit against the tribe because of tribal sovereign immunity. The state of Michigan's petition for certiorari is currently pending and, at the time of this writing, the Supreme Court has asked for the opinion of the U.S. Solicitor General before making a decision on the petition. It is interesting to note that there appears to be a split on this issue between the Sixth Circuit and an older Tenth Circuit's opinion in *Mescalero Apache Tribe v. New Mexico.*[42] Another type of cases that will eventually stretch the envelope of tribal sovereign immunity are those like *Cash Advance & Preferred Cash v. Colorado*.[43] These cases are not about Indian gaming but involve payday lenders partially owned by Indian tribes. In such cases, tribal sovereign immunity is being used to avoid complying with state usury laws even though what is involved here are loans issued over the internet and mostly involving non-Indian customers not living on Indian reservations. In addition, a majority of the lending outfits seem to be corporations that are only partially owned by the tribe.[44] I believe that the issues and problems raised by these tribal payday lending activities will only increase in the future. Right now, I have the same feeling about this payday lender issue that I had when myself and other members of Chairman Udall's staff first approached him about introducing the first Indian gaming bill back in 1983. Tribes have sovereign rights and have survived as sovereign nations primarily because of the willpower and tenacity of their people but tribal immunity from state laws remain a very precarious right. If tribal immunity is perceived as being abused in order to victimize non-Indians otherwise protected under state law, such immunity will be severely tested and will be in danger of being lost.

Conclusion

Whenever there is a perception that an unregulated problem exists in Indian country, the knee jerk reaction of some always seems to be the same: have the tribes completely regulated by the states, or federally prohibit the tribal activity outright as in the Johnson Act. I believe that if tribes and their advocates do not take the lead in coming up with a solution to the payday lending problem, one of two things will happen: the Court will abolish tribal sovereign immunity or the Congress will pass a law authorizing a federal agency, such as the newly created Consumer Financial Protection Bureau (CFPB) to unilaterally and completely regulate tribal payday lending activities. IGRA came up with an innovative compromise: a quasi-independent commission, a majority of whose members had to be tribal members, and a tribal state compact mechanism which gave tribes a meaningful opportunity to negotiate, at least before the Supreme Court upset the apple cart in *Seminole Tribe*. It was not a perfect solution and it remains controversial but it ended up working much better than the alternative the anti-tribal gaming interests were pushing which was to have tribal gaming under state jurisdiction. During the negotiations which led to IGRA, the battle cry of the anti-tribal gaming advocates was the mythical "level playing field" argument. They did not want the tribes to have an "unfair" advantage over the non-Indian casinos. We, on the pro-

tribal side, also wanted a level playing field but our version of the argument was that, being sovereign entities, the tribes should be on a level playing field with the states, not the Donald Trumps of this world. Those who may have to negotiate this upcoming tribal payday lending issue on Capitol Hill on behalf of the tribes would do well to keep this in mind. ⊙

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Endnotes

[1]25 U.S.C. § 2701-21.

[2]Article 1, section 8, clause 3 of the Constitution provides that the Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

[3]States were part of other legislation such as Public Law Number 280 and the Indian Child Welfare Act (ICWA) although Public Law Number 280 did not take into consideration tribal sovereign interests and arguably ICWA did not take into consideration the states' interests.

[4]480 U.S. 202 (1987).

[5]463 U.S. 713 (1983).

[6]For a detailed account of the background and political context in the wake of IGRA written by someone who was the lead counsel on Indian affairs in the House during enactment of this legislation, see Frank Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L.J. 17 (2010).

[7]For a comprehensive legislative history of IGRA, see Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Usurpation of Tribal Sovereignty?*, 42 Ariz. St. L.J. 17 (2010).

[8]For an insightful critique of the IGRA's compacting process, see Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal State Compacts Under the Indian Gaming Regulatory Act*, 29 Ariz. St. L.J. 25 (1997).

[9]*See Colorado Indian Tribes v. NIGC*, 466 F.3d 134 (2006) (holding that the NIGC did not have any authority to issue its minimum internal control regulations).

[10]*See* Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. Rev. 778 (2006).

[11]*See* Matthew L.M. Fletcher, *California v. Cabazon Band, A Quarter Century of Complex Litigious Self-Determination,* 59 Fed. Law. 50, n.1 (2012).

[12]Steven Andrew Light & Kathryn R.L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 Drake L. Rev. 413 (2009).

[13]517 U.S. 44 (1996).

[14]For a recent article on problems generated by the Supreme Court opinion, see Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions From Statutes in Gaming Compacts to Further Tribal Economic Development: Satisfying the Economic Benefits Test,* 54 S.D. L. Rev. 419 (2009).

[15]497 F.3d 491 (2007).

[16]*See United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1302 (9th Cir. 1998) and *Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994). *See also Santee Sioux v. Norton*, No. 8:05CV147, 2006 WL 2792734 (D. Neb. Sept. 26, 2006).

[17]For a recent critical analysis of the fee to trust process under IGRA, see Brian L. Lewis, *A Day Late and a Dollar Short: Section 2719 of the Indian Gaming Regulatory Act, the Interpretation of Its Exception, and the Part 292 Regulations*, 12 T.M. Cooley J. Prac. & Clinical L. 147 (2010). *See also* Eric M. Jensen, *Indian Gaming on Newly Acquired Lands,* 47 Washburn L. Rev. 675 (2008).

[18]913 F.2d 1024 (1990).

[19]*See Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250 (1994) and *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (1993).

[20]312 F.3d 1094 (2003).

[21]602 F.3d 1019 (2010).

[22]See Antonia Cowan, *You Can't Get There From Here: IGRA Needs Reinvention Into a Relevant Statute for a Mature Industry*, 17 Vill. Sports & Ent. L.J. 309 (2010).

[23]230 F.3d 365 (2000).

[24]327 F.3d 1019 (2003).

[25]324 F.3d 607 (2003).

[26]*See, for instance,* Joshua L. Sohn, *The Double Edged Sword of Indian Gaming*, 42 Tulsa L. Rev. 139 (2006) (arguing that in ruling in favor of state taxing jurisdiction in the *City of Sherrill* case, the Court was influenced by the success of Indian gaming).

[27]118 U.S. 375 (1886).

[28]See Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 Ariz. St. L.J. 253, 259-65 (2010).

[29]30 U.S. (5 Pet.) 1 (1831).

[30]31 U.S. (6 Pet.) 515 (1832).

[31]*See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

[32]534 U.S. 84 (2001). *See also* Graydon Dean Luthey Jr., Chickasaw Nation v. United States: *The Beginning of the End of the Indian Law Canons in Statutory Cases and the Start of the Judicial Assault on the Trust Relationship*, 27 Am. Indian L. Rev. 553 (2002–2003).

[33]555 U.S. 379 (2009).

[34]132 S. Ct. 2159 (2012).

[35]131 S. Ct. 2313 (2011).

[36]*See* Alex Tallchief Skibine, *Toward a Trust We Can Trust: The Role of the Trust Doctrine in the Management of Tribal Natural Resources*, *in* Sarah Krakoff & Ezra Rosser, Tribes, Land, and the Environment (Ashgate 2012).

[37]462 U.S. 324 (1983).

[38]No. 3:06cv1212, 2012 WL 1069342 (D. Conn. Apr. 25, 2007).

[39]528 F.3d 1184 (2008).

[40]No. 02AS04545, 2003 WL 733094 (Cal. Super. Ct. Feb. 27, 2003).

[41]No. 11-1413, 2012 WL 3326596 (6th Cir. Aug. 15, 2012).

[42]131 F.3d 1379, 1385-86 (1997).

[43]242 P.3d 1099 (2010).

[44]For a comprehensive analysis of the problem see Nathalie Martin and Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk*, 69 Wash. & Lee. L. Rev. 751 (2012).