# Op-Ed/Editorials: National Indian Gaming Commission Cannot Regulate Class III Gaming

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Most people, including those in the gaming industry, who have heard of the National Indian Gaming Commission ("NIGC"), assume that it regulates Indian Gaming. Even some of the Commissioners themselves believe they have this power.

They are wrong.

The misunderstanding arises from the way the modern law of Indian gaming was created. First came court cases. While these were being fought all the way up to the U.S. Supreme Court for almost a decade, Congress was involved with sometimes heated negotiations among the interested parties: the tribes, of course, but also powerful political players who wanted to limit Indian gaming.

The most influential of these were members of the U.S. House of Representatives and Senate from Nevada. Most observers thought the tribes would eventually lose, that the courts would rule that if a state had strict criminal restrictions on gambling, tribes would have to abide by those limits. California allowed charities to have bingo games limited to $250 maximum jackpots, so its tribes would not be permitted to offer larger prizes. So, the negotiations tended to favor the states, with a few crumbs being thrown to the tribes. Then came the U.S. Supreme Court decision in the Cabazon case in 1987.

The Court ruled that under a statute passed decades earlier, Public Law 280, the question of what forms of gambling tribes could offer in most states depended upon the public policies of those states. If a state allowed charity bingo, tribes

could also operate bingo. And the tribes, being sovereign governments, could self-regulate. This included the right to set their own limits. So, tribes in California could, and did, offer bingo with prizes of $500,000. Suddenly, the entire political landscape had changed. The tribes had the upper-hand in negotiations in Congress. States not only allowed charity bingo, they also had state lotteries and racetracks, and two states, New Jersey and Nevada, had casinos. New Jersey was not concerned, because there were no federally recognized Indian tribes within its borders. But Nevada did have tribes, as well as a powerful casino industry that wanted to make sure tribal casinos were strictly regulated. In fact, the Nevada lawmakers wanted the state to do the regulating. They didn't care about bingo and similar games. They also weren't concerned about lotteries, since it was thought no tribe could compete against a massive state lottery. And horse racing, which is fighting for its life, did not seem like much of a threat, especially since tribes could not afford to build expensive new racetracks.

So, Congress enacted a compromise bill, the Indian Gaming Regulatory Act. It codified what everyone thought they wanted: Tribes could self-regulate Class I gaming, which was limited to home poker games and traditional games at festivals. Tribes would self-regulate Class II, bingo and poker, with a new government agency, the NIGC, having some oversight authority. The forms most dangerous to commercial casinos, including slot machines, banking card games, parimutuel betting and lotteries, would only be allowed if the tribe agreed in a compact to let the state be at least a co-regulator.

I, and other lawyers who understood gaming law, told Nevada's representatives in Congress that they were not creating the level playing field they thought they were. They might not care about high-stakes bingo, but if the IGRA said tribes could offer giant jackpots when a state allowed charities to have low-limit bingo, courts would decide the same rules applied to low-limit blackjack.

No one could predict the explosion of casinos on riverboats, barges and in mountain towns. But even in 1988, many states allowed charities to have casino nights.

It also was not that difficult to see that bingo could be played on machines, that lotteries did not have to be once-a-week drawings and that horseracing can be shown on any video screen.
We were told that Congress did not intend to open these doors, and that the IGRA

would be “fixed.” It never was.

Because the states were to be the primary regulator of Class III gaming, the new NIGC was not given much of a role. I remember asking Tony Hope, the first NIGC chairman, why he agreed to take the job, since he would be blamed for anything that went wrong and actually had very little power. He said he knew the NIGC was mostly limited to Class II games, but it was a once-in-a-lifetime chance to created a new federal government commission.

The enormous growth of Indian casinos led to calls for greater federal governmental controls. Twelve times, Congress considered laws to strengthen, or as they sometimes put it, to “clarify” that the NIGC could regulate Class III gaming. None of these passed, but the NIGC began to operate as if they had.

On January 5, 1999, the NIGC promulgated regulations setting out minimum internal control standards (“MICS”) for not only Class II but also Class III Indian gaming. These were more than 70 pages long and covered everything from how the games were played, casino security, internal controls, credit operation, internal and external audits, etc., down to how many employees must be involved in emptying coin buckets from slot machines.

The Colorado River Indian Tribes challenged the NIGC’s authority to issue MICS. In an important decision, a three-judge panel of the U.S. District Court in the District of Columbia held that, “While surely well-intentioned, the NIGC has overstepped it bounds.”

In legal jargon, the NIGC was hung up by the first prong of the Chevron test. In a 1984 case involving Chevron U.S.A., the U.S. Supreme Court issued an opinion telling courts how to rule on an administrative agency’s interpretation of its statutes. The first prong of the test is to see if Congress had spoken on the issue. If the statute were ambiguous, then deference would be given to the agency’s regulations.

All three judges found that the MICS failed the first test. Congress was absolutely clear in the IGRA in dividing up the sovereign powers of the states, tribes and federal government. The NIGC has no role in regulating Class III gaming.

What does this mean for the future? The court only overturned the MICS for casinos. The NIGC still has the power to make just about any regulation it wants

for Class II gaming. And in most states, the tribal-state compacts impose standards of control for casinos comparable to the now-rejected MICS.

The greatest danger to competitors, such as commercial casinos in Nevada, the general public and eventually to Indian gaming itself, are those Class III tribal casinos where the states failed to write tough controls into their compacts. Tribes with no outside government oversight might now be doing great jobs policing themselves. But casinos have historically not been allowed to self-regulate because inevitably some insider gets greedy. And scandal can lead to backlash and calls for prohibition.

The only way to keep every casino operation clean for many years is to have many people watching. And then you need additional people, to watch the watchers.

What do you think? Comments on this article can be addressed to Prof. I. Nelson Rose.

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