

Policy Analysis

No. 336

March 8, 1999

INTERNET GAMBLING *Popular, Inexorable, and (Eventually) Legal*

by Tom W. Bell

Executive Summary

The Internet offers new and better access to something that American consumers demand in spades: gambling. Lawmakers and prohibitionists can neither effectively stop Internet gambling nor justify their attempts to do so. In the long run it will, like so many other forms of gambling, almost certainly become legal. In the short run, however, Internet gambling faces some formidable opponents.

As a market activity devoted to the pursuit of happiness, Internet gambling draws support from neither Democrats nor Republicans. As an upstart competitor to entrenched gambling interests, both public and private, Internet gambling threatens some very powerful lobbies.

Not surprisingly, Congress has been considering bills that would prohibit Internet gambling. But the architecture of the Internet makes prohibition easy to evade and impossible to enforce. As an international network, moreover, the Internet offers instant detours around domestic bans.

Consumer demand and lost tax revenue will create enormous political pressure for legalization, which we should welcome if only for its beneficial policy impacts on network development and its consumer benefits. We should also welcome it for a more basic reason: as the Founders recognized, our rights to peaceably dispose of our property include the right to gamble, online or off.

Tom W. Bell is an assistant professor at Chapman University School of Law and an adjunct scholar of the Cato Institute. He is coeditor with Solveig Singleton of Regulators' Revenge: The Future of Telecommunications Deregulation (Cato Institute, 1998).

Introduction

For better or for worse, the Internet offers new ways of satisfying age-old human desires. For the most part it serves blandly virtuous ends, such as private correspondence, public discourse, and legal commerce.¹ Clean living sells few stories, however, and buys still fewer votes, so reporters and politicians tend to focus on the Internet's salacious side. They dwell especially on pornography and gambling, both of which mix big money with powerful temptations. In the eyes of overeager regulators, however, Internet gambling presents something even more shocking than sex: the threat that entrenched gambling monopolies, nurtured and sometimes even run by government officials, might face new competition.

This paper describes the powerful demand for Internet gambling, analyzes the forces arrayed against it, and argues against its prohibition. Attempts to outlaw Internet gambling will inevitably fail. The very architecture of the Internet will frustrate prohibitionists, while consumer demand for Internet gambling and the states' demand for tax revenue will create enormous political pressures for legalization.

Public deliberation and government action will determine whether legalized Internet gambling comes slowly and painfully or quickly and cleanly. All facts indicate, however, that sooner or later Americans will legally gamble over the Internet. We should welcome this inevitability. The legalization of Internet gambling will have several beneficial policy impacts, and, as the Founders recognized, our right to peaceably dispose of our property includes the right to gamble. Lawmakers therefore can neither effectively stop Internet gambling nor justify their attempts to do so.

Consumer Demand for Internet Gambling

Americans love to gamble. At least 56 percent of Americans gambled in 1995.² It was estimated that Americans would wager more than \$600 billion in 1998--nearly \$2,400 for every man, woman, and child.³ About \$100 billion of that sum would go toward illegal bets on professional and college sports, evidence that Americans already pay little heed to anti-gambling laws.⁴ Having already embraced traditional games of chance, Americans will almost certainly extend a warm welcome to Internet gambling, legal or not.

The Internet offers cheap and easy access to a variety of gambling services, bringing competition to an industry that has long operated under highly restrictive licensing practices. Thanks to the Internet, gamblers no longer have to fly to Las Vegas to play the slots, drive to the nearest authorized track to play the horses, or even walk to the corner store to play the state lotto. Consumers can now play those and other games at home via the many Internet sites--well over 100 and growing--that offer gambling services.⁵

Americans have already shown that they support the nascent Internet gambling industry. Analysts calculate that of the \$1 billion in revenues that Internet gambling generated in 1997, about \$600 million came from the United States. Online casinos will have worldwide revenues of some \$7.9 billion by the year 2001, \$3.5 billion of it coming from U.S. consumers.⁶

Because the Internet offers bettors instant access to overseas gambling sites and relative safety from prosecution, online gambling will grow regardless of what lawmakers and prudes want. Futility, however, seldom bars bad public policy. So it remains quite uncertain how quickly consumers will enjoy legal Internet access to new gaming services.

The Prohibitionist Lobby

A variety of political forces pushes for a ban on Internet gambling. Left-wing activists have shown no interest in defending consumers' rights to assemble and speak on the Internet about gambling. And conservatives, while nominally in favor of free markets, make notable exceptions for activities that, like gambling, smack too much of the pursuit of happiness. Since neither Democrats nor Republicans will defend Internet gambling as a matter of principle, lobbyists have rushed into the vacuum.

A number of powerful lobbies have financial reasons to favor a ban on Internet gambling. The established, offline gambling industry has huge sunk and overhead costs that nimble new competitors might prevent it from recovering. The incumbent industry also brings very deep pockets to the political process; it contributed nearly \$7 million to candidates in the 1995-96 elections.⁷ Lobbyists for the offline gambling industry do not openly demand the prohibition of Internet gambling. They have, however, objected that Internet gambling unfairly escapes heavy regulation⁸ and have already demonstrated their power to shape legislation banning Internet competition.⁹

State and municipal authorities, having grown fond of nurturing and taxing local gambling, can easily see that Internet gambling might put their cash cows out to pasture. In 1996 state authorities alone collected \$3 billion in taxes from casinos and other licensed private gambling operations.¹⁰ Because of their lottery monopolies, which in 1996 sold \$43 billion worth of tickets (up 12 percent from 1995)¹¹ and earned revenues of \$14 billion,¹² state authorities have a direct stake in preventing citizens from shopping for better odds on the Internet. After all, state and local officials collect \$0.00 from Internet gambling operations.

Even religious groups may have a conflict of interest when it comes to opposing Internet gambling. Charitable games raked in \$2.5 billion in 1995, a 3.4 percent share of the legal gambling market.¹³ Whether or not Internet gambling represents a moral scourge, it certainly represents a competitive threat to church bingo games and the like. It bears noting, given the fervor with which some self-appointed moral guardians attack gambling, that few Americans regard gambling as immoral.¹⁴ A 1993 survey found that only 25 percent of those who did not gamble cited moral or religious reasons.¹⁵

Political Efforts to Ban Internet Gambling

Both the U.S. House and Senate have recently considered bills to prohibit Internet gambling. Although they differ in their details and may well change as they work through the legislative process, any of the proposed bills would, if signed into law, impose draconian, unjust, and unenforceable restrictions on Internet gambling.¹⁶ Sen. Jon Kyl (R-Ariz.), sponsor of the Senate bill, summed up how many U.S. politicians regard Internet gambling (and, undoubtedly, much else) when he said, "I don't believe it can be regulated, so we have to prohibit it."¹⁷

That existing laws cover Internet gambling makes the rage for new legislation all the more perverse. Several federal statutes plainly outlaw the business of Internet gambling, though the paucity of relevant case law makes their application to individual amateur bettors uncertain.¹⁸ The current version of the Federal Interstate Wire Act (the Wire Act) prohibits using interstate communications to run a gambling business.¹⁹ The Organized Crime Control Act of 1970 similarly makes it a federal crime to engage in a gambling business that is illegal under state law.²⁰ The federal Travel Act,²¹ as read broadly by the courts, criminalizes all interstate communications²² that attempt to

facilitate the distribution of gambling proceeds.²³ Still other federal laws may apply to Internet gambling.²⁴ Federal law enforcement agents thus lack not the authority but the will to go after Internet gambling.

The Justice Department has admitted that federal law already prohibits transmitting gambling information via the Internet but confesses that enforcing the law "isn't one of our priorities."²⁵ Even Senator Kyl's office admits that he "has the view that it is already against the law to gamble on the Internet."²⁶ Given that courts have hardly had a chance to apply existing laws to Internet gaming, why would Congress rush to pass new and potentially unnecessary legislation?

A close look at recent legislative proposals suggests that, by invoking the supposed need to address the horrors of Internet gambling, Congress aims to expand federal power over both currently legal gambling activities and the Internet as a whole. Enforcing the proposed statutes would require law enforcement officials to engage in detailed, constant, and intrusive monitoring of citizens' Internet use. That would wreak havoc on the Internet and our civil liberties while doing little to inhibit Internet gambling.

The Kyl Bill

Senator Kyl's Internet Gambling Prohibition Act of 1997 initially banned every sort of online commercial contest, everywhere in the United States, for everyone involved.²⁷ That blanket prohibition stirred up a swarm of lobbyists,²⁸ however, and Kyl amended the bill. As passed by the Senate in 1998,²⁹ Kyl's bill included a loophole for certain sectors of the incumbent gambling industry, such as state lotteries and intrastate parimutuel activities, when conducted by parties licensed under state or federal law.³⁰ Another loophole exempted widely popular fantasy sport leagues from prosecution.³¹ Apart from those concessions to special interests, Kyl's bill continued to subject Internet gambling to a blanket ban.³² The Internet Gambling Prohibition Act failed to make it to the president's desk in 1998, but Kyl has vowed to renew his fight in the 106th Congress.³³

Kyl presented his bill as merely an update of the Wire Act, a federal statute that already regulates wagering over the wires. In fact, however, Kyl targeted Internet gambling for new and special penalties. His bill would subject amateur bettors to federal liability for gambling,³⁴ whereas the Wire Act applies only to people

"engaged in the business of betting or wagering."³⁵ Phone in your picks to the office football pool and rest easy. E-mail them in and, under Kyl's bill, you would face as much as \$500 in fines and three months in jail.³⁶ Even the Department of Justice criticized Kyl's discriminatory treatment of Internet gambling, noting that lawmakers may find it "hard to explain why conduct that is not a federal crime in the physical world suddenly becomes subject to federal sanction when committed in cyberspace."³⁷

Kyl's bill would also, unlike the Wire Act, make interstate gambling a federal crime, even when carried on between states that have legalized the games in question.³⁸ The Wire Act exempts from prosecution bets transmitted between two states, or a state and a foreign country, so long as both jurisdictions permit such betting.³⁹ The Wire Act rightly keeps the federal government out of locally legal business, whereas Kyl's bill would create a whole new class of federal crimes.

Kyl's bill reaches beyond the Internet--and even interstate communications--to interfere with matters better left to state and local authorities. Its coverage includes "any information service" that "uses a public communication infrastructure" to "enable computer access by multiple users to a computer server."⁴⁰ Kyl's bill would thus cover e-mail merely sent across town. Given that many office e-mail systems rely on outside service providers, it might even cover e-mail sent across the hall! The Wire Act that Kyl claims to take as his model modestly, and properly, limits its scope to transmissions "in interstate or foreign commerce."⁴¹

The Goodlatte-LoBiondo Bill

Although it shares the name and the professed aims of Senator Kyl's bill, the Internet Gambling Prohibition Act of 1997 that Reps. Robert Goodlatte (R-Va.) and Frank A. LoBiondo (R-N.J.) introduced in the House differs from the Senate bill in some important respects.⁴² Whereas Kyl's bill targets only Internet users, the Goodlatte-LoBiondo bill would expand federal law to reach all individual amateur bettors, online or off.⁴³ It would make it a federal crime to telephone a neighbor and casually bet a six-pack on the big game. Together, the two bills thus offer a Hobson's choice between unjust inconsistency and unjust breadth.

The Goodlatte-LoBiondo bill would require an interactive computer service provider, once given mere notice by law enforcement agents, to discontinue furnishing any

facility that "is being used or will be used for the purpose of transmitting or receiving gambling information" in violation of law.⁴⁴ As discussed in the next section, the architecture of the Internet renders this provision utterly impractical. Even if it were enforceable, the Goodlatte-LoBiondo bill would make Internet communications less economical, less efficient, and less secure.

The Inevitable Failure of Prohibition

Several factors will frustrate attempts to prohibit Internet gambling. This section discusses three of them:

- First, Internet technology renders prohibition futile. The Internet's inherently open architecture already hobbles law enforcement officials, and relentless technological innovation ensures that they will only fall further and further behind.
- Second, as an international network, the Internet offers an instant detour around merely domestic prohibitions. Principles of national sovereignty will prevent the United States from forcing other countries to ban Internet gambling, and it takes only one safe harbor abroad to ensure that U.S. citizens can gamble over the Internet.
- Third, consumer demand for Internet gambling and the states' demand for tax revenue will create enormous political pressure for legalization. The law enforcement community, which has until recently enjoyed the media spotlight, will quickly find its calls for prohibition drowned out by those and other political forces.

Internet Technology Renders Prohibition Futile

The very architecture of the Internet renders gambling prohibition futile. Even the Department of Justice admits that traditional attacks on interstate gambling "may not be technically feasible or appropriate with regard to Internet transmissions."⁴⁵ In contrast to telephone communications, which typically travel over circuit-switched networks, Internet communications use packet switching.⁴⁶ Each Internet message gets broken into discrete packets, which travel over various and unpredictable routes until received and reassembled at the message's destination. In other words, sending a message over the Internet is a bit like writing a letter, chopping it up, and mailing each

piece separately to the same address. The recipient can piece it together, but anyone snooping on your correspondence has a tougher go of it.

Understanding Internet communications as akin to the postal system clarifies why prohibition of Internet gambling will not work. Imagine telling the U.S. Postal Service that it must henceforth crack down on all letters conveying information used in illegal gambling. It would rightly object that it already has its hands full just delivering the mail and that it lacks the equipment and personnel to snoop through every letter. Furthermore, it cannot always tell which messages relate to illegal activities. People use "bet" and "wager" in everyday conversations, whereas gamblers often speak in code. Finally, customers of the mail service would strongly object to having the Postal Service paw through their correspondence.

Prohibitionists could not expect the Postal Service to simply stop delivering mail to and from certain addresses associated with illegal gambling. The Postal Service would again object to the burdens of implementing such a program, and citizens would again object to law enforcement officials' spying on private correspondence. More important, trying to cut off mail to certain addresses would utterly fail to stop gambling: gamblers would rely on post office boxes--which they could change at a moment's notice--and drop off outgoing correspondence with no return address.

All of those considerations apply with equal or greater force to Internet gambling. The high volume of traffic alone ensures that Internet service providers would find it impossible to discriminate between illicit gaming information and other Internet traffic.⁴⁷ It is easier to encrypt messages, to change addresses, and to send and receive messages anonymously over the Internet than through the postal system.⁴⁸ The inherently private nature of the Internet would also stymie prohibitionists. In contrast to the quasi-public and monolithic postal system, the Internet relies on thousands of separate and wholly private service providers to carry out its deliveries. All of them would stridently object to the burdens of enforcing a ban on Internet traffic. More than a few would simply refuse to cooperate.

Does that sound like a pessimistic account? To the contrary, it merely describes the current situation. As technological innovation continues to drive the development of Internet communications, law enforcement officials will fall further and further behind the tricks used by illegal gamblers.

Given the technological constraints, prohibiting Internet gambling plainly will not work as intended. As an unintended side effect, however, prohibition would sorely compromise the cost, efficiency, and security of Internet communications. In criticizing recent legislative proposals to outlaw the consumption of Internet gambling services, the Department of Justice observed that "this would likely require the backbone provider to filter messages by examining the content of traffic flowing across its network in a way that may have serious economic and societal consequences for Internet usage generally."⁴⁹ We would never accept the cost--in money, time, or privacy--of authorizing the post office to open every letter in a futile crusade against gambling. Internet users will hardly allow their network to suffer a similar fate. Given the inevitable failure of technical fixes, legalizing Internet gambling offers the only viable solution.

Internet Gambling Can Escape Domestic Prohibitions

Outlawing Internet gaming services domestically will simply push the business overseas. Federal law enforcement agents admit that they cannot stop overseas gaming operations. "International Internet gambling? We can't do anything about it," Department of Justice spokesman John Russell said. "That's the bottom line."⁵⁰ Even Kyl has confessed that "this would be a very difficult kind of activity to regulate because we don't have jurisdiction over the people abroad who are doing it."⁵¹

Both practical and legal considerations ensure that no domestic ban on Internet gambling will have an international reach. Because the Internet provides instant access to overseas sites, to be effective, any domestic prohibition on gaming services will have to cover the entire planet. American law enforcement agents can--and recently did--arrest local citizens accused of running Internet gambling businesses,⁵² but smart operators will quickly learn to set up abroad and stay there.⁵³

Gaming services can find ample shelter overseas. A growing number of countries, including Australia, New Zealand, Antigua, and Costa Rica, have decided to legalize and license Internet gaming services.⁵⁴ Principles of international law, which protect each country's sovereignty, bar the United States from extraditing its citizens merely for violating domestic anti-gambling laws.⁵⁵ Furthermore, the Sixth Amendment of the Constitution's Bill of Rights, because it guarantees criminal defendants the right to confront their accusers, prohibits the prosecution of those who

remain overseas while operating Internet gambling sites.⁵⁶ Law enforcement officials in the United States can therefore neither arrest nor sentence anyone who offers Internet gambling services from a safe harbor abroad.

Even if through international negotiations U.S. authorities managed to export a domestic ban on Internet gambling, that sort of foreign trade carries too high a price. As the Department of Justice observed in its critique of the Kyl bill, "If we request that foreign countries investigate, on our behalf, conduct that is legal in the foreign state, we must be prepared to receive and act upon foreign requests for assistance when the conduct complained of is legal, or even constitutionally protected, in the United States."⁵⁷ That threat looms all too large, given that most foreign states regulate speech in ways forbidden by the First Amendment.

Political Demand for Internet Gambling

As discussed above, consumers have already demonstrated a huge demand for Internet gambling. Soon, though, the prohibitionists will have more than angry voters to worry about. Law enforcement agents have seized the media spotlight by telling scary stories and demanding new powers to crush Internet gambling. As the futility of prohibition becomes more and more evident, however, cooler heads in state revenue departments will begin to see Internet gambling as a huge new cash cow. Prohibition merely ensures that Internet gamblers will ship their money to places like Antigua, New Zealand, and Australia. State governors and legislatures will soon demand a share of that bounty. The same political forces that have led to the widespread legalization of lottery, casino, and riverboat gambling will eventually favor the legalization of Internet gambling.⁵⁸

Indeed, the trend toward the legalization of Internet gambling has already started. When he introduced his bill banning Internet gambling, Senator Kyl proclaimed, "Gambling erodes values of hard work, sacrifice, and personal responsibility."⁵⁹ He nonetheless amended his bill to ensure that the incumbent gambling industry would remain free to exploit the Internet (even while would-be competitors remained shut out). Kyl's generosity attracted the attention of the Department of Justice, which noted that "the numerous exceptions for parimutuel wagering would expand the scope of permissible parimutuel activities beyond what is currently permitted by existing law."⁶⁰ As Internet gambling grows and spreads, both in its officially sanctioned legal forms and in its unstoppable illegal

ones, so too will the power of its lobbyists to wear down prohibitionists.

Notwithstanding lawmakers' apocalyptic tales to the contrary, legalized Internet gambling will come as no great shock. Representative Goodlatte defended his bill to prohibit Internet gambling with the claim that existing laws "have been turned on their head" by the Internet because "no longer do people have to leave the comfort of their homes" to access casinos.⁶¹ In fact, however, nine states already allow their citizens to access professional gaming services at home via telecommunications devices.⁶² Far from revolutionizing American culture, legalized Internet gambling will merely extend current social and technological trends.

The Benefits of Internet Gambling

For the reasons set forth above, attempts to prohibit Internet gambling will inevitably fail and give way to legalization. Futility, however, hardly suffices to bar bad public policy. It thus bears noting that the legalization of Internet gambling offers a number of benefits.

Internet gambling will encourage the private sector to develop network capacity and commerce. Just as real-world casinos have competed to build innovative and appealing environments, so too will Internet gaming services compete to offer the flashiest graphics and most sophisticated user interfaces. That competition will result in broader bandwidth and better software for all sorts of Internet applications.

Critics of real-world casinos fault them for luring consumers into windowless caverns far from the real world, with money traps at every turn and free-flowing booze.⁶³ Some gambling analysts even claim that casinos, tracks, and other real-world sites rely on giving gamblers a place to socialize, creating little communities that console losers and--for a price--administer to the lonely.⁶⁴ Regardless of the validity of such criticisms, they certainly do not apply to Internet gambling. To the contrary, consumers who log on from home computers will find it impossible to escape yelling kids, barking dogs, and all the other distractions of the real world. Internet gambling thus offers a more wholesome environment than its real-world counterpart.

Gamblers deserve all the benefits that other consumers of entertainment services enjoy--including the benefits of

a competitive marketplace. By giving consumers cheap and easy access to a variety of gaming opportunities, the Internet will bring competition to an industry that has too long enjoyed the shelter of highly restrictive licensing practices. Freeing the gambling market will help to ensure that only the most honest and generous casinos succeed in drawing bettors' business.

Gamblers also deserve the same legal protections that other consumers enjoy. Prohibition will not cut off access to Internet gambling; it will, however, cut off access to the courts. Internet gamblers, like other consumers, will undoubtedly suffer fraud, breach of contract, and other legal wrongs from time to time. Prohibition ensures that Internet gamblers, like people involved in the drug trade, will have no recourse to legal remedies.⁶⁵ Prohibiting Internet gambling will not make it inaccessible, whereas legalizing it will put the benefits of increased competition within the rule of law.

On the Regulation of Internet Gambling

For the reasons set forth above, we should both recognize and celebrate that legalization will trump the prohibition of Internet gambling. But regulators will no doubt remain worried. What role will they have in the brave new world of Internet gambling? Playing off that worry, proponents of a ban on Internet gambling have argued that, if prohibition will not work, then neither will any scheme of regulation.⁶⁶ Such an argument fundamentally misunderstands a basic principle of governance: if they offer greater benefits than burdens, regulations can succeed even where prohibition fails.⁶⁷

The comparative advantage of limited regulation over prohibition explains why people do not illegally shoot craps in Las Vegas alleys. In the case of Internet gambling, the benefits of winning an official stamp of approval might convince an online casino to submit to regulation,⁶⁸ even if that same casino could easily flout a total ban on its business. Exactly how much regulation will the Internet gambling industry tolerate? In all likelihood, not very much; for the reasons set forth above, providers and consumers of Internet gambling services will find it relatively easy to escape unduly burdensome regulations.

It may well turn out that Internet gambling tolerates only such simple and general rules as those that common law stipulates for property, contracts, and torts. That

would still constitute regulation of a sort. Those basic principles already suffice to make regular many other types of commerce, after all, and would probably suffice for the rest were commerce more free.⁶⁹ Politicians and bureaucrats might not regard it as "regulation" to treat Internet gambling as an ordinary business, but their preferred solution--detailed and particular rules enforced by specialized administrative bodies--would arguably do more to make Internet gambling subject to rent seeking and industry capture than it would to make it regular. At any rate, such statist "irregulation" has little chance of affecting Internet gambling.

The Right to Gamble, Online and Off

Friends of liberty argue convincingly that the right to peaceably dispose of one's property includes the right to gamble. Although utterly sound in philosophical terms, such an argument will almost certainly fail to affect public policy. Lawmakers typically care more about practices than principles. They will thus comfortably ban Internet gambling on the assumption that history has demonstrated the legitimacy of prohibiting, or at least heavily regulating, games of chance.

Of course, history alone could never defeat the moral argument for the right to gamble. Somewhat surprisingly, however, history does not even support lawmakers who would infringe on that right. Gambling in fact played a major role in the personal and political lives of the Founders of the United States. The infamous Stamp Act, which triggered the shot at Concord "heard round the world," infuriated colonists by taxing playing cards and dice.⁷⁰ Thomas Jefferson, while drafting the Declaration of Independence, relaxed by gambling on backgammon, cards, and bingo.⁷¹ Jefferson later declared the lottery preferable to conventional means of raising government revenue on grounds that it is "a tax laid on the willing only."⁷²

Benjamin Franklin--using his era's most advanced technology--printed a good portion of the colonies' playing cards.⁷³ George Washington regularly bet on horses, gambled in card games, and bought lottery tickets.⁷⁴ Washington also managed public lotteries, as did Franklin and John Hancock.⁷⁵ Lotteries even helped to pay for the first home of the U.S. Congress,⁷⁶ as well as for public buildings throughout the new U.S. capital.⁷⁷

Clearly, the Founders embraced gambling as part of their inalienable right to "the Pursuit of Happiness."

The historical record should give pause even to lawmakers willing to ignore the moral argument against interfering with the right to gamble. How could any modern politician justify stripping the American people of rights that the Founders fought for, won, and exercised? Certainly, the advent of Internet gambling is no excuse for ignoring honorable historical precedents.

Conclusion

Pundits have described the Internet, typically in overblown prose, as a powerful tool for decentralizing political power and advancing human liberty.⁷⁸ Whether or not the Internet will live up to such hyperbole remains to be seen. True, the Internet has frustrated censors and brought worlds of information to our fingertips. But it has never fought against the combined forces of big money, political power, and moral rhetoric--not, at least, until Internet gambling began to compete with entrenched, real-world, public and private gambling interests.

Gambling presents the Internet with the greatest test it has yet faced, but it will probably prevail. Its prohibitionist opponents must not only pass legislation banning Internet gambling (a relatively easy task), but enforce it (a nearly impossible one). Sooner or later, as the futility of prohibition sinks in, as consumers demand the benefits of competition in gambling services, and as states tire of seeing potential tax revenues flow to foreign jurisdictions, Americans will enjoy legal Internet gambling.

The legalization of Internet gambling will advance vital public policy goals. It will reaffirm the values, so dear to the Founders, of individual liberty, property rights, and the pursuit of happiness. And it will establish the Internet as a bona fide technology of freedom.

Notes

1. See Mary Meeker and Sharon Pearson, The Internet Retailing Report (New York: Morgan Stanley, 1997), chap. 5, <<http://www.ms.com/misc/inetRetail.html>>, for a discussion of the relative popularity of Web sites and of various uses of the Web.

2. Kevin Heubusch, "Taking Chances on Casinos," American Demographics, May 1997, <http://www.marketingtools.com/Publications/AD/97_ad/9705_ad/AD970530.htm>, quoting Roper Starch Worldwide Survey.

3. Steven Crist, "All Bets Are Off," Sports Illustrated, January 26, 1998, p. 85. Note that this sum represents what American gamblers risked on their bets ("handle" to gambling businesses) rather than what they lost (gambling businesses' gross revenues).

4. Ibid. It bears noting that this represents an estimate of illegal bets on professional and college sports alone; other types of illegal bets, such as unlicensed poker games, are not included in the estimate.

5. Allison Flatt, "Overview of Internet Gambling," Staff briefing on Internet gambling prepared for the National Gambling Impact Study Commission, May 13, 1998, p. 2, <<http://www.ngisc.gov/meetings/may2198/flatt.pdf>>, counted over 90 casinos, 39 lotteries, 8 bingo games, 53 sports books, and various dog- and horse-racing sites as of May 1998. For general discussions of the scope and operation of offshore gambling sites, see Crist, p. 85; Mary Ann Akers, "On-Line Betting Makes Some Rich, Others Edgy," Washington Times, January 27, 1998, p. A1; and Brett Pulley, "With Technology, Island Bookies Skirt U.S. Law," New York Times, January 31, 1998, p. A1.

6. Sebastian Sinclair, Casino Gambling and the Internet (New York: Christiansen/Cummings Associates, 1998), p. 8, estimates that in 1997 worldwide Internet casino revenues reached \$1,090.1 million and that revenues from the combined U.S. and Canadian market reached \$603.5 million.

7. Those contributions have, moreover, been on a sharp upward trend. In the 1991-92 elections, the gambling industry gave \$1.7 million to candidates. Peter H. Stone, "Upping the Ante," National Journal, June 6, 1998, p. 1289.

8. "We cannot support it without tough regulation," said Frank Fahrenkopf, president of the American Gaming Association, of Internet gambling. Quoted in Tony Batt, "Study Panel to Address Internet Gaming," Las Vegas Review-Journal, May 20, 1998, p. D1. Batt reports that "Fahrenkopf and other industry supporters prefer not to dwell on the competitive threat posed by Internet gaming. Instead they argue that the absence of regulation could lead to a major scandal that could taint the entire industry." It would hardly prove surprising if the gambling industry privately cared a great deal about the competitive threat posed by Internet gaming, however. The incumbent industry clearly profits when licensing practices bar new competition, but admitting that fact would harm public relations.

9. Stone reports that the American Gaming Association successfully lobbied Sen. Jon Kyl (R-Ariz.) to change legislation that might have adversely affected its members' ability to advertise online. Stone, p. 1292.

10. Sinclair, p. 14.

11. "Present Legal Realities," International Gaming and Wagering Business, August 1997, p. S55.

12. Sinclair, p. 14.

13. Heubusch, quoting Roper Starch Worldwide survey.

14. In refusing to condemn gambling, many no doubt follow the official doctrines of their religions. For example, "[G]ames of chance (card games, etc.) or wagers are not in themselves contrary to justice. They become morally unacceptable when they deprive someone of what is necessary to provide for his needs and those of others." Catechism of the Catholic Church (The Vatican: Paulist Press, 1994), p. 580. "Brian Rusche, director of the Joint Religious Legislative Coalition, a mainstream lobbying group, said, 'When we scanned [Christian and Jewish] religious writings, we couldn't find an absolute moral prohibition' against gambling." Martha Sawyer Allen, "Gambling Doesn't Seem Quite Right, But Is It Wrong?" (Minneapolis) Star Tribune, October 18, 1997, p. 7B.

15. Heubusch.

16. See, for example, Adam Thierer, "Will Rain Fall on Their Field of Dreams?" Washington Times, April 22, 1998, p. A17, criticizing bills that would outlaw online fantasy sports leagues.

17. Quoted in Crist, p. 85.

18. For arguments that existing federal laws outlaw many types of Internet gambling, see generally Seth Gorman and Antony Loo, "Comment: Blackjack or Bust: Can U.S. Law Stop Internet Gambling?" Loyola Los Angeles Entertainment Law Journal 16 (1996): 667; and Nicholas Robbins, "Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet," Boston University Journal of Science and Technology Law 2 (1996): 7.

19. "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . shall be fined under this title or

imprisoned not more than two years, or both." 18 U.S.C.S. § 1084 (1998).

20. "(a) Whoever conducts . . . an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both. (b) As used in this section-- (1) 'illegal gambling business' means a gambling business which--(i) is a violation of the law of a State . . . in which it is conducted; (ii) involves five or more persons who conduct . . . all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2000 in any single day." 18 U.S.C.S. § 1955 (1998).

21. "(a) Whoever . . . uses the mail or any facility in interstate or foreign commerce, with intent to--(1) distribute the proceeds of any unlawful activity . . . (3)(A) . . . shall be fined under this title, imprisoned not more than 5 years, or both. . . . (b) As used in this section (i) 'unlawful activity' means (1) any business enterprise involving gambling. . . ." 18 U.S.C.S. § 1952 (1998).

22. See United States v. Lockretis, 385 F.2d 487, 489 (7th Cir. 1967), holding that the Wire Act prohibits "use of an interstate wire facility with intent to promote illegal activity, and it is well within the power of Congress to so insure the integrity of channels of interstate commerce by such a prohibition," vacated on other grounds, 390 U.S. 338 (1967), rev'd on other grounds, 398 F.2d 64 (7th Cir. 1968); and United States v. Smith, 209 F. Supp. 907, 916 (E.D. Ill. 1962), holding that "Congress intended that communication facilities in interstate commerce should be included within the scope of the prohibitions of the statute. . . ." See also United States v. Villano, 529 F.2d 1046, 1052 (10th Cir. 1976); United States v. Kelly, 395 F.2d 727, 729 (2d Cir. 1968); and United States v. Borgese, 235 F. Supp. 286, 298 (S.D.N.Y. 1964).

23. The plain language of 18 U.S.C.S. § 1952(a)(1) suggests that the Travel Act should apply to individual amateur Internet bettors. Internet gamblers certainly attempt to "distribute the proceeds" of gambling, both by putting money on bets and by collecting their wins. True, a line of cases has interpreted 18 U.S.C.S. § 1952(a)(3) to not render individual amateur bettors liable under the Travel Act. See Rewis v. U.S., 418 F.2d 1218, 1221 (5th Cir. 1969), holding that interstate bettors do not "promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of any unlawful activity" under § 1952(a)(3), reversed on other grounds,

401 U.S. 808, 811 (1971), stating in dicta that "it cannot be said, with certainty sufficient to justify a criminal conviction, that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act." But those cases do not address the liability of interstate amateur bettors under § 1952(a)(1), leaving the question unresolved.

24. See Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C.S. § 1953(a) (1998): "(a) Whoever . . . knowingly carries or sends in interstate or foreign commerce any record . . . or other device . . . for use in (1) bookmaking; or (2) wagering pools with respect to a sporting event; or (3) in a numbers . . . or similar game shall be fined under this title or imprisoned for not more than five years or both." But see § 1953(b) of the same act, which exempts from the reach of § 1953 (a) transmissions of materials the use of which is legal under applicable state laws. See also Professional and Amateur Sports Protection Act, 28 U.S.C.S. § 3702 (1998): "It shall be unlawful for . . . (2) a person to sponsor, operate, advertise, or promote . . . [any] wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate" But see § 3704 of the same act, which exempts from the reach of § 3702 various preexisting gambling schemes and any parimutuel animal racing or jai alai game.

25. John Russell, Justice Department spokesman, quoted in Mark Camps, "Web Sports Gambling a Sure Bet, for Now," San Francisco Chronicle, May 29, 1997, p. B3.

26. Unnamed spokesman from Kyl's office, quoted in Thomas Moore, "Internet Gambling Receives New Blow," Las Vegas Business Press, February 3, 1997, p. 18. Elsewhere, Kyl himself said, "Currently, nonsports betting is interpreted as legal." Sen. Jon Kyl of Arizona, Introductory Remarks on the Internet Gambling Prohibition Act of 1997, Congressional Record 143 (March 19, 1997): S2560.

27. Internet Gambling Prohibition Act of 1997, S. 474 (reported in the Senate), 105th Cong., 1st sess. (1997), § 1085(b)(1): "It shall be unlawful for a person to place, receive, or otherwise make a bet or wager, via the Internet. . . ." See also § 1085(c)(1): "It shall be unlawful for a person engaged in the business of betting or wagering to engage in that business through the Internet. . . ." and § 1081 (6), defining "bets or wagers" as "the staking or risking by any person of something of value (other than a de minimus amount) upon the outcome of a contest, sporting event, or game of chance. . . ."

28. For a description of the lobbying power of the licensed gambling industry and its influence on Kyl, see generally Stone.

29. See Internet Gambling Prohibition Act of 1998, Kyl (and Bryan) Amendment No. 3266, to Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1999, S. 2260 (hereinafter Internet Gambling Prohibition Act of 1998, Amendment to S. 2260), 105th Cong., 2d sess., 1998.

30. See *ibid.* at § 1085(e)(1)(A), which exempts from prohibition any "otherwise lawful bet or wager that is placed, received, or otherwise made wholly intrastate for a State lottery or racing or parimutuel activity, or a multi-State lottery" under certain conditions, and § 1085(e)(1)(B), which similarly exempts Indian games conducted on Indian lands.

31. See Bryan Amendment No. 3267, to Internet Gambling Prohibition Act of 1998, Amendment to S. 2260, 105th Cong., 2d sess., 1998, which changes § 1081(6)(D) in the act's definition of "bets or wagers" to exclude reasonable administrative fees paid to participate in fantasy sport or rotisserie leagues.

32. Internet Gambling Prohibition Act of 1998, Amendment to S. 2260, § 1085(b) makes it "unlawful for a person knowingly to use the Internet or any other interactive computer service--(A) to place, receive, or otherwise make a bet or wager with any person; or (B) to send, receive, or invite information [intentionally] assisting in the placing of a bet or wager. . . ." Section 1085(c) subjects gambling businesses to a similarly broad ban.

33. "Congressional Update," Fort Worth Star-Telegram, October 22, 1998, p. 8.

34. The Department of Justice complained that Kyl's bill would unduly expand federal law. "In our view, extending federal jurisdiction to cover mere bettors would be both unnecessary and unwise." L. Anthony Sutin, acting assistant attorney general, U.S. Department of Justice, Office of Legislative Affairs, letter to Sen. Patrick J. Leahy, May 28, 1998, p. 3; copy on file with the author.

35. 18 U.S.C.S. § 1084(a) (1998).

36. Internet Gambling Prohibition Act of 1998, Amendment to S. 2260, § 1085(b).

37. Sutin, p. 1.

38. Internet Gambling Prohibition Act of 1998, Amendment to S. 2260, § 1085(b)-(c), generally prohibits participating in or conducting the business of Internet gambling; section 1085(e) exempts from prosecution only intrastate wagers on state lotteries or licensed parimutuel activities, or wagers by persons physically located on duly licensed Indian gaming sites.

39. 18 U.S.C.S. § 1084(b): "Nothing in this section shall be construed to prevent . . . the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal."

40. See the definition of "interactive computer service" in Internet Gambling Prohibition Act of 1998, Amendment to S. 2260, § 1085(a)(3).

41. 18 U.S.C.S. § 1084(a).

42. Internet Gambling Prohibition Act of 1997, H.R. 2380 (introduced in the House), 105th Cong., 1st sess., 1997.

43. Ibid. at § 1084 (a)(2) levies criminal penalties on anyone who "knowingly uses a communications facility for the transmission or receipt in interstate or foreign commerce of bets or wagers. . . ."

44. Ibid. at § 1084(c)(2). Kyl's Internet Gambling Prohibition Act of 1998, Amendment to S. 2260, contains similar provisions, though they require interactive computer services to terminate the accounts only of customers who have violated the act (§ 1085(d)(2)(C)(i)) and in all other instances directs courts to consider the technical and economic burdens that the demands of enforcing the act may impose on service providers. See § 1085(d)(2)(C)(ii).

45. Sutin, p. 7.

46. See generally Barry M. Leiner et al., "A Brief History of the Internet," <<http://info.isoc.org/internet/history/brief.html>>; and Kevin Werbach, "Digital Tornado: The Internet and Telecommunications Policy," Federal Communications Commission, Office of Policy and Plans Working Paper Series 29, March 1997, <http://www.fcc.gov/Bureaus/OPP/working_papers/>, pp. 16-18.

47. Internet backbone providers "may not be able to differentiate gambling-related transmissions that are being sent by a specific user of a particular computer system from other transmissions sent by other users of that system." Sutin, p. 7.

48. Even though a casual gambler may find such evasive techniques too complicated to bother with at present, Internet gambling businesses have strong incentives to master them--and to develop and disseminate evasive techniques that consumers will find easy to use.

49. Sutin, p. 7.

50. Quoted in Crist, p. 85.

51. Ted Koppel, "The Odds of Stopping Gambling on the Internet," ABC Nightline, April 7, 1998, excerpt of videotaped statement by Kyl. Kyl continued his analysis by proposing a solution to this admitted problem: "So the way that our legislation is enforced is to simply pull the plug at the point of entry into the United States." This reveals a fundamental misunderstanding of how the Internet works, however. Thanks to packet switching, Internet traffic from a given country can enter the United States from any number of overseas sites. To bar entry of Internet traffic from, say, Antigua, Kyl would have to bar all international communications.

52. Professor I. Nelson Rose of Whittier Law School, an expert on gambling law, offered this trenchant analysis of why the Department of Justice finally decided to apply existing federal laws against Internet gambling:

Federal prosecutors had been criticized by state attorneys general and Congress for not doing anything about Internet gaming. Now, by striking at only six companies (and the safest six to go after from a law-enforcement point-of-view), the U.S. Attorney General has shown that her U.S. Attorneys and FBI agents can put the fear of God into the entire industry--using laws already on the books.

Perhaps this was the secret agenda behind these headline-grabbing arrests. The DOJ has made it clear that it does not support proposals being considered by Congress, like the Kyl bill, which would make it a federal crime to make a bet on the Internet. The DOJ has stated that it does not want to go after first-time \$5 bettors.

Now, the DOJ has shown that the new laws are unnecessary--at least for the easy cases.

I. Nelson Rose, "Internet Operators Arrested," Gaming Industry Litigation Reporter, April 1998, p. 9.

53. See Benjamin Weiser, "14 Are Charged with Taking Sports Bets over the Internet," New York Times, March 5, 1998, p. A1. Weiser recounts the first federal crackdown on Internet gambling operators and quotes Anthony Cabot, a gambling law expert in Las Vegas, Nevada. "You're never going to see a shutdown," Cabot said. "[T]hose who are in the industry are going to take much greater precaution in hiding their ownership if they are U.S. citizens."

54. For a discussion of the plans of Australia and New Zealand to legalize and regulate Internet gambling, see Crist, p. 92. Crist, p. 88, also discusses Antigua's licensing practices; and Akers, pp. A1, A8, discusses practices in Costa Rica.

55. Gyneth McAllister, expeditor of international investments for the Antiguan government, commented, "The issue for the United States should not be whether Internet gambling should exist in Antigua or not. Antigua is a sovereign state and isn't their concern. We are no banana republic." Quoted in Crist, p. 88.

56. The Sixth Amendment to the Constitution of the United States reads: "In criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

57. Sutin, p. 5. Emphasis added.

58. "Internet gambling presents . . . an entrepreneurial opportunity for the state itself." David Post, "Betting on Cyberspace," The Recorder, June 5, 1997, p. 4.

59. Kyl, Introductory Remarks on the Internet Gambling Prohibition Act of 1997.

60. Sutin, p. 6.

61. Rep. Robert Goodlatte of Virginia, Statement upon introduction of the Internet Gambling Prohibition Act of 1997, Congressional Record 143 (September 3, 1997): E1633.

62. In some cases, the relevant state laws authorize only gambling via telephone, leaving it ambiguous as to whether or not Internet communications using telephone lines would

qualify. See Regs., Conn. State Agencies § 12-571-11b(a) (1997), authorizing telephone account wagering; Md. Bus. Reg. Code Ann. § 11-805(a) (1997) (same); Rev. Stat. Neb. Ann. § 2-1239 (1997) (same); NY Consol. Law Service, Racing & Wagering § 1012 (1997) (same); Oh. Admin. Code Ann. 3769-3-32(A) (Anderson 1997) (same); 4 Penn. Stat. § 325.218(b) (1997) (same). Other state statutes speak more broadly, leaving ample room for Internet gambling. See Kent. Rev. Stat. § 230.378(1) (Michie 1996), which authorizes telephone account wagering, together with § 230.210(17) (Michie 1996), which defines telephone account wagering to include communication by any electronic medium; Nev. Rev. Stat. Ann. 465.090-94 (1997), which allows gambling via telecommunications when conducted pursuant to license; and Ore. Rev. Stat. § 462.015(2) (1997), which authorizes electronic media account wagering.

63. Casinos offer a "hypnotic mix of light, noise, alcohol and day-into-night, night-into-day indulgence, to infuse in the gamblers and vacationers a hazy, dazy sense of letting go." David Spanier, Welcome to the Pleasuredome: Inside Las Vegas (Reno: University of Nevada Press, 1992), p. 14. Casinos "design facilities so patrons lose track of time, . . . treating their customers as if they were rats in a cage." Bernie Horn, communications director of the National Coalition Against Legalized Gambling, Testimony before the National Gambling Impact Study Commission, Washington, August 20, 1997, <<http://www.ngisc.gov/meetings/aug2097/aug20p17.html>>.

64. "[T]he social rewards of gambling . . . include companionship, empathy, and social interaction. As gamblers become socialized into a gaming mileu [sic], their contacts with nongamblers often become less meaningful, and they find that other settings lack the social rewards offered by the gambling world. In order to remain part of that social world, individuals must continue their gambling." John D. Rosecrance, Gambling without Guilt: The Legitimation of an American Pastime (Pacific Grove, Calif.: Brooks/Cole, 1988), p. 163.

65. If drugs were legalized, "consumers would have access to the legal system to protect them against fraud and negligence on the part of the producer. Producers would no longer have to resort to violence to enforce contracts and ensure payments." Mark Thornton, The Economics of Prohibition (Salt Lake City: University of Utah Press, 1991), p. 151.

66. See, for example, Sen. Jon Kyl's analysis of the issue: "On one hand, they say no way can you control this,

and then they turn around and say regulate it. I think they're being disingenuous." Quoted in Joe Salkowski, "Betting on the Horses," April 15, 1998, <<http://dispatches.azstarnet.com/features/1998/0415.htm>>.

67. An example of how gambling regulators must adapt to market conditions is given by Rosecrance: "Although both Nevada and Atlantic City adopted stringent restrictions to keep illegal operators from being licensed, regulations were relaxed when it appeared that former bookies and illicit casino managers were the only ones capable of running a profitable gaming operation" (p. 165).

68. "[T]he state is well-positioned [with regard to Internet gambling] to take a piece of the action as a trusted certifying authority, reassuring consumers that activities are conducted honestly." Post, p. 4. That by no means justifies a state monopoly, however. "There is no necessary reason that the state has to supply this certification--why couldn't Microsoft? or Citibank?" Ibid.

69. See generally Richard A. Epstein, Simple Rules for a Complex World (Cambridge, Mass.: Harvard University Press, 1995); Friedrich A. Hayek, Law, Legislation and Liberty, vol. 1 (Chicago: University of Chicago Press, 1973); and Friedrich A. Hayek, The Road to Serfdom (Chicago: University of Chicago Press, 1944), pp. 72-87.

70. Stephen Longstreet, Win or Lose: A Social History of Gambling in America (Indianapolis: Bobbs-Merrill, 1977), p. 31.

71. Ibid., p. 37.

72. Thomas Jefferson, The Writings of Thomas Jefferson, ed. Andrew A. Lipscomb (Washington: Thomas Jefferson Memorial Association, 1903), vol. 17, p. 450.

73. William N. Thompson, Legalized Gambling: A Reference Handbook (Santa Barbara, Calif.: ABC-CLIO, 1994), p. 64.

74. Longstreet, p. 31.

75. John Samuel Ezell, Fortune's Merry Wheel: The Lottery in America (Cambridge, Mass.: Harvard University Press, 1960), p. 272.

76. Ibid., p. 108.

77. Ibid., p. 102.

78. For example, John Perry Barlow has said, "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather." John Perry Barlow, "A Declaration of the Independence of Cyberspace," February 8, 1996, <http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration>.

Published by the Cato Institute, Policy Analysis is a regular series evaluating government policies and offering proposals for reform. Nothing in Policy Analysis should be construed as necessarily reflecting the views of the Cato Institute or as an attempt to aid or hinder the passage of any bill before congress. Contact the Cato Institute for reprint permission. Additional copies of Policy Analysis are \$6.00 each (\$3.00 each for five or more). To order, or for a complete listing of available studies, write the Cato Institute, 1000 Massachusetts Ave., N.W., Washington, D.C. 20001, call toll free 1-800-767-1241 (noon - 9 p.m. eastern time), fax (202) 842-3490, or visit our website at www.cato.org.