

TESTIMONY

of

Tom W. Bell
Director
Telecommunications & Technology Studies
Cato Institute
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regarding

Internet Gambling: Prohibition v. Legalization

Thank you for inviting me to testify today on the relative merits of prohibiting Internet gambling versus legalizing it. The issue certainly deserves our careful consideration--but not because public debate will determine whether Internet gambling gets prohibited or legalized. No amount of debate will do that. Ultimately, it does not even matter whether legislators and law enforcement officials try to outlaw Internet gambling. Public deliberation and government action will determine whether legalized Internet gambling comes slowly and painfully or quickly and cleanly--hardly a trivial matter. All facts indicate, however, that sooner or later Americans will legally gamble over the Internet.

My testimony today will describe some of the factors that will frustrate attempts to prohibit Internet gambling and compel its eventual legalization. I will focus on three factors:

- First, Internet technology renders prohibition futile. The Internet's inherently open architecture already hobbles law enforcement officials, while

relentless technological innovation ensures that they will only fall farther and farther behind.

- Second, as an international network, the Internet offers an instant detour around merely domestic prohibitions. Principles of national sovereignty will prevent the U.S. from forcing other countries to enforce a ban on 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 these and other political forces.

Since the hard, cold facts about the inevitable failure of prohibition will undoubtedly depress some decent and well-intentioned people, I will leaven my analysis with some comforting words about Internet gambling. A dispassionate account reveals that Internet gambling offers several benefits:

- Internet gambling will drive network development;
- It will provide a more wholesome environment than real-world casinos; and
- It will benefit consumers by increasing competition in gambling services.

Before launching into the details of why legalization will trump the prohibition of Internet gambling, and why that outcome should cause no great alarm, allow me to clear away a preliminary objection. Some proponents of a ban on Internet gambling argue that if prohibition will not work then neither will any scheme of regulation.¹ Such an argument fundamentally misunderstands a basic principle of governance, however: Regulations can succeed even where

¹ 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." Joe Salkowski, *Betting on the Horses--Racing Lobbyists Jockey Past Proposed Internet Gambling Ban*, ARIZONA DAILY STAR, May 15, 1998, available at < <http://dispatches.azstarnet.com/features/1998/0415.htm> > (quoting Sen. Kyl).

prohibition fails if they offer benefits that exceed their burdens. That is 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, 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--but only practical experience can settle that question.

Internet Technology Renders Prohibition Futile

The very architecture of the Internet renders gambling prohibition futile. In contrast to telephone communications, which typically travel over circuit switched networks, Internet communications use packet switching. 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 corresponding with someone by 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 gambling prohibition just will not work. Imagine telling the 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. It would furthermore note that it could not always tell which messages relate to illegal activities. People use "bet" and "wager" in everyday conversations whereas gamblers often speak in code. Meanwhile, customers of the mail service will strongly object to having the postal service paw through their correspondence.

Nor can prohibitionists expect the postal service to simply stop delivering mail to and from certain addresses associated with illegal gambling. The postal service will again object to the burdens of implementing such a program. Citizens will again object to law enforcement officials

spying on private correspondence. More importantly, though, trying to cut off certain addresses will simply fail to stop gambling. Gamblers will rely on P.O. boxes, which they can change at a moment's notice, and simply drop off outgoing correspondence with no return address.

All these considerations apply with equal or greater force to Internet gambling. Compared to the postal system, the Internet makes it easier to encrypt messages, to change addresses, and to send and receive messages anonymously. Internet service providers would thus find it impossible to discriminate between illicit gaming information and other Internet traffic. Furthermore, 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 farther and farther behind illegal gamblers.

Given these 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. 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."² Even Sen. Jon Kyl has confessed that "this would be a very

² Steven Crist, *All Bets are Off*, SPORTS ILLUSTRATED, Jan. 26, 1998, at 85.

difficult kind of activity to regulate because we don't have jurisdiction over the people abroad who are doing it."³

Both practical and legal barriers prevent any domestic ban on Internet gambling from having international effect. Because the Internet provides instant access to overseas sites, any domestic prohibition on the offer of gaming services will have to cover the whole planet to work. American law enforcement agents can--and recently did--arrest local citizens accused of running Internet gambling businesses, but smart operators will quickly learn to set up abroad and stay there.⁴

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.⁵ 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.⁶ Furthermore, the Sixth Amendment of the Constitution's Bill of Rights prohibits the criminal prosecution of those who remain overseas while operating Internet gambling sites.⁷ Law enforcement officials in the United States can thus neither arrest nor sentence anyone who offers Internet gambling services from a safe harbor abroad.

³ 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." *Id.* This reveals a fundamental misunderstanding of how the Internet works, however. Thanks to packet switching, Internet traffic from a given country can enter the U.S. from any number of overseas sites. To bar entry of Internet traffic from, say, Antigua, Kyl would have to bar all international communications.

⁴ See, Benjamin Weiser, *14 Are Charged With Taking Sports Bets Over the Internet*, NEW YORK TIMES, March 5, 1998, at A1. Weiser recounts the first federal crack-down 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." *Id.* at A1, A29.

⁵ See, Crist, *All Bets are Off*, at 92 (discussing plans of Australia and New Zealand to legalize and regulate Internet gambling); *id.* at 88 (discussing Antigua's licensing practices); Mary Ann Akers, *On-line betting makes some rich, others edgy*, WASHINGTON TIMES, Jan. 27, 1998, at A1, A8 (discussing practices in Costa Rica).

⁶ Gyneth McAllister, Expeditor of International Investments for the Antigua 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, All Bets are Off*, at 88.

⁷ U.S. Const., amend. VI: "In criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

The Powerful Demand for Internet Gambling

Americans love to gamble. Having already embraced traditional games of chance, they will almost certainly extend a warm welcome to Internet gambling. At least 56% of Americans gambled in 1995.⁸ Few Americans regard it as immoral; A 1993 survey found that only 25% of non-gamblers cited moral or religious reasons.⁹ By current estimates, Americans will wager more than \$600 billion in 1998--nearly \$2,400 for every man, woman, and child.¹⁰ About \$100 billion of that sum will go toward illegal bets, demonstrating that Americans already pay little heed to anti-gambling laws.¹¹

Regardless of its legality, 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.¹² 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.¹³ Because the Internet offers bettors instant access to overseas gambling sites and relative safety from prosecution, online gambling will grow regardless of what prohibitionists want.

Soon, though, the prohibitionists will have more than consumer demand 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 assures 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

⁸ Kevin Heubusch, *Taking Chances on Casinos*, AMERICAN DEMOGRAPHICS (May 1997), available at <http://www.marketingtools.com/Publications/AD/97_ad/9705_ad/AD970530.htm> (quoting Roper Starch Worldwide Inc. survey).

⁹ Heubusch, *Taking Chances on Casinos*, (quoting Roper Starch Worldwide Inc. survey).

¹⁰ Crist, *All Bets are Off*, at 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).

¹¹ *Id.*

¹² SEBASTIAN SINCLAIR, *CASINO GAMBLING AND THE INTERNET* 8 (Christiansen/Cummings Associates, Inc., 1998) (estimating 1997 worldwide Internet casino revenues of \$1,090.1 million, and combined U.S. and Canada market of \$603.5 million).

¹³ *Id.*

that have led to the widespread legalization of lottery, casino, and riverboat gambling will thus eventually lead to the legalization of Internet gambling.

Indeed, this trend towards the legalization of Internet gambling has already started. Initially, Sen. Kyl's Internet Gambling Prohibition Act of 1997 banned every sort of online commercial contest, everywhere in the United States, for everyone involved.¹⁴ Facing a storm of objections, he recently drafted an amendment to the bill that would allow a variety of types of online gambling, such as interstate off-track bet pooling and intrastate parimutuel and lottery bets.¹⁵ Rep. Bob Goodlatte once defended his own bill to prohibit Internet gambling with the claim that existing laws "have been turned on their head" by the Internet because "[n]o longer do people have to leave the comfort of their homes" to access casinos.¹⁶ In fact, however, nine states already allow their citizens to access professional gaming services at home via telecommunications devices.¹⁷ Legalized Internet gambling, far from revolutionizing American culture, will come as a natural extension of current social and technological trends.

The Benefits of Internet Gambling

I have set forth a number of reasons why attempts to prohibit Internet gambling will inevitably fail and give way to legalization. Mere futility hardly suffices to bar bad public policy, however. Allow me, then, to adduce some reasons why we should welcome the legalization of Internet gambling.

Internet gambling will encourage the private sector to develop network capacity and commerce. Just as real-world casinos have competed to build the most innovative and appealing environments, so too will Internet gaming services compete to offer the flashiest graphics and most sophisticated user interfaces. That competition will, as a

¹⁴ Internet Gambling Prohibition Act of 1997, S. 474 (Reported in Senate), 105th Cong., 1st Sess. (1997).

¹⁵ See, Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong., 1st Sess. (1997) (Draft amendment in the nature of a substitute, on file with the author). See also, Salkowski, *Betting on the Horses--Racing Lobbyists Jockey Past Proposed Internet Gambling Ban*.

¹⁶ 143 CONGRESSIONAL RECORD E1633 (Sept. 3, 1997) (statement of Rep. Goodlatte upon introduction of Internet Gambling Prohibition Act of 1997).

¹⁷ SINCLAIR, CASINO GAMBLING AND THE INTERNET 8, 21 n. 3.

nice side-benefit, 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 gambling traps at every turn and free-flowing booze. 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 phone calls, barking dogs, and all the other distractions of the real world. Internet gambling thus offers a more wholesome environment than its real-world counterpart.

Lastly, we should never forget that gamblers deserve all the benefits that other consumers of entertainment services enjoy--including the benefits of competition. By giving consumers cheap and easy access to a variety of gaming opportunities, the Internet will bring competition to an industry that has long enjoyed the shelter of highly restrictive licensing practices. Gamblers will 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 already play these and other games at home via the many Internet web sites--over 50 and growing--that offer gambling services.¹⁸ Prohibiting Internet gambling will not make it inaccessible, whereas legalizing it will put the benefits of increased competition within the rule of law.

¹⁸ Crist, *All Bets are Off*, at 85 ("In '96 only two on-line sites handled sports bets; now there are at least 50."). See also, Mary Ann Akers, *On-line betting makes some rich, others edgy*, WASHINGTON TIMES, Jan. 27, 1998, at A1 (discussing generally the scope and operation of offshore gambling sites); Brett Pulley, *With Technology, Island Bookies Skirt U.S. Law*, NEW YORK TIMES, Jan. 31, 1998, at A1 (same).

¹⁸ 18 U.S.C.A. § 1084 (1997).