

**Outline of Testimony
of
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**Before the House Judiciary Committee
Pennsylvania General Assembly
Public Hearing on Internet Gambling**

July 8, 1998

Two bills concerning Internet gambling have recently been introduced into the General Assembly and are being considered by this Committee. One (HR 2271) would make it a summary offense for individuals to “participate in on-line gambling over the Internet or through an interactive computer service.” A second (HR 2438) would make it a misdemeanor for those “engaged in the business of betting or wagering” to use any computer “for the transmission or receipt of bets or wagers,” if (1) the person placing the bet or wager, (2) the computer receiving the bet or wager, or (3) any communication facility used in transmitting the bet or wager, is located in the Commonwealth of Pennsylvania.

For purposes of this discussion, I will accept one major premise underlying these bills: that it is a legitimate and worthwhile function of this Legislature to seek ways to control, or prohibit, Internet gambling, because of the corrosive effect of gambling (and, by extension, Internet gambling) on the moral fabric of the community, the need to protect citizens from squandering their money on fraudulent operations run by unscrupulous operators, or the need to protect the Commonwealth’s lottery revenues from competition. Reasonable people might disagree with that proposition, viewing these activities as purely private, consensual conduct that are “none of the Commonwealth’s business.” I will spare you my own views on this question, for I assume that you did not ask me here for the purpose of examining the general question of whether gambling activities should be regulated at all. Instead, I will simply assume that these bills have a worthwhile purpose — namely, eliminating (or at least reducing the incidence of) Internet gambling — and my focus here will be on whether they can be effective in achieving that purpose (and at what cost) in the rather special circumstances of the Internet.

I would urge the legislature to act *most* cautiously on this legislation. Neither of these bills is likely to have any material impact on the amount of gambling available to Pennsylvania residents over the Internet, because enforcement of the statutes’ provisions will prove extremely difficult and/or intrusive on the privacy of Pennsylvanians. Paradoxically, to the extent the bills *are* effective, they are probably unconstitutional.

Enforcement: Costs of Detecting Violators. HR 2271 and HR 2438 approach enforcement from two different directions. HR 2271 criminalizes the activities of *individual bettors*; the act of placing an online wager is the heart of the offense. HR 2438, on the other

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hand, criminalizes activities only of those “engaged in the *business* of betting or wagering”; only operators of online gambling businesses, and not the individual customers of those businesses, can be prosecuted for violating this latter statute.

Each bill poses difficult enforcement dilemmas for law enforcement officials. It is by no means clear that the provisions of HR 2271 can be enforced at anything resembling an acceptable cost. Note the extraordinarily wide sweep of the bill’s prohibitions; anyone, for example, using her office electronic mail system to enter the company “betting pool” for the NCAA basketball tournament would be violating this statute. It is, on the one hand, troublesome that the General Assembly is considering legislation that would make criminals out of several million otherwise perfectly law-abiding Pennsylvania residents; *current* law, it should be emphasized, does *not* criminalize *individual* gambling activities in this way.² Because the prohibited activities can easily take place “privately” — sitting alone at one’s computer at home, or at work — it will, like other statutes attempting to control private activities of this kind (*e.g.*, prohibitions on prostitution, or on alcohol or drug consumption), necessarily involve substantial costs if it is to have any chance of actually reducing the incidence of the targeted behavior. The residents of the Commonwealth may be willing to bear these costs because of the significance they attribute to attempts to control these activities — although one certainly wonders whether that is the case with respect to gambling activities of the kind dealt with here.

To illustrate these enforcement difficulties, suppose that I spent several hours this morning before coming to the State House at my office computer (at Temple University Law School in Philadelphia) wagering at one of the available Internet gambling sites; let’s call this site “www.webcasino.com.”³ The purpose of HR 2271 is to deter precisely this conduct. In order for this deterrence to be effective, law enforcement officials must be able to detect violations such as mine; how will that detection be accomplished? How will prosecutors ever gain access to the information that individuals have violated these statutory provisions?

It is *not*, let me stress, *impossible* for them to do so. There may indeed be a record of the fact that I visited this gambling site. Many web browsers, for example, store a record of the web sites that users have visited; so on my hard drive, at this moment, there may well be a record of my having visited the webcasino.com site. Similarly, my Internet Service Provider — in this case, Temple University, the entity through whose computer I connect to the Internet — has the

²HR 2271 thus represents a substantial modification to the Commonwealth’s treatment of gambling activities. The current gambling prohibition in Pennsylvania, 18 Pa.C.S. §5513, prohibits the manufacture or sale of gambling devices, the solicitation of others for the purpose of gambling, and the provision of premises to be used for gambling. It does not criminalize the activity of the individual bettors themselves.

³That is, in fact, not a very far-fetched scenario. My son and I are active participants in a “fantasy baseball” league hosted on the Internet (at <http://espn.sportszone.com>). HR 2271 defines online gambling as “the making, placing, or receipt via computer of any bet or wager of money or other thing of value, made in exchange for a chance to win a prize, stake, or other consideration or thing of value dependent upon the result of any game, contest, or any other event, the outcome of which is uncertain or a matter of change, whether such game, contest or event occurs or is to occur inside or outside the limits of this Commonwealth.” Given that prizes are indeed awarded to the best-performing teams, my activities this morning may indeed have violated the terms of HR 2271.

capability to store a record of all Internet sites that I have visited.

But reliance on these records for enforcement of this bill is troubling, for two reasons. *First*, the intrusiveness on the personal privacy of Pennsylvania Internet users should not be underestimated. Many people are deeply concerned about the privacy of their online movements, for reasons having nothing to do with a desire to gamble or engage in any unlawful activity whatsoever; passage of this legislation would appear to give them additional grounds to be concerned.

Second, these detection mechanisms can — relatively easily — be evaded. For example, it is trivially easy — three mouseclicks, to be precise — for me to disable that feature of my web browser that stores on my hard disk this record of the sites I have visited. And as far as the record stored by my Internet Service Provider is concerned, while evasion takes a tad more ingenuity and familiarity with computers, it is hardly difficult to ensure that my Service Provider's records do not reveal my movements through cyberspace. I can, for example, go to one of the widely available “anonymizer” sites that assign me an encrypted “alias” as I move from website to website, effectively eliminating any record that this particular user (“DPOST” from the Temple University Internet server) took any particular steps on the Internet. Additionally, there is a widely-available tool available on the Internet — known as the “Telnet” protocol — that allows users to access remote Internet computers (i.e., computers other than the ones provided by the user's service provider) and to use that remote computer as the user's “host” computer for an Internet session. Again, were I to utilize this technique, my service provider would have no record of the sites that I visited after I “switched” to the other host.⁴

Enforcement: The Need for “Extraterritorial” Jurisdiction

HR 2438 would appear to escape these enforcement difficulties. Unlike HR 2271, HR 2438 applies only to those “engaged in the business of betting or wagering”; *individual users* accessing gambling sites from within Pennsylvania thus would not be covered by these prohibitions. Those “in the business of betting,” of course, generally *advertise* their services as a means of attracting customers; detecting violations of HR 2438 would likely be relatively straightforward.⁵

But while the costs of detecting violations of HR 2438 may be minimal, it has other, serious enforcement problems of its own. Recall that HR 2438 defines the new criminal offense of “us[ing] a computer or other communication facility for the transmission or receipt of bets or wagers . . . when [1] the person placing the bet or wager, [2] the computer receiving the bet or wager, or [3] any communication facility used in transmitting the bet or wager, is located in this

⁴It might be suggested that these evasion techniques can currently be used only by “sophisticated” computer users. That is undoubtedly true; but it is a virtual certainty that public awareness of these tools, and their availability to “unsophisticated” users, will increase precisely to the extent that activities like Internet gambling — i.e. activities that people, for whatever complicated reasons, desire to engage in — are outlawed.

⁵It would hardly be difficult for someone in the Attorney General's office, for example, to compile a regularly-updated list of Internet sites at which bets and wagers are being placed in violation of this statute.

Commonwealth.” Return to the www.webcasino.com example. Under [2], if the webcasino “server” is located within Pennsylvania, it will be relatively straightforward to institute an action against the operators under the terms of HR 2438. That will, one can reasonably suppose, push such operations to other jurisdictions outside Pennsylvania — many of which, in the United States or elsewhere, permit gambling operations of this kind.

That effect may be precisely what is intended by this bill; that is, if the purpose of this legislation is to eliminate those machines that provide gambling services from within Pennsylvania, it may well accomplish that goal. But one should not harbor the misapprehension that this will have the slightest impact on the accessibility of Internet gambling to Pennsylvania residents. A critical design feature of the Internet — indeed, its most revolutionary feature — is that physical location is *irrelevant*, in the sense that network servers and online addressees are equally accessible from everywhere. Any Web site in any odd corner of the network can be accessed with essentially equivalent transmission speed and message quality from any other corner of the network. The effects of whatever information is available at a given site are felt simultaneously and equally in all jurisdictions, independent of their “distance” from one another.⁶

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“The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have ‘addresses,’ they are logical addresses on the network rather than geographic addresses in real space.”

American Library Association v. Pataki, 969 F. Supp 160, ___ (SDNY 1997).

Cyberspace “does not merely weaken the significance of physical location, it destroys it in three distinct senses. First, events in cyberspace take place ‘everywhere if anywhere, and hence no place in particular;’ they do not cross geographical boundaries (in the way that, say, environmental pollution crosses geographical boundaries), they ignore the existence of the boundaries altogether. The cost and speed of message transmission from one point on the net to any other is entirely independent of physical location: messages can be transmitted between physical locations without any distance- or location-based degradation, decay, or delay. There are no physical cues or barriers that might otherwise keep geographically remote places and people separate from one another, no territorially based boundaries at all. A message posted to an Internet server in, say, Japan arrives no more quickly at another Internet server in Japan than it does at a server located anywhere on the globe, it looks no different when retrieved from a server down the street than from a server across the Pacific, and it is, simultaneously and instantaneously, accessible to persons accessing the Internet from anywhere. Second, while we may be able to sustain a useful fiction that, in some sense at least, the location of the physical server on Japanese soil gives Japan some special interest in the content of the communication posted there, many events and transactions have no recognizable tie at all to physical places but take place only on the network itself, which, by its very nature, is not a localizable phenomenon. Usenet discussion groups, for example, consist of continuously changing collections of messages that are routed from one network to another across the global net, with no centralized location at all. They exist, in effect, everywhere, nowhere in particular, and only on the Net. And third, the net enables simultaneous transactions between large numbers of people who do not and cannot know the physical location of the other party. One can meaningfully talk of the ‘location’ of events and transactions in cyberspace, but only in reference to a virtual space consisting of the ‘addresses’ of the machines between which messages and information are routed; this machine addressing system is entirely independent of the physical address or location of those machines”).

Internet servers outside the Commonwealth can thus be no less “conveniently” accessed by Pennsylvania Internet users than those within the Commonwealth. If the purpose of this legislation is to reduce the availability of Internet gambling sites to Pennsylvanians, HR 2438 is likely to be entirely ineffective, unless the provisions of this statute can be enforced “extraterritorially” — that is, against operators whose computers are located in *other* jurisdictions. The statutory language appears to contemplate such extraterritorial scope; by criminalizing the use of computers for the receipt of bets or wagers whenever the “person placing the bet or wager” is located in Pennsylvania, and when “any communication facility used in transmitting the bet or wager” is located in Pennsylvania, the statute would appear to apply to the www.webcasino.com site even if it is located in Nevada, or Belize.⁷

But any attempt by Pennsylvania to enforce its law against individuals in other jurisdictions is likely to be deemed unconstitutional as a violation of the Commerce Clause. The Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside the State’s borders, whether or not the commerce has effects within the State.”⁸ One court — see *American Library Association et al v. Pataki*, 969 F. Supp. 160 (SDNY 1997) — struck down New York’s attempt to control the transmission of “indecent” material on the Internet on just these grounds, and a similar challenge to HR 2438 would likely prove effective as well.

It is, moreover, likely to prove unwise. The principle on which such an extraterritorial assertion of jurisdiction is based — that Pennsylvania has a legitimate interest in prosecuting those whose actions outside Pennsylvania have an “effect” inside Pennsylvania — may seem attractive in this context; Pennsylvania residents, however, are unlikely to find it attractive when it is applied in reverse, i.e., to activities undertaken by Pennsylvania residents from within Pennsylvania that contravene the law of some foreign State or nation.

David G. Post. “Governing Cyberspace.” 43 Wayne Law Review 155, 156-57 (1997)

⁷Indeed, given the current architecture of the Internet, it is virtually impossible for proprietors of gambling sites located in other jurisdictions to avoid violating the provisions of this statute even if they wanted to do so (short of ceasing operation entirely). The proprietors of www.webcasino.com cannot determine whether an individual bettor is located in Pennsylvania, nor can they avoid using some “communication facility” located in Pennsylvania. The Internet’s “packet switching” mode of operation is responsible for this inability to route messages “away from” Pennsylvania. Message handling protocols on the Internet subdivide individual messages — including messages to or from our hypothetical www.webcasino.com site — into smaller “packets” that are routed independently to their destination (where they are automatically reassembled). A single message may travel through several different pathways, bouncing from Internet node to Internet node, before it is reassembled at its destination. It is thus perfectly likely that a message from a user in Michigan to a web site in Singapore travels “through” Pennsylvania, i.e., utilizes one or more machines in Pennsylvania as intermediate transfer points. This routing is not in the control of the individual user.

⁸*Healy v. The Beer Institute*, 491 US 324, 336 (1989), citing *Edgar v. MITE*, 457 US 624, 642-43 (1982). See also *id.* (“A statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State”).

What is to be Done? Nothing — at least, nothing by the Pennsylvania General Assembly. If this problem is to be dealt with in a sensible manner, it will require national, or more likely international, action. Several bills have already been introduced in Congress to deal with Internet gambling, including one, the “Internet Gambling Prohibition Act of 1998,” introduced by Senator John Kyl, that has many of the features of HR 2438. That is a far more appropriate forum in which to deal with these issues.