S T A T E O F T E N N E S S E E
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Opinion No. 01-019

State Lottery - - Impact of Federal Indian Gaming Regulatory Act

QUESTIONS

1. If Tennessee had a lottery as set out in Senate Joint Resolution 1 (SJR 1), would an Indian tribe be able to conduct Class III gambling, or other gaming facilities, on Indian land in Tennessee?

2. If the answer to either question is yes, are there any alterations to SJR 1 which would prevent such facilities from being developed as a result of Tennessee's adoption of a state lottery.

3. Regarding paragraph 4 beginning "All other forms ... ", does this provision allow for multi-day annual events in addition to single day annual events?

4. Is there any method for further limiting the general classification 501(c)(3) to specifically designate charities and other public service organizations as distinct for the totality of a 501(c)(3)?

OPINIONS

1. It is possible that an Indian tribe could establish Class III or other types of gaming if Tennessee had a state lottery.

2. No, although Indian gaming would be restricted to the gaming that state law permits others to conduct.

3. SJR 1 does not define "annual event." Consequently, it appears to be a matter left to the General Assembly to determine once the proposed amendment becomes a part of the Constitution.

4. Specifically designating charities and other organizations in the amendment would likely run afoul of the United States Constitution's equal protection guarantees.

ANALYSIS

1. SJR 1 would allow the General Assembly to authorize a state lottery. The State would have to restrict the use of the lottery revenues to specified educational uses. SJR 1 expressly prohibits any other form of lottery except for the type described in the sections 3 and 4 of this opinion.

The Indian Gaming Regulatory Act (the Act or IGRA), 25 U.S.C. §§ 2701, *et seq.*, states that Indian tribes may establish Class I[1] gambling on Indian lands and have exclusive jurisdiction over it. Under the Act, Indian tribes may also establish Class II[2] and Class III gambling on Indian lands under certain conditions. A lottery would be Class III[3] gambling. In enacting IGRA, Congress found that Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. 25 U.S.C. § 2701(5).

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[1] Class I gambling means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with tribal ceremonies or celebrations. 25 U.S.C. § 2703(6).

[2] Class II gaming means

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only is such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include--

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(7)(a)-(B).

[3] Class III gaming is all forms of gaming that are not Class I or Class II gaming. 25 U.S.C. § 2703(8).

The Act makes Class III gambling activities lawful for Indian tribes on Indian lands if such activities meet specific statutory criteria,[4] including that the activity must be on Indian land in a state that permits such gaming for any purpose by any person, organization, or entity. 25 U.S.C. § 2710(d). To establish Class III gaming on Indian lands would require, at a minimum, (1) that there be an approved tribal ordinance authorizing Class III gaming; (2) that the gaming be located in a State that permits such gaming for any purpose by any person, organization or entity, and (3) that there be a compact entered into by the tribe and the state which is in effect. *Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546, 1552 (10th Cir. 1997).[5] To this Office's knowledge, there is no "Indian tribe" which holds "Indian land" in Tennessee. Thus, at this point, IGRA does not apply.

What type of Indian gaming, if any, could be established once Tennessee has a state lottery would depend on a detailed factual analysis of the proposed gaming. *See Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268 (D.C. Idaho 1994).[6] Under IGRA, the law and public policy of the state set the scope of permissible Class III gaming on tribal lands. *Coeur d'Alene Tribe*, 842 F. Supp. at 1276.

2. SJR1 expressly prohibits any lottery except the state lottery described and other lotteries, not associated with casinos, which are approved by the General Assembly under paragraph 3 of the amendment. In general, the more gambling that a state allows, the greater the possibility there is for Indian gaming under IGRA.

It should be noted that the constitutionality of amendments to SJR 1 at this stage of the amendment process is not clear. This Office has previously opined that during the first legislature's consideration of a resolution proposing a constitutional amendment, amendments to the resolution are permissible. *Op. Tenn. Atty. Gen*. U96-037 (April 22, 1996). Amendments to the proposed language of a constitutional amendment occurring during the second legislature's consideration present a more complicated issue — whether the language of the amendment can be changed at all given the prior approval by the previous legislature. Cases from other jurisdictions take two approaches: a strict compliance approach and a substantial compliance approach. *See Coleman v. Pross*, 246 S.W. 2d 613 (Va. 1978) (the "same precise proposal" must be approved each time); *McWhirter v. Bridges*, 155 S.W. 2d 897 (S.C. 1967) (exact wording may not be required); *Selzer v. Synhorst*, 113 N.W. 2d 724 (Iowa 1962) (the amendment must be passed both times "in the same form"); *State ex rel. Owen v. Donald*, 151 N.W. 331 (Wis. 1915) ("each of the two houses must agree to the precise proposal agreed to at the previous session").

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[4] "Indian tribe" and "Indian land" are defined terms under IGRA and contain criteria which an Indian group must meet to avail itself of the Act. Under IGRA "Indian tribe" refers to federally recognized Indian tribes, bands, nations or other Indian community with recognized powers of self-government.

[5] Judgment affirmed, 104 F.3d 1546 (10th Cir. 1997), certiorari denied, 522 U.S. 807 (1997).

[6] Judgment affirmed, 51 F.3d 876 (9th Cir. 1995), certiorari denied, 516 U.S. 916 (1995).

The only Tennessee authority on this issue is an 1851 House Judiciary report that says "after passing at one session of the Legislature, they [proposed amendments] cannot be amended at the next, for the reason that if amended, the propositions would not be the same . . . ." 4 Messages of the Governors of Tennessee, 451. This Office cannot, with any degree of certainty, predict which approach would be adopted by our state Supreme Court. Under either view, substantial changes at this stage of the process would not be constitutional.

3. SJR 1 allows the General Assembly by two-thirds vote to permit a lottery "for an annual event operated for the benefit of a 501(c)(3) organization located in this state...." SJR 1 does not define "annual event." "To the extent the constitution says nothing about the way certain matters are to be handled in the legislature...such matters are within the discretion of that governmental body." *Ashe v. Leech*, 653 S.W.2d 398, 401 (Tenn. 1983). Consequently, it appears to be a matter left to the General Assembly to determine, once the proposed amendment becomes a part of the Constitution.

4. Generally speaking, 26 U.S.C. § 501(c)(3) makes certain entities organized for religious, charitable, scientific, literary or educational purposes exempt from federal taxes. Specifically designating charities and other organizations in the amendment would be problematic because the Equal Protection Clause of the United States Constitution requires that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L. Ed. 989 (1920). Specifically selecting certain organizations to benefit from lotteries will likely run afoul of this requirement unless there is a rational basis for the selection made.

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