June 9, 1999

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

Thank you for the opportunity to present the views of the Department of Justice on S. 692, the "Internet Gambling Prohibition Act of 1999."

As you know, current law prohibits the use of the Internet to engage in gambling activities related to sports betting. Under 18 U.S.C. § 1084 it is illegal to use a wire communication facility to transmit in interstate or foreign commerce bets or wagers, or information assisting in the placement of bets or wagers, on any sporting event or contest. The Internet is a "wire communication facility," as defined in 18 U.S.C. § 1081. Indeed, even in those instances where the Internet travels over non-traditional communication facilities (i.e., microwave or satellite), the "wire communication facility" definition generally applies, because it includes facilities other than wire and cable that can aid in the transmission of data between "the points of origin and reception of such transmission."

We do recognize, however, that the Internet has allowed for new types of electronic gambling, including interactive games such as poker and blackjack, that may not clearly be included within the types of gambling currently made illegal by section 1084. As a result, we strongly support your efforts to amend federal gambling statutes to ensure that new types of gambling activities made possible by emerging technologies are prohibited.

That said, we also believe that any legislation concerning gambling activities should have three important characteristics. First, the legislation should treat physical activity and cyberactivity in the same way. If an activity is prohibited in the physical world but not on the Internet, then the Internet becomes a safe haven for that criminal activity. Similarly, conduct that is not a federal crime in the physical world should not be subject to federal criminal sanction when committed in cyberspace. Second, legislation should be technology-neutral. Legislation tied to a particular technology may quickly become obsolete and require further amendment. Last, it is critical that the law recognize that the Internet is different from prior modes of communication in that it is a multi-faceted communications medium that allows not only point-to-point transmission between two parties (like

the telephone), but also the widespread dissemination of information to a vast audience (like a newspaper). As a result, any prohibitions that are designed to prohibit criminal activity on the Internet must be carefully drafted to accomplish the legislation's objectives without stifling the growth of the Internet or chilling its use as a communication medium.

With these overarching principles in mind, the Department of Justice is troubled by the proposal in S. 692 to create a new section 1085 of title 18, United States Code, to address the legality of Internet gambling. We appreciate the efforts that have been made to address some of the concerns raised by the Department of Justice about S. 474, a bill introduced in the 105th Congress in the Senate to address Internet gambling. We believe, however, that if section 1085 is enacted it would substantially overlap and be inconsistent with existing federal gambling laws. We therefore strongly recommend that Congress address the objective of this legislation through amending existing gambling laws, rather than creating new laws that specifically govern the Internet. Indeed, the Department of Justice believes that an amendment to section 1084 of title 18 could satisfy many of the concerns addressed in S. 692, as well as ensure that the same laws apply to gambling businesses, whether they operate over the Internet, the telephone, or some other instrumentality of interstate commerce.

An amendment to section 1084 should address the following:

(1) to clarify that section 1084 applies to all betting or wagering (not merely betting or wagering on sports events) and includes the sending and receiving of bets and wagers over wireless communication facilities;

(2) to require interactive computer service providers to cooperate with law enforcement agencies in the same manner as is currently required of common carriers and to grant such providers the same shield from liability that is currently provided to common carriers; and

(3) to explain that section 1084 applies to those engaged in the business of betting or wagering who are located outside the territorial jurisdiction of the United States, when those individuals knowingly facilitate or aid in unlawful betting and wagering by sending or receiving a bet or wager, or information assisting in the placing of a bet or wager, from an individual located within the United States.

The following summarizes our suggestions for amending section 1084, both to cover Internet gambling explicitly and to eliminate possible ambiguities that currently exist in the law.

Some concern has been expressed that section 1084 does not include certain communication facilities, such as microwave or satellite. While we believe that these types of facilities are included within the definition of "wire communication

facility," we recommend that references to "wire communication facility" be replaced with "wire or wireless communication facility" to remove any doubt as to whether microwave or satellite facilities are covered by this section. In addition, a definition of "wireless communication facility" that includes microwave and satellite services should be placed in section 1081.

Another ambiguity can be eliminated from section 1084 through the inclusion of the words "or receipt" after "transmission" in subsections (a) and (b). This change would confirm the interpretation of many courts that section 1084 applies to those individuals in the business of betting or wagering who "receive" bets or wagers, or information assisting in the placing of bets or wagers, from others. See e.g., United States v. Pezzino, 535 F.2d 483, 484 (9th Cir.) (per curiam), cert. denied, 429 U.S. 839 (1976) (finding that section 1084 forbids "the use of interstate facilities for sending or receiving wagering information").

The addition of "receipt" to paragraphs 1084(a) and (b) would make it explicit that it is not only illegal for gambling businesses to send or receive bets or wagers, but it is also illegal for them to send or receive information assisting in the placing of bets or wagers. The Department of Justice believes that this clarification is necessary to ensure that federal gambling laws are read comprehensively. We realize, however, that the information provisions in section 1084 may need to be reviewed to ensure that the statute is constitutional, as well as consistent with other laws. We also believe that a definition of "information assisting the placement of bets or wagers" must be added to the statute. The Department of Justice is not proposing a specific definition for "information assisting the placement of bets or wagers" at this time, however, as we believe it prudent to await the Supreme Court's decision, expected later this month, in Greater New Orleans Broadcasting Ass'n v. United States, No. 98-387, a case that will likely affect the legality of restrictions on "commercial speech," including gambling advertising.

In addition, it is important that 1084(a), along with the exceptions in 1084(b), be expanded to include all forms of betting and wagering, not only betting and wagering on sports events. These changes would only affect those in the business of betting and wagering and would leave primary enforcement of gambling laws, including those that apply to end bettors, to the states.

Currently, section 1084(a) includes gambling activities that involve interstate or foreign commerce. However, we believe that it is necessary to expand this coverage to include the transmission or receipt of bets or wagers to or from U.S. residents and gambling businesses on the high seas or in other locations not covered by interstate or foreign commerce. We suggest revising section 1084(a) to include knowingly facilitating the transmission or receipt to or from an individual or gambling business located in the United States of bets or wagers, or information assisting in the placing of bets or wagers:

(1) in interstate or foreign commerce;

(2) within the special maritime and territorial jurisdiction of the United States; or

(3) any place outside the jurisdiction of any nation.

This amendment would make unlawful those actions taken outside the United States that knowingly aid or facilitate unlawful betting and wagering by sending or receiving a bet or wager, or information assisting in the placing of a bet or wager, from an individual located within the United States.

It is also important from an enforcement standpoint that Congress amend section 1084 to require interactive computer service providers, like the common carriers already subject to the statute, to remove or disable access to materials residing on their online sites when notified in writing by a law enforcement agency of a violation of the federal gambling laws. These providers, like the common carriers currently controlled by the section, would not be liable for the removal or disabling of materials if they do so in compliance with any notice received from a law enforcement agency. If an interactive computer service provider receives notice but is not the proper recipient of the notice, the provider should be required by the amended section 1084 to cooperate, as required by law, with law enforcement agencies to identify the person or persons who control the site. In addition, a definition of "interactive computer service provider" should be added to section 1081.

As we noted previously, the Department of Justice believes that amending section 1084 as proposed could address the concerns that led to the introduction of S. 692. At the same time, it would avoid creating overlapping and inconsistent federal gambling laws, which we believe would result if S. 692 were enacted in its current form. While it is difficult for the Department to accurately assess all of the potential legal problems with S. 692, we nonetheless offer comments that identify some of our specific concerns. We stress, however, that even if all of these concerns were addressed, the Department of Justice still would have reservations regarding the creation of section 1085. If, however, Congress chooses to enact section 1085 specifically to regulate Internet gambling, we strongly urge that our suggested revisions to section 1084 be made simultaneously to minimize the ambiguities and inconsistencies among the federal gambling statutes that will result from separate legislation addressing Internet gambling.

The Department of Justice's first concern with S. 692 is its exemption of certain forms of gambling from the ban on Internet gambling. Specifically, the Department of Justice opposes the exemptions for parimutuel wagering and fantasy sports leagues, because there is no legitimate reason why bets or wagers sent or received by gambling businesses on these activities should be exempted from the ban while bets and wagers on other activities are not. The Department of

Justice is especially troubled by the broad exemptions given to parimutuel wagering, which essentially would make legal on the Internet types of parimutuel wagering that are not legal in the physical world. The Department of Justice notes that S. 692 may incorrectly imply that the Interstate Horse Racing Act of 1978, 15 U.S.C. § 3001 et seq., allows for the legal transmission and receipt of interstate parimutuel bets or wagers. The Interstate Horse Racing Act does not allow for such gambling, and if a parimutuel wagering business currently transmits or receives interstate bets or wagers (as opposed to intrastate bets and wagers on the outcome of a race occurring in another state), it is violating federal gambling laws.

The Department of Justice is also of the opinion that there should be no special exemption for bets or wagers on fantasy sports leagues and contests, as we can think of no reason why bets or wagers on fantasy sports leagues placed or accepted by gambling businesses should be allowed on the Internet when bets or wagers on sporting events and games of chance are not. If activities related to fantasy sports leagues and contests fall within section 1085's definition of "bets and wagers," they should be prohibited on the Internet. If Congress intends by this provision to exempt activities related to fantasy sports leagues and contests, other than betting or wagering on such contests, we suggest that S. 692 be revised to permit these non-betting and wagering activities. However, we do urge Congress to craft carefully legislation to ensure that gambling on fantasy sports leagues and contests is not legalized on the Internet, when all other gambling is banned.

The Department of Justice's last comment relating to the exemption provisions of S. 692 is that the bill does not address the issue of Indian gaming. We are concerned that S. 692 would make illegal those gaming activities occurring entirely on Indian lands that are currently legal under the Indian Gaming Regulatory Act ("IGRA").

We have reviewed the definition of terms in S. 692 and found that the bill contains definitions that are different than those found in existing gambling statutes, expand the legality of certain types of gambling, raise constitutional concerns, or are circular or overly expansive. For example, the definition of "bets or wagers" would make the scope of section 1085 much broader than the scope of section 1084. Section 1084 currently only prohibits bets or wagers on sporting events or contests, and does not prohibit the various other forms of gambling (i.e., games of chance or contests of others) prohibited by proposed section 1085. In order for "bets or wagers" to have the same meaning in sections 1084 and 1085, a definition of "bets and wagers" should be placed in section 1081 and the references to sporting events or contests should be stricken from section 1084.

Another definition that conflicts with existing law is "gambling business," found in subsection (a)(4). For purposes of proposed section 1085, a "gambling business" is one that "involves 1 or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business, and . . . has been or remains

in substantially continuous operation for a period in excess of 10 days or has a gross revenue of $2,000 or more from such business during any 24-hour period." While the Department of Justice has no objection to this definition, we believe that the same definition of gambling business should govern sections 1084 and 1085. For consistency's sake, we suggest that this definition of "gambling business" be placed in section 1081 so that it is applicable to both sections 1084 and 1085 and that references to "business of betting or wagering" in 1084 be replaced with "gambling business."

An example of a definition that is circular is "closed-loop subscriber-based service," found in subsection (a)(2). The term is defined as "any information service or system that uses ... a device or combination of devices ... expressly authorized and operated in accordance with the laws of a State, exclusively for placing, receiving, or otherwise making a bet or wager described in subsection (f)(1)(B)." Subsection (f)(1)(B), in turn, defines such bets or wagers as those occurring on a closed-loop subscriber-based service. Thus, a "closed-loop subscriber-based service" is defined, in part, as a "closed-loop subscriber-based service."

Subsection (a)(5)(A) defines "information assisting in the placing of a bet or wager" generally to mean "information that is intended by the sender or recipient to be used by a person engaged in the business of betting or wagering to place, receive, or otherwise make a bet or wager." Subsection (b)(1)(B), in turn, prohibits persons engaged in a gambling business from using the Internet or any other interactive computer service to "send, receive, or invite information assisting in the placing of a bet or wager." As discussed above, the constitutionality of restrictions on commercial speech, including gambling advertising, might be affected by the Supreme Court in Greater New Orleans later this month. We recommend that Congress wait until the Court has issued its decision in Greater New Orleans before attempting to craft any new advertising restrictions relating to gambling. Moreover, section (a)(5)(B) would treat information relating to parimutuel wagering activities more favorably than information relating to other betting. We see no reason why parimutuel wagering should be given such a preference.

Subsection (b)(1)(A) would make it unlawful "for a person engaged in a gambling business to use the Internet or any other interactive computer service . . . to place, receive, or otherwise make a bet or wager." Subsection (a)(6), in turn, would define "interactive computer service" to mean:

> any information service, system, or access software provider that uses a public communication infrastructure or operates in interstate or foreign commerce to provide or enable access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.

This definition would appear to encompass "any information service, system, or access software provider that uses a public communication infrastructure," even if it does not "operate[] in interstate or foreign commerce to provide or enable access by multiple users to a computer server." This definition could include two computers that are networked to a single server that is not linked to the Internet or otherwise used in interstate or foreign commerce. Consequently, the prohibitions in subsection (b)(1)(A), which reference the broad definition, might give rise to constitutional challenges that application of the prohibitions in certain cases exceeds Congress's power under the Commerce Clause. See generally United States v. Lopez, 514 U.S. 549 (1995); see also United States v. Denalli, 73 F.3d 328, 330-31 (11th Cir.) (per curiam) (use of personal home computer unconnected to interstate phone lines does not necessarily affect interstate commerce), modified, 90 F.3d 444 (11th Cir. 1996). The risk of challenge, however, could readily be avoided by replacing the words "public communication infrastructure" with "channel or instrumentality of interstate or foreign commerce." The definition then should, for example, be satisfied by a showing that use of the interactive computer service in question entails use of telephone lines, which typically are instrumentalities of interstate commerce. See, e.g., United States v. Clayton, 108 F.3d 1114, 1117 (9th Cir. 1997). In addition, we are concerned that the second part of the definition relating to those services that operate in interstate or foreign commerce is too limiting and will exclude those services that operate on the high seas or in other locations not covered by interstate or foreign commerce.

The definition of "private network" in subsection (a)(10) is too expansive. The definition includes "a communications channel or channels, including voice or computer data transmission facilities, that use either . . . private dedicated lines; or . . . the public communications infrastructure, if the infrastructure is secured by means of the appropriate private communications technology to prevent unauthorized access." This definition arguably would make all of a common carrier's system a private network since common carriers have in place mechanisms to prevent unauthorized access to their system. For example, a common carrier that uses safeguards to insure that a telephone customer's conversation is private and not readily accessible would be operating a private network under this definition.

The Department of Justice also has identified certain subsections of the prohibitions section that raise several issues. For example, subsection (b)(1) should include an intent requirement if criminal penalties are to be imposed, a task which could be accomplished by placing "knowingly" after "person" and before "engaged." In addition, S. 692 generally criminalizes both the sending and receiving of bets by a person engaged in a gambling business, but the penalties section in subsection (b)(2)(A)(i) only provides for a fine of the greater of $20,000 or the "amount that such person received in bets or wagers." Under this section, a sender of bets or wagers could only be fined $20,000, while a receiver of bets or wagers potentially could pay a larger fine.

Another inconsistency is that subsection (b)(2)(B) states that an individual who engages in prohibited activities under the act shall be imprisoned "not more than 4 years," which is more than the two year penalty assessed for those who engage in prohibited gambling activities under section 1084. Also, subsection (b)(3) allows a court, upon conviction of a person under section 1085, to enter a permanent injunction enjoining that person from transmitting bets or wagers or information assisting in the placing of a bets or wagers, and labels such an injunction "an additional penalty." Permanent injunctions generally are not punitive in nature and should not be labeled as penalties. Last, we would note that the prohibitions section contains no provisions limiting prohibited activities to those activities which have a nexus with the United States. We are concerned that S. 692, as written, could raise extraterritorial jurisdiction issues.

The Department of Justice has determined that several sections of S. 692 establish legal standards for law enforcement agencies that are inconsistent with existing legal standards. Specifically, we have identified problems with subsection (d)(4)(B), "Disclaimer of Obligations, subsection (d)(2)(A), "Notice to Interactive Computer Service Providers," and subsection (d)(3)(D), "Notice and Ex Parte Orders." Each of these subsections cite to "orders" or "subpoenas" that are required before federal or state law enforcement agencies may act. Unfortunately, these sections improperly imply that a court order is needed in situations where it currently is not, or state that a subpoena is sufficient when a court order is actually needed. We believe that to be consistent with existing law, "as required by a notice of an order of a court" in subsection (d)(4)(B) and "upon receipt of a subpoena" in subsection (d)(2)(A) should be replaced with "as required by law." In addition, the phrase "for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the communications network of the service provider" in subsection (d)(3)(D) should be stricken and replaced with "except as allowed by law."

Regarding the subsections related to civil and injunctive relief, we have five observations. First, S. 692 provides that federal district courts will have original, exclusive, and "continuing" jurisdiction over civil actions to enjoin violations of section 1085. Federal jurisdictional statutes do not usually specify that jurisdiction is "continuing," nor do they need to do so. We worry that including such language here might lead to negative inferences regarding other jurisdictional statutes.

Second, the bill provides for temporary restraining orders to be issued after providing notice. Temporary restraining orders ordinarily are issued without notice. To be consistent with existing law, subsection (d)(3) should reference "preliminary injunctions" rather than "temporary restraining orders."

Third, subsection (d)(3)(B) establishes a "probable cause" standard for the issuance of an ex parte temporary restraining order. Probable cause is a criminal rather than civil standard of proof. As written, the bill could require a higher showing than a temporary restraining order usually requires. In addition, the bill

could be read to permit the government to seek an ex parte temporary restraining order without the usual showings regarding imminent injury and infeasibility of notice. We are concerned that this deviation from the Federal Rules may raise constitutional concerns, at least in some applications. Also, the provision in subsection (c)(3)(B)(i) for an ex parte temporary restraining order that lasts 30 days is inconsistent with the current legal requirement that a temporary restraining order last for 10 days, with the possibility of a 10 day extension.

Fourth, subsection (d)(3)(A) permits suits against interactive computer service providers by "Federal or State law enforcement agencies" while subsections (c)(2)(A) and (c)(2)(B) provides for suits to enjoin violations of section 1085 by the United States or state Attorneys General. The Department believes that both sections should only allow the United States and/or Attorneys General to bring suit. This is particularly important in light of the Attorney General's plenary authority to conduct and supervise all litigation, criminal and civil, on behalf of the United States Government. See, e.g., 28 U.S.C. §§ 516, 519.

Fifth, subsection (d)(4)(B)(ii) references a "notice or an order of a court under this paragraph," even though the paragraph contains no authorization for any notice or order. In addition, this section may unduly limit the ability of law enforcement agencies to gain access to materials from interactive computer service providers in situations where Internet gambling is not at issue.

These technical concerns, we believe, illustrate the difficulties inherent in attempting to obtain consistency and clarity in separate legislation concerning the same type of activity carried out via different modes of communications.

The Department has one additional general concern about the current version of S. 692. Section 3, entitled "Report on Enforcement," requires the Attorney General to submit to Congress within three years of the date of enactment of the bill a report analyzing the problems associated with enforcing section 1085, recommendations for the best use of the Department of Justice's resources in enforcing this section, and estimates on the amount of activity and money being used to gamble on the Internet. We believe the requirements of this section are unnecessary, burdensome, and would require an unnecessary diversion of the Department's resources.

Again, thank you for the opportunity to comment on this legislation. Please do not hesitate to call on us to answer any questions you may have regarding the suggestions discussed in this letter or if you would like the Department of Justice to provide any additional assistance. We look forward to discussing this matter with you further. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,
/s/

Jon P. Jennings
Acting Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman

The Honorable John L. Kyl
Chairman

Subcommittee on Technology, Terrorism
and Government Information

The Honorable Dianne Feinstein
Ranking Minority Member
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