

1 MR. FLYN: Thank you very much, and thank you members
2 of the Commission.

3 The American Legislative Exchange Council, or ALEC, is
4 the nation's largest bipartisan association of state legislators.
5 Founded in 1973, ALEC's network of nearly 3,000 democrat and
6 republican legislators worked to develop policies consistent with
7 principles espoused by Thomas Jefferson, namely free markets,
8 individual liberty, limited government, and federalism.

9 I want to say first that ALEC takes no position on
10 whether state or local governments should allow gambling,
11 lotteries, or other games of chance in their jurisdictions.

12 ALEC further takes no position on which particular
13 games of chance should be allowed if a state or local government
14 decides to permit gaming in its jurisdiction.

15 My comments to the Commission today are confined solely
16 to the question of whether federal action, either statutory or
17 regulatory is warranted in this issue.

18 Games of chance, particularly lotteries, have a long
19 history in this country. Many of the early colonial ventures,
20 the settlement of Jamestown, for example, were supported by
21 lotteries.

22 All 13 original colonies established at least one
23 lottery to raise revenue for a variety of public projects.
24 Lottery funds were used to build churches, libraries, and helped
25 to establish Harvard, Yale, Princeton, and other universities.

26 Thomas Jefferson himself defended state lotteries as a
27 means of raising revenue, because lotteries unlike taxes, involve
28 only willing participants.

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1 Lotteries are really one of the underlying issues that
2 sparked America's war of independence. In 1769 the English
3 Parliament tried to establish that no lotteries could be
4 conducted in the Colonies without the permission of the Crown.

5 The colonists protested what they saw as an intrusion
6 into the internal affairs of the colonies. The Crown's
7 interference with laws passed by the colonial legislatures were a
8 recurring irritant to the colonists, and provided one of the
9 foundations for the carefully delineated separation of powers
10 between federal and state governments.

11 Following independence lotteries spread throughout the
12 country. Ben Franklin, John Hancock, and George Washington were
13 all prominent sponsors of lotteries for public works projects.

14 Congress even authorized a lottery in 1823 to pay for
15 the beautification of Washington, D.C. Nothing came of this,
16 however, because the organizers fled with the proceeds.

17 This scandal is typical of many in the early colonial
18 period, and it fed growing opposition to lotteries. Critics
19 charged that lotteries were crooked and targeted the poor.

20 And this led a number of states to begin repealing
21 their lotteries. By the end of the 19th century 35 states had
22 constitutional prohibitions against lotteries, and no states
23 permitted the operation of lotteries.

24 It is important to note that it was the action of state
25 legislatures, in the growing face of public opposition, which put
26 an end to lotteries in this country.

27 To the extent that federal legislation was enacted, it
28 concerned primarily the prohibition of transporting lottery

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1 tickets across state lines, and barring the use of the mail to
2 advertise lotteries.

3 Despite early scandals the federal government made no
4 attempt to regulate the state management or state authorization
5 of lotteries. The actions of the federal government arose, for
6 the most part, at the request of the states, to assist them in
7 helping stop the spread of lotteries.

8 The federal response concerning those items clearly
9 under federal jurisdiction, regulation of mails, and interstate
10 commerce.

11 From 1894 to 1964 there were no legal government
12 lotteries sponsored in the United States. New Hampshire
13 established the first modern lottery in 1964, followed by New
14 York and New Jersey.

15 These were enacted, primarily, as a means to raise
16 revenue in the face of widespread opposition to tax increases.
17 Today, as you've noted, 37 states and D.C. authorize and sponsor
18 lotteries.

19 The states use these revenues for a wide variety of
20 programs. However, the principal beneficiary is education,
21 receiving specifically earmarks in 17 states.

22 In contrast to the lotteries of the 18th and 19th
23 century, modern lotteries have largely been free from scandal.
24 States have maintained a very tight regulatory oversight of
25 lotteries, and gaming in general.

26 In the limited case where scandal has arisen, the
27 states have moved quickly to impose tighter control. It could be
28 argued that no other industry in America is as tightly regulated
29 as gaming and lotteries.

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1 The precise mechanisms vary from state to state for
2 oversight, but evidence confirms they have been successful in
3 keeping lotteries free from scandal, specially in comparison to
4 the scandals of the 18th and 19th century.

5 Again, to address the federal issue. The founders of
6 our nation crafted a system of government that was unique in the
7 world. The system, federalism, was based on the delicate balance
8 between the enumerative authority of the federal government, and
9 the states.

10 Wary of vesting the central government with too much
11 power, the founders placed in the Constitution two provisions
12 limiting its power. Most important is the 10th amendment, which
13 states: The powers not delegated to the United States by the
14 Constitution, nor prohibited by it to the States, are reserved to
15 the States, respectively, or to the people.

16 The further limitation is encompassed in Article 1
17 section 8, also known as the Commerce Clause. Congress shall
18 have the power to regulate commerce with foreign nations, and
19 among the several states, and with the Indian tribes.

20 With these provisions the founders reserved the
21 regulation of domestic affairs to the states, and reserved for
22 the federal government foreign affairs and interstate commerce.

23 The decision to divide decision making authority was
24 deliberate. As Jefferson wrote: The way to have good and safe
25 government is not to trust it all to one, but to divide it among
26 the many, distributing everyone exactly the function he is
27 competent to.

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1 Jefferson further wrote in his autobiography: It is
2 not by the consolidation, or concentration of powers, but by
3 their distribution, that good government is effected.

4 And James Madison wrote in Federalist 45: The powers
5 delegated by the proposed Constitution to the federal government
6 are few and defined. Those which are to remain with the state
7 governments are numerous and indefinite.

8 So for most of our nation's history these limitations
9 on federal powers were vigorously defended and upheld. The
10 Supreme Court repeatedly rebuffed attempts by Congress to expand
11 its authority to regulate domestic affairs under the commerce
12 clause.

13 It is important to note the landmark ruling Marvey v
14 Madison, in which Marshall stated the limitations on
15 congressional power. And he wrote: The powers of the
16 legislature, Congress, are defined and limited. And that those
17 limits may not be mistaken or forgotten, the Constitution is
18 written. To what purposes or powers limited, and to what purpose
19 is that limitation committed to writing, that these limits may,
20 at any time, be passed by those intended to be restrained.

21 The distinction between the Government with limited
22 power, and unlimited powers, is abolished if those limits do not
23 confine the person whom they are imposed. And if acts
24 prohibited, and acts allowed are of equal obligation.

25 The 1930s ushered a new era of commerce clause
26 jurisprudence. The Court recognized a broadening of actions that
27 have an effect on interstate commerce, expanding the authority of
28 Congress to regulate domestic affairs will allow -- would you
29 like me to?

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1 CHAIR JAMES: No, please go on.

2 MR. FLYN: While allowing this new federal authority,
3 however, the Court did mark a cautionary note. The scope of the
4 interstate commerce power must be considered in light of our dual
5 system of government, and may not be extended so as to embrace
6 effects upon interstate commerce so indirect and remote, than to
7 embrace them, in view of our complex society, would effectively
8 obliterate the distinction between what is national, and what is
9 local, and create a completely centralized government.

10 Over the subsequent decades the authority of Congress
11 to regulate domestic affairs is greatly expanded, based on the
12 argument of interstate commerce. However -- and I will leave the
13 rest of the quotes.

14 CHAIR JAMES: I'm going to ask you to summarize.

15 MR. FLYN: Let me just note that the --

16 CHAIR JAMES: Excuse me, what I'm going to ask you to
17 do, and what we are most interested in hearing is any
18 recommendations that you have for us to consider at this point.

19 MR. FLYN: Well, my recommendation would be confined,
20 because ALEC takes no position on whether a lottery should be
21 allowed or not. My only recommendation is that the issue is left
22 to the state legislatures to decide.

23 That federal -- for the federal government to enter
24 into this is a usurpation of the tenth Amendment in the Commerce
25 Clause, and the federal government has no authority to regulate
26 lotteries at the state level.

27 Lotteries at the state level are domestic affairs of
28 the state. In a large degree they are set now as part of the

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1 fiscal constitution of the state, they are used as a revenue
2 raising mechanism.

3 For the federal government to set down regulations and
4 requirements on state lotteries is, in a sense, regulating the
5 internal fiscal constitution of the state, which I don't think we
6 want to allow to the federal government.

7 What I would recommend to the Commission is that if you
8 come across any recommendations on how state lotteries should be
9 organized, that you simply make them that, recommendations to
10 legislatures for the states to enact, and not for the federal
11 government to impose.

12 CHAIR JAMES: Thank you.

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