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CHAIRPERSON JAMES:

And I'm going to ask Mr. Wilkins if he would now summarize his remarks for us.

MR. WILKINS: Thank you, Madam Chair and members of the Commission. My travel arrangements are by foot and subway.

I appreciate the opportunity to discuss matters of Native American gaming. I wanted to respond

1 though first to a question that I understand was asked  
2 by Commissioner Wilhelm this morning of our Attorney  
3 General, Attorney General Harshbarger as to whether he  
4 opposed Keno. And I'm told the answer is yes. He has  
5 opposed Keno since its original introduction in 1993.  
6 And I am told that he has sent letters to that effect  
7 at the time, which I suppose I could provide if that  
8 was helpful to anybody.

9           Our experience with Native American  
10 gambling is very much in the preliminary stage. We  
11 don't have the experience Connecticut does. And yet  
12 the message that we have, which I will express by  
13 discussing the constitutional issues, is really pretty  
14 much the same message that Connecticut has.

15           It's very important for the state and its  
16 citizens to have a way to have a meaningful debate  
17 about the impact of expanded gambling. And yet, it is  
18 also very difficult to have that debate.

19           I start with the background or proposition  
20 that any tribal casino or bingo hall will have an

1 effect on citizens throughout the state, and indeed  
2 throughout other states as well.

3           We are now presented with a proposal by the  
4 Wampanoag Tribe for a high stakes bingo hall and we  
5 have called for a debate on whether this expansion of  
6 gambling within Massachusetts borders is a wise thing  
7 to do or not.

8           Many gambling proponents say that we have  
9 no role to play in that debate. And our response is  
10 that under the Indian Gaming Regulatory Act and  
11 particularly under the Constitution, we do have a role  
12 to play. I should add that in Massachusetts and in a  
13 number of other states around the country there are  
14 specific settlement acts that regulate the relationship  
15 between the states and the tribes within their borders.  
16 And that is also an important factor in our debate in  
17 Massachusetts.

18           Now the constitutional issues that I will  
19 discuss arise from the indisputable fact that every  
20 Indian gambling enterprise has at least three

1 sovereigns involved. The United States, the tribe and  
2 the state. In IGRA, the Congress chose to include the  
3 states, we could have a debate about whether Congress  
4 had to make that choice, whether it could have excluded  
5 states, but it did include the states and I think for  
6 very wise reasons. Without including the states you  
7 have a system that would take away the ability of state  
8 citizens and officials to affect their quality of life.  
9 Presumably it would involve the imposition of federal  
10 rules on the local matters, on locally sensitive  
11 matters I should say. It would have required a large  
12 new federal bureaucracy and probably an unfortunate  
13 bureaucracy. So including the states was an important  
14 thing to do.

15           Now having said that, I also acknowledge  
16 that Congress put very significant limitations upon the  
17 roles of the states in what they could do. And it did  
18 so in recognition of tribal sovereignty, which I think  
19 is an indisputable given in this area. And indeed,  
20 that tribal sovereignty is at the heart of Indian

1 gambling. To me the question is how you reconcile that  
2 sovereignty with the sovereignty of the state and with  
3 the sovereignty of the United States.

4           Now the first issue that I wanted to  
5 discuss is really in the heart of federalism, which has  
6 already come up this afternoon. And that issue  
7 involves the 11th Amendment to the United States  
8 Constitution. The original scheme of IGRA was that if  
9 the states refused to negotiate in good faith with the  
10 tribe, the tribe could then sue the state in federal  
11 court and ask a federal judge to examine whether the  
12 state had negotiated in good faith.

13           The availability of these good faith  
14 lawsuits put the states and tribes in a particularly  
15 adversarial and litigious posture. And I submit that  
16 litigation is probably not the best way to go to make  
17 policy about gambling in this area.

18           Two years ago, the United States Supreme  
19 Court put an end to such lawsuits in a case called,  
20 Seminole Tribe of Florida V. Florida and I have

1 provided footnotes to my remarks, which I know is a  
2 little unusual, but I find it hard to discuss legal  
3 issues without doing that. The Supreme Court basically  
4 held that Congress does not have the power to override  
5 the states immunity to sue in federal court.

6           Now that is the ruling on the legal side,  
7 and we're now faced with the proposal by the U.S.  
8 Department of Interior to become effectively the  
9 arbiter of whether the states are negotiating in good  
10 faith. And Attorney General Harshbarger is one of 21  
11 state attorneys generals who has written to the  
12 Department of the Interior urging it not to adopt  
13 opposed rules that would put the Department of the  
14 Interior in that position.

15           In a nutshell, I think this proposal just  
16 raises the question of how can a federal executive  
17 agency have a power that the Supreme Court has said the  
18 federal courts themselves lack.

19           Now the emphasis on the 11th Amendment due  
20 to the Supreme Court case has deemphasized other

1 constitutional issues that had arisen in the areas of  
2 Native American gambling. And the only one that I will  
3 mention here is the issue of the 10th Amendment to the  
4 United States Constitution, which gives all powers not  
5 held by the United States to the states and to their  
6 citizens.

7           Prior to the 11th Amendment decision the  
8 federal courts were all over the map on the issue, but  
9 it is our contention as a state that the 10<sup>th</sup> Amendment  
10 tells Congress that it may not enlist the states in  
11 forcing or regulating a federal program. That is that  
12 the states are not subdivisions of the federal  
13 government and their sovereignty must be respected in  
14 that regard. We don't have a dispositive federal  
15 ruling on that issue.

16           Now the other set of constitutional issues  
17 that I think is crucial in this area involves state  
18 constitutions. And while you might think that we're  
19 dealing with 50 different rules there, or more than 50,  
20 if you count commonwealths and districts, in fact the

1 state constitutional issues I'm talking about here are  
2 fairly consistent, it appears, throughout the states,  
3 at least as reflected in the reported decisions.

4           The issue that I'm talking about is who  
5 speaks for the state in its negotiations with another  
6 sovereign, namely the tribe. And it comes up in two  
7 particular areas. The main area that has been  
8 litigated to date is who speaks for the state in  
9 entering into a Class III or casino gambling compact.  
10 And the answers that have come from the state courts  
11 and most of the federal courts is that if the governor  
12 is going to be signing the compact it has to be  
13 authorized by the legislature. Why, well because a  
14 compact involves issues that are inherently legislative  
15 in nature. It often expands gambling beyond what  
16 otherwise would be allowed in the state. It often  
17 creates new agencies. It affects the jurisdiction  
18 between the state and the tribe. And these are  
19 essentially legislative matters.

1           There have been times when tribes and  
2 governors acting unilaterally have entered into  
3 compacts and the courts have generally struck those  
4 down.

5           Now the other area where this state  
6 separation of power issue becomes important is an issue  
7 that is important in Massachusetts and as yet has not,  
8 I think, generally been litigated elsewhere. You will  
9 certainly hear issues regarding after acquired property  
10 and gambling on after-acquired property. What after-  
11 acquired property is, is land that was acquired by the  
12 tribe and taken into trust for the benefit of the tribe  
13 by the federal government after the enactment of IGRA,  
14 so after 1988.

15           And on after-acquired property gambling  
16 cannot occur unless first of all the Secretary of  
17 Interior makes a particular finding, land that has been  
18 taken into trust of course, and unless the governor  
19 concurs in the Department of Interior's finding. And  
20 the state constitutional issue comes at that third

1 stage. When a governor concurs what does she or he  
2 have to have by way state authority.

3           And we argue in Massachusetts that the  
4 governor again needs legislative authority before  
5 altering that relationship with the tribe, before  
6 authorizing gambling on land that otherwise would be  
7 subject to a prohibition on gambling.

8           Very briefly, the other types of issues  
9 that we encounter have to do sometimes with federal  
10 preemption, tribes or other gambling proponents argue  
11 that IGRA has, for instance, taken away the  
12 legislature's ability to have a say in matters of  
13 Native American gambling and we put out simply that  
14 IGRA allows the Governor to say no. And the governor  
15 could say no for the reason that the legislature hadn't  
16 authorized it and that would be no conflict with IGRA,  
17 so we don't believe that there is a problem there.

18           And finally, in the interest of  
19 completeness and to really put a perspective on the  
20 Massachusetts' situation, I would point out that we

1 have a settlement act with the Wampanoag Tribe, which  
2 was a negotiated arrangement resolving a land dispute  
3 on Gay Head, an island off, well on Martha's Vineyard,  
4 an island off of Massachusetts. And this settlement  
5 act was entered into by the tribe and the Commonwealth,  
6 it was enacted by the Massachusetts legislature,  
7 enacted by the United States Congress. And that act  
8 gives the Commonwealth more authority than it generally  
9 otherwise would have to regulate or prohibit gambling  
10 in the Commonwealth. And I know the tribe and we have  
11 a debate over it to the extent to which that is true,  
12 but I think it's fairly well established that it is  
13 true at least to some extent.

14           And I mention this not because it is a  
15 parochial issue but because you will see similar issues  
16 in Rhode Island, in Maine, and Texas where the reported  
17 decisions are from. And there are also settlement acts  
18 as I understand it, in Florida, not for the entire  
19 state of Florida, but one tribe in Florida particularly  
20 and South Carolina and Texas. So this is another level

1 of complexity, I think, in the Indian gambling  
2 situation.

3           To sum up, there's been much debate and  
4 litigation over constitutional issues related to Native  
5 American gambling, in our view the healthier respect  
6 for the well settled principles on which our state and  
7 federal governments were founded would eliminate many  
8 of these disputes.

9           Let's put the debate where it ought to be.  
10 Is expanded gambling a good idea, whether we're talking  
11 about Native American gambling, whether we're talking  
12 about state sponsored gambling, whether we're talking  
13 about businesses expanding gambling.

14           To answers these question, we submit, is  
15 essentially a legislative judgement, and the one thing  
16 that we really should oppose, I think, is an attempt to  
17 preempt that legislative debate.

18           CHAIRPERSON JAMES: Thank you.